

CHAPTER XXV

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Evidence to be taken in presence of accused.—Except in cases mentioned in this section, a trial is vitiated by failure to examine the witnesses in the presence of the accused person. Where, therefore, the witnesses were examined in chief in the absence of the accused persons, and the latter's legal representative did not object, but at a later date cross-examined the witnesses in the presence of the accused, it was held that the trial was vitiated by the irregularity(1). The wording of this section, laying down that all evidence shall be taken in the presence of the accused, includes the evidence for the defence as well as for the prosecution. Where, after all the prosecution witnesses were examined, the accused absconded, and the witnesses named by him were examined in his absence and he was convicted, the conviction was held to be illegal(2). Failure to examine the witnesses in the presence of the accused vitiates a trial. It is not a mere irregularity curable by section 537, even though such failure has led to no miscarriage of justice(3). An order is wholly illegal, if it is based upon evidence which is recorded behind the back of a party at a time when he was not a party to the proceedings at all(4). A *pardanashin* lady was placed in a passage screened from the direct view of the Judge, who sat close by. A sworn interpreter, a member of the family to which the lady belonged, was so stationed as to be able to see the lady all the time. The lady's voice could be heard perfectly. It was held that the mode of examination adopted was perfect and was virtually a hearing of the evidence in the presence of the accused(5). There is no provision in the Code which protects a court of justice and its officers from being compelled to protect their privacy that it is undesirable to compel their

(1) *Baigan Singh v. Emperor*, 6 Pat. 691=107 I. C. 530=A. I. R. 1928 Pat. 143=9 Pat. L. T. 827=9 A. I. Cr. R. 450=23 Cr. L. J. 200.

(2) *Nga Po Shein v. Emperor*, 19 I. C. 719=14 Cr. L. J. 287=U. B. R. (1912), 162

(3) See the cases cited in the last two notes and *Queen v. Lalla*, 2 N. W. P. H. C. R. 49.

(4) *Narayan v. Chandra Bhaga*, 26 Cr. L. J. 1289=89 I. C. 153=A. I. R. 1925 Nag. 467.

(5) *Hassan Khan v. Empress*, 41 P. R. 1887 Cr.

attendance(1). They may be examined on commission under section 503, *infra*(2).

Admission of evidence in one case as evidence in another.—

When evidence in one connected case is admitted as evidence in another case, at the wish of the accused, the procedure is illegal, as evidence was not recorded in the presence of the accused as required by this section(3). But in an Allahabad case it was held that the procedure was illegal, but that the irregularity was cured by s. 537 of the Code and s. 167 of the Evidence Act as it was not shown that there was any failure of justice, or that the accused had been substantially prejudiced, and as the matters elicited in cross examination were sufficient to sustain the conviction(4). In a Calcutta case, however, where three separate charges were preferred at the same time and the prisoners were convicted on the evidence recorded in one case, without hearing their defence in the other two cases the proceedings were quashed(5).

Procedure of admitting evidence at former trial.—Where the evidence of the witnesses taken in the absence of the prisoner at a former trial was read out to them and put in on their assenting to it as a true record of the facts, it was held that the proceeding was irregular and prejudicial to the accused and that such witnesses should have been subject to a fresh oral examination(6). In a criminal trial it is entirely illegal to read out to the witnesses their depositions made on a previous occasion to put a few additional questions and then to tender them for cross-examination and the illegality is not cured by the provisions of section 537(7).

Record should show that evidence was taken in accused's presence.—A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the deposition, make it apparent that he has done so(8).

Dispensing with personal attendance of accused.—A Sessions Judge has power to dispense with the personal attendance of an accused and allow him to appear by pleader during the Sessions trial. Such a power may properly be exercised in favour of *Purdanashin* ladies at least until they are convicted(9). Unless and until a Magistrate has good reason to believe that there is a strong likelihood of the charge being proved, an accused if she be really a *pardah* woman of good position, should not ordinarily be compelled to appear in person in the first instance(10). A High Court has the power to dispense with the

(1) *Basant Bibi, In re*, 12 A. 69 (72).

(2) *Crown v. Chatranbar*, 9 Cr. L. J. 219, *In re Hurro Soondry*, 4 U. 20 = 5 C. L. R. 93; *In re Basant Bibi*, 12 A. 69; *In re Faridunnissa*, 5 A. 92.

(3) *Thakar Singh v. Emperor*, 101 I. C. 99 = 28 Cr. L. J. 771; *Allu v. Emperor*, 4 Lab. 376 = 5 Lab. L. J. 103.

(4) *Empress v. Nand Ram*, 9 A. 609 = (1887) A. W. N. 143.

(5) *Queen v. Bunka Behary*, 1 W. R. Cr. 82.

(6) *Queen v. Bishonath*, 3 B. L. R.

App. Cr. 20 = 12 W. R. 3 Cr.

(7) *Lyme v. Emperor*, 77 I. C. 425 = 4 Lab. 381 = 1921 L. 17 = 25 Cr. L. J. 377.

(8) *Rachali Hari v. Emperor*, 18 C. 129; *Empress v. Polp Singh*, 10 A. 174; *Emperor v. Ruding*, 9 A. 720 = (1887) A. W. N. 223.

(9) *Kandamani Devi v. Emperor*, 45 M. 359 = 66 I. C. 330 = 23 Cr. L. J. 266 = A. I. R. (1912) M. 19 = 15 L. W. 650 = (1912) M. W. N. 165 = 42 M. L. J. 837 = 30 M. L. T. 846.

(10) *Prem Kaur v. Sham Nath*, 8 Cr. L. J. 454 = 3 P. W. R. Cr. 61.

attendance of an accused, during his trial before the High Court, on the ground of his ill health(1).

Evidence to be taken in presence of pleader.—Where the presence of accused is dispensed with the evidence may be recorded in the presence of his pleader(2). When, however, the Sessions Judge or Magistrate engages a counsel for the defence of an accused, he does so with the express or implied consent of the latter. No court has any authority to force upon a prisoner the services of a counsel if he is unwilling to accept them(3).

354. In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

Manner of recording evidence outside presidency-towns.

355. (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m) both inclusive, when tried by a Magistrate of first or second class and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

Record in summons-cases and in trials of certain offences by first and second class Magistrates.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open court, and shall sign the same, and such memorandum shall form part of the record.

Scope of the section.—This section merely prescribes a briefer record in summons cases and other cases which may be tried summarily

(1) *Emperor v. King*, 14 Bom. L. R. 226=15 I. C. 96=13 Cr. L. J. 461.

M. W. N. 165=42 M. L. J. 837=30 M. L. T. 346=45 M. 359; *Emperor v. King*, 14 Bom. L. R. 226=15 I. C. 96=13 Cr. L. J. 461.

(2) *Kandamani Devi v. Emperor*, 66 I. C. 330=23 Cr. L. J. 266=A I. R. (1922) Mad. 79=15 L. W. 550=(1922) Cr. P. C.—83

(3) *Crown v. Sukhdev*, 11 Lah. 220=81 P. L. R. 824.

when they are as a matter of fact tried regularly(1). This section applies to offences coming within cls. (b) and (m) of section 260 but not to offences falling under section 261 cl. (b). Therefore, even if rough notes of evidence are taken by a Magistrate in a case under section 261(b) of the Code, they need not form part of the record under section 264 (2) of the Code(2).

Memorandum of the substance of the evidence.—The direction that the Magistrate must make a "memorandum of the substance of the evidence of each witness as the examination of the witness proceeds", is not complied with by a mere statement that a witness "deposes as last witness"(3).

Summary trial.—In cases to which sections 263 and 264 are applicable, the Magistrate is perfectly free to take such notes as he pleases, or if he prefers to take none at all, and whether he takes notes or whether he does not, whatever notes he makes are his private property which he can treat exactly as he pleases. It has been so laid down by the Allahabad High Court(4), which has questioned the contrary view taken in a Calcutta case(5). The High Courts at Madras, Bombay and Rangoon have also dissented from the view taken by the Calcutta High Court(6). As it is not obligatory that a Magistrate should make any memorandum or notes of the evidence of the witnesses examined in a case tried summarily, any notes made by the trying Magistrate for his own use in embodying the substance of the evidence in the judgment must be treated as private notes and not as a part of the record(7). In a case triable summarily, the depositions of the witnesses need not be read out to them(8).

Sub section(2).—Where a Magistrate trying a warrant-case summarily takes down the substance of the evidence of each witness but does not sign the record, the procedure is illegal and the illegality vitiates the trial(9).

Power of native second class Magistrate to record memorandum of evidence in English.—There is no provision of law which renders it illegal for a native second class Magistrate to record the

1. *De. L. v. Emperor* 102 I. C. 345 = 29 Bom. L. R. 710 = 28 Cr. L. J. 537 = A. I. R. (1927) Bom. 426 = 8 A. I. Cr. R. 168; *Nagoor Kamni v. Sihu*, 52 M. L. J. 32 = 28 Cr. L. J. 138 = 99 I. C. 346 = (1927) M. W. N. 40 = A. I. R. (1927) Mad. 298; *Emperor v. Maung Po Saw*, 18 Rang. 225 = A. I. R. 1935 Rang. 106.

Cr. R. 168.

(3) *Reg v. Byhavalad Surjim*, 1 Bom. H. C. R. 91.

(4) *Emperor v. Mantoo*, 49 A. 261 = 25 A. L. J. 140 = 28 Cr. L. J. 97 = 1927 A. 121 = 99 I. C. 215 = L. R. 8 A. 12 Cr. followed in *In re Tippanna*, 58 B. 298 = A. I. R. 1934 B. 157 = 36 Bom. L. R. 212; *Ismail v. Emperor*, 25 A. 346 = 28 Cr. L. J. 442 = 101 I. C. 474; cf. *Atma Ram v. Emperor*, 49 A. 181 = 8 L. R. A. Cr. 9 = 99 I. C. 120 = 28 Cr. L. J. 88 = 7 A. I. Cr. R. 127.

(5) *Satish Chundia v. Emperor*, 48 C. 20 = 32 C. L. J. 251 = 22 Cr. L. J. 402 = 61 I. C. 816.

(6) *Chimanlal v. Emperor*, 102 I. C. 345 = 29 Bom. L. R. 710 = 28 Cr. L. J. 537 = A. I. R. (1927) Bom. 426 = 8 A. I. Cr. R. 168; *Nagoor Kamni v. Sihu*, 52 M. L. J. 32 = 28 Cr. L. J. 138 = 99 I. C. 346 = (1927) M. W. N. 40 = A. I. R. (1927) Mad. 298; *Emperor v. Maung Po Saw*, 18 Rang. 225 = A. I. R. 1935 Rang. 106.

(7) *Govt. of Mysore*, 6 Mys. L. J. 284; see also *Rahimtullah v. Emperor*, 19 S. L. R. 136 = 26 Cr. L. J. 1026 = 87 I. C. 914.

(8) *Mohammad Ishaq v. Emperor*, 23 Cr. L. J. 120 = 65 I. C. 552 = A. I. R. 1928 Pat. 167 = 1 Pat. L. R. 159.

(9) *Balkeshwar v. Emperor*, 3 Pat. L. T. 322 = 23 Cr. L. J. 114 = 65 I. C. 516 = 1922 Pat. 5.

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memorandum of the substance of evidence of each witness mentioned in this section in English. Even if the procedure were irregular, the irregularity will not vitiate the trial, unless a failure of justice has been occasioned thereby(1).

Maintenance proceedings.—Proceedings under Chapter XXXVI of the Code cannot be conducted as in a summary trial under Chapter XXII. The evidence should be recorded as provided by this section(2).

356. (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge.

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English or the language of the court is English, an authenticated translation of such evidence in the language of the court shall form part of the record.

(2-A) When the evidence of such witness is given in any other language, not being English, than the language of the court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the court or in English shall form part of the record.

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes, and such memorandum shall be written

(1) *Emperor v. Gopal Goundan*, 19 M. 263=2 Weir. 433=6 M. L. J. 134.

(2) *Kali Dassi v. Durgu Charan*,

20 C. 351; see also *Kamta v. Mangal Dei*, 76 I. C. 974=23 O. C. 237=25 Cr. L. J. 302.

and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Amendment.—Sub section (2-A) has been added by section 96 of the Criminal Procedure Code Amendment Act, XVIII of 1923. In the Statement of Objects and Reasons (1921), the following passage occurs: "Section 356 does not provide for evidence being taken down in any other language than that of the court or, if the language of the court is not English, in English. The result is a certain loss of accuracy whenever evidence is given in a third language, as it has to be translated into, and taken down in, the language of the court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in the translation". In the Bill introduced in the Legislative Assembly the words "or cause it to be taken.....superintendence" were omitted, but were added during the debate "to meet the case of a Magistrate or Judge who does not know the language in which the evidence is given"(1).

Other than Presidency Magistrates.—S. 362 of the Code provides how the evidence in a case should be recorded by a Presidency Magistrate, where he imposes a fine exceeding Rs. 200 or imprisonment for a term exceeding six months. In no other case is it necessary for a Presidency Magistrate to record any evidence(2).

In all inquiries under chapter XII and XVIII.—Under sub-section (1), in a proceeding under s. 145 of the Code, the evidence of each witness must be taken down in the vernacular by the Magistrate himself or under his superintendence. But an omission to comply with this provision is only a mere irregularity curable under s. 537 and does not vitiate the trial(3). The mere fact that in a proceeding under s. 145 the Magistrate had not recorded the evidence of the witnesses in the manner laid down in this section, but had only kept a memorandum of the evidence in English, is not an illegality vitiating the proceedings but a mere irregularity which could be cured by s. 537(4). There is, however, a decision of the Calcutta High Court, the case of *Sadanand v. Krista*(5), which is a decision to the contrary effect. In that case the Magistrate made a memorandum of the evidence in English but the depositions were not taken down in the vernacular. It was held that

(1) Legislative Assembly Debates, 7th February 1923, page 2035

(2) *Enaman v. Emperor*, 31 C. 983 (1986).

(3) *Kallu v. Bashiruddin*, 32 Cr. L. J. 372=129 I. C. 269=28 A. L. J. 1504=A. I. R. 1931 A. 3=L. K. 11 A. 181 Cr.=Ind. Rul. (1931) A. 141=(1931) Cr. Cas. 3=53 A. 172; *Sankatta v. Dishwanath*, 32 Cr. L. J. 368=129 I. C. 265=A. I. R. 1931 A. 2=Ind. Rul. (1931) A. 137=

(1931) Cr. Cas. 2; *Emperor v. Jhabbar Mal*, 116 I. C. 672=A. I. R. 1928 A. 222=L. R. 9 A. 90 Cr.=10 A. I. (C. R. 101=26 A. L. J. 196=Ind. Rul. (1929) All. 462=30 Cr. L. J. 530.

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(5) 42 C. 381=27 I. C. 672=16 Cr. L. J. 192=19 C. W. N. 124.

the provisions of sub-section (1) were imperative and that non-compliance with those provisions cannot be condoned. A somewhat similar line of argument was taken in the case of *Nathu Khan v. Emperor*(1). It is remarkable that a distinction is drawn in s. 355 and this section between summons-cases and inquiries under Chap. XII; s. 355 directs that in summons cases the Magistrate shall make a memorandum of the substance of the evidence of each witness, whereas this section directs that in inquiries under Chap. XII the evidence of a witness shall be taken down in writing in the language of the court by the Magistrate or in his presence or hearing or under his personal supervision and superintendence, and shall be signed by the Magistrate(2).

Recording of evidence in language which is not court language.—The direction contained in this section is mandatory, and the recording of evidence, therefore, in a language which is not the language of the court, is not merely an irregularity but an illegality which vitiates the trial. Even if it is irregularity, it is so grave and material that it cannot be cured by section 537(3). Where a Magistrate omits to prepare a vernacular record of the evidence as required by this section, he commits an irregularity which vitiates the trial(4). But in recent Allahabad cases it has been held that omission to record the evidence in the mode prescribed by this section is only a mere irregularity curable under s. 537 and does not vitiate the trial(5).

Sub-section 3.—This sub section applies only where evidence has been recorded in accordance with sub-section (1) but not personally by the Magistrate. Where, therefore, the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal direction and superintendence nor signed by him, but he made a memorandum thereof and signed the same, it was held that the provisions of this section had not been complied with(6). If, however, in proceedings under Chapter VII evidence is recorded in the language of the court by the Magistrate's Reader, the omission by the Magistrate to make a memorandum of the statement of each witness as required by this section is an irregularity in no way vitiating the proceedings, where the Magistrate applies his mind to the evidence, takes considerable care in sifting it and arrives at a correct conclusion. Such an irregularity does not occasion a failure of justice and is covered by the provisions of section 537(7). *Nayeb*

(1) A. I. R. 1932 S. 145-26 S. L. R. 853-1932 Cr. C. 681.

Cr. L. J. 205-206 S. L. R. 11 B. L. R. App. 5-20 W. R. Cr. 14; Empress v. Barmajit.

(5) *Kalu v. Bashiruddin*, 53 A. 172-32 Cr. L. J. 372-129 I. C. 269-28 A. L. J. 1501-A. I. R. 1911 A. 8=L. R. 11 A. 181 Cr.—Ind. Rul. (1931) A. 141; *Sankatha v. Bishuanath*, 31 Cr. L. J. 368-129 I. C. 265-A. I. R. 1931 A. 2=Ind. Rul. 1931 A. 137-1931 Cr. Cas. 2; see also *Harbakhsh v. Emperor*, 6 O. C. 73.

(6) *Sadananda v. Krishna*, 42 C. 381.

(7) *Sumran Singh v. Emperor*, 4 O. W. N. 1200-A. I. R. 1921 O. 112-29 Cr. L. J. 70-106 I. C. 582-9 A. I. Cr. R. 372.

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Recording of evidence in language which is not court language—The direction contained in this section is mandatory, and the recording of evidence, therefore, in a language which is not the language of the court, is not merely an irregularity but an illegality which vitiates the trial. Even if it is irregularity, it is so grave and material that it cannot be cured by section 537(3). Where a Magistrate omits to prepare a vernacular record of the evidence as required by this section, he commits an irregularity which vitiates the trial(4). But in recent Allahabad cases it has been held that omission to record the evidence in the mode prescribed by this section is only a mere irregularity curable under s. 537 and does not vitiate the trial(5).

Sub-section 3.—This sub section applies only where evidence has been recorded in accordance with sub-section (1) but not personally by the Magistrate. Where, therefore, the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal direction and superintendence nor signed by him, but he made a memorandum thereof and signed the same, it was held that the provisions of this section had not been complied with(6). If, however, in proceedings under Chapter VII evidence is recorded in the language of the court by the Magistrate's Reader, the omission by the Magistrate to make a memorandum of the statement of each witness as required by this section is an irregularity in no way vitiating the proceedings, where the Magistrate applies his mind to the evidence, takes considerable care in sifting it and arrives at a correct conclusion. Such an irregularity does not occasion a failure of justice and is covered by the provisions of section 537(7). *Nayeb*

(1) A. I. R. 1932 S. 145=20 S. L. R. 553=1932 Cr. C. 681.

(2) *Surjya Kanta v. Hem Chunder*, 80 C. 503(514)=7 C. W. N. 404.

(3) *Janki Prasad v. Emperor*, 19 Cr. L. J. 235=13 I. O. 827; *Khettromony v. Sreenath*, 11 B. L. R. App. 6=20 W. R. Cr. 14, *Empress v. Barnajit*, 1931 A. I. R. 1931 S. 145=20 S. L. R. 553=1932 Cr. C. 681.

(5) *Kalu v. Bashiruddin*, 53 A. 172=32 Cr. L. J. 372=129 I. C. 269=29 A. L. J. 1504=A. I. R. 1931 A. 9=L. R. 11 A. 181 Cr.=Ind. Rul. (1931) A. 141; *Sankatha v. Bishwanath*, 31 Cr. L. J. 368=129 I. C. 265=A. I. R. 1931 A. 2=Ind. Rul. 1931 A. 187=1931 Cr. Cas. 2; see also *Harbakhsh v. Emperor*, 6 O. C. 73.

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Shahana v. Emperor(1) is an exactly similar case. In that case the Sessions Judge omitted to take down the deposition of witnesses in writing himself, or to make a memorandum of the substance of what the witnesses deposed as required by sub-section (3), but it appeared from the record that the evidence was taken down in the presence and hearing and under the personal direction and superintendence of the Judge, and that the depositions of the witnesses were read over and interpreted to them in the presence of the accused and their pleader and admitted to be correct. It was held that the irregularity did not vitiate the trial, but was cured by section 537 of the Code.

Vernacular record not in agreement with English Record.—Ordinarily, where evidence is given by a witness in his own language, the vernacular record of the case is more reliable and entitled to greater weight. But when the Magistrate recording the evidence in English is an Indian gentleman of considerable experience as a Magistrate, his record should be preferred. Where, however, the record of such a Magistrate and the vernacular record are at variance, the accused is entitled to the benefit of any omission from the latter and the doubts created thereby(2).

357. (1) The Local Government may direct that

Language of record of evidence. in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or Class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open court

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the court, although such language is not his mother-tongue.

Language of Record of Evidence.—This section prescribes the language in which the evidence of witnesses in the trials and inquiries referred to in the last section shall be taken down(3). The authority

(1) 61 C 399—A. I. R. 1934 C. 636—
33 C. W. N. 659.

L. J. 625=73 I. C. 513—A. I. R. (1923)
(Lab.) 167

(2) *Sadhu Singh v. Crown*, 24 Cr.

(3) *Empress v. Gopal Goundan*, 19
M. 269 (270).

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conferred on an officer by this section is personal to that officer and in force only so long as he remains in the particular district in which it has been conferred(1). Where a Magistrate, not being empowered under the section to record evidence in his own handwriting, did so and committed the accused for trial, held, that the Magistrate's proceeding was irregular, but that, as there was nothing to show that the accused had been prejudiced, the commitment was good(2).

statement of accused how recorded.—The Magistrate need not record the statement of an accused in the words of the very language in which it is made, when it is a foreign language, the record must be in the language in which it is interpreted(3).

Sub-section (2).—Where a court is composed of more than one Judge the deposition of a witness need not necessarily be signed by all the Judges of the court before whom the witness is examined and the fact that it is signed by only one of them alone does not vitiate the deposition. The object of requiring the Presiding Officer of the court to sign the deposition of the witness examined by him is to ensure the accuracy of the record and it cannot reasonably be urged, that that object can be achieved only if all the Judges composing the court sign the record(4).

358. In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to section 357, in the manner provided in the same section.

359. (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

Mode of recording evidence under section 356 or section 357.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

Mode of recording evidence—The ordinary and proper and convenient way of recording evidence is to take it down in the first person, exactly as spoken by the witness(5). A Judge should in taking down evidence, adhere as far as possible to the words actually used either in the question or in the answer as given by the witness(6). The provisions

(1) *Anonymous*, 2 Weir. 434.

(2) *Ibid.*

(3) *Empress v. Vasmibilee*, 5 O. 826.

(4) *Tajmahmud v. Emperor*, 107

I. C. 100=23 P. L. R. 14=I. L. T. 40
Lah. 26=29 Cr. L. J. 212=A. I. B. 1928

Lah. 125=9 A. I. Cr. R. 505

(5) *Queen v. Zoolfukar Khan*, 8 B. L. R. App. 21 (22)=16 W. R. 36 (37) Cr.

(6) *Empress v. Nga Saw*, 11 Bur. L. R. 8 cited in *Aiyar Cr. P. C. P. 1240* and *Mitra Cr. P. C. P. 903*.

of law will not be complied with by recording a more or less accurate paraphrase of the evidence given by a witness(1).

360. (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence, when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Scope and object.—The object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down(2). The depositions should be read over to the witness in a manner so as to make it possible for the accused or his pleader to listen to what is being read over and to attend to any correction made(3). It is fair both to the witness as well as to the Magistrate who takes down the deposition as well as to the accused to have the deposition read over as soon as the examination of the witness is over. It would avoid any conflict between any recollection of the accused's pleader, the recollection of the prosecuting counsel and the recollection of the court as well as the recollection of the witness. Seeing there are four different persons to be considered in this connection the provisions of this section are not only a salutary provision, but is a provision intended for the furtherance of justice(4). Having regard to the general object of Chap. XXV, which is to

(1) *Ibid.*

(2) *Abdul Rahman v. Emperor*, 5

585=29 Bom. L. R. 813=45 O. L. J. 441
P. C.; *Ramdhori v. Emperor*, 4, Pat.
L. W. 44=19 Cr. L. J. 163=43 I. C. 585
=1919 Pat. 13.

(3) See the cases cited in the last note and; *Government of Assam v. Sahibulla*, 51 O. 1; *Emperor v. Jyotir Chandra* 36 C. 955; *Sonai Mia v. Hardeo Nath*, 28 C. W. N. 199; *Queen v. Issur Raut*, 8 W. R. Cr 63; *Hiralal v. Emperor*, 28 C. W. N. 968.

(4) *Kuppu Mudali, In re*, 49 M. 71.

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ensure accuracy of the record and afford information to the accused as to what the evidence at the trial is, compliance with sub-section (1) is imperative and not only directory (1). In the case of *Jyotish Chandra v. Emperor* (2) a Sessions Judge refused to follow the provisions of the section on the ground that it would involve a great waste of time and observed: "The section seems to me directory and not obligatory. If the witness detects a mistake he can come back and say so. This is the universal practice in Sessions Courts my experience extending to about six such courts. *Optima est legum interpretis consuetudo.*" Sir Lawrence Jenkins, C. J., observed that he did not agree with the view, for the custom indicated by the learned Judge could not alter the plain words of the Act.

Proceedings for security to keep the peace—A case under section 107 of the Code is triable as a summons case, and the Magistrate is, therefore, not bound to read over the depositions to the witnesses, as they are only a memorandum of the substance as required by section 355(3).

Proceedings to furnish security for good behaviour.—This section applies to proceedings where a person is called upon to show cause why he should not furnish security for good behaviour, and the omission to comply with its provisions vitiates such proceedings (4).

Inquiry under s. 145 of the Code—There was a conflict of judicial opinion as to whether the provisions of this section are applicable to an inquiry held under s. 145 of the Code. A Division Bench of the Calcutta High Court in *Aswin Kumar v. Puti* (5) decided that this section is applicable to proceedings under s. 145. Another Division Bench of the same Court in *Gopal Mondal v. Atul* (6) also held that the said provisions do apply to these proceedings. On the other hand, in *Ishan Chandra v. Hriday Krishna* (7), there was a difference of opinion on this question between the learned Judges. But a full bench has now authoritatively laid down that the provisions of this section do apply to proceeding under section 145 to this extent at least, that as the evidence of each witness is completed it must be read over to him. But the parties to the proceeding under s. 145 are not "accused" and their attendance at the reading over is not necessary (8). Again much to the same effect is the ruling of the Patna High Court reported as *Ram*

(1) *Hira Lal v. Emperor*, 29 C. W. N. 969, *Howard v. Bodington*, L. R. 2 P. D. 203-211; *Liverpool Borough Bank v. Turner*, 20 L. J. Ch. 379.

(2) 86 C. 955, 959.

(3) *Hamdhari v. Emperor*, 19 Cr. L. J. 162=4 Pat. L. W. 44=43 I. C. 585=1918 Pat. 19; *Legal Remembrancer v. Jafar*, 52 C. 608=A. I. R. 1925 C. 910=89 I. C. 976=26 Cr. L. J. 1456, *Anonymous*, 2 Welr. 493 (Omission to do so is not fatal to conviction).

(4) *Sa natan v. Emperor*, 52 C. 632=26 Cr. L. J. 1240=88 I. C. 856=41 C. L. J. 352=A. I. R. (1925) Cal. 720; *Nawab*

Ali v. Emperor, 52 C. 470=88 I. C. 819=A. I. R. (1925) Cal. 816=26 Cr. L. J. 1233.

(5) 51 C. 437=26 Cr. L. J. 914=A. I. R. (1925) C. 678=29 C. W. N. 474 86 I. C. 978.

(6) Un. Rep. Cr. Rev. 960 of 1924, decided 26 November 1924 (Newbould and Mukerji, JJ.), referred to in 52 Cal. 721 (792).

(7) 29 C. W. N. 475=41 C. L. J. 357=87 I. C. 979=26 Cr. L. J. 915.

(8) *Narendra v. Sabarali*, 52 C. 721=29 C. W. N. 701=41 C. L. J. 479=A. I. R. (1925) Cal. 822=88 I. C. 714=26 Cr. L. J. 1194. See also *Appeal v. Khays Peer*, 6 Mys. L. J. 405.

Narain v. Dhon Rai(1), where it was held that in the case of proceedings under Chapter XII the evidence must be read over to the witnesses, but the non-reading over of depositions does not invalidate the trial. The same view was emphasized in another case(2).

Examination of Complainant.—It is desirable that the substance of the oral examination of a complainant recorded under s. 200 of the Cr. P. C. should, like the deposition of a witness under this section, be read over to the deponent if it is to be ultimately used for contradicting him. Where, however, this has not been done, the substance of the oral examination does not become inadmissible under s. 91 of the Evidence Act in proof of the statement therein contained(3).

Examination of accused.—This section applies to the evidence of witnesses, and not to the examination of the accused(4).

Deposition must be read over to witness.—The judgment of the Judicial Committee in *Abdul Rahman v. Emperor*(5), is an authoritative pronouncement on the interpretation of this section, which enjoins that in warrant cases as the evidence of each witness is completed it shall be read over to him in the presence of the accused or of his pleader if he appears by pleader. In strictly carrying out the provisions of sub-section (1) by the daily reading over in open court of the depositions of each witness, the court does not lay itself open to the criticism, though that procedure should occupy considerable time(6). A departure from the terms of the section might lead to considerable embarrassment, and place a serious impediment in the proper administration of justice(7).

Deposition by whom to be read over.—It is the duty of a Judge or Magistrate to read over himself or have read in his presence and made necessary corrections in, the depositions of witnesses, in the presence and hearing of the accused or his pleader(8). After depositions of some of the witnesses are completed, their being read over to the witnesses by the Bench clerk and witnesses signature taken while the court is recording the examination of other witnesses, is a procedure not warranted by the law and it is not a compliance with the provisions of this section(9).

Reading of deposition by witness himself.—The mere reading of the deposition by the witness himself is not a sufficient compliance with this section as the accused does not thereby get an opportunity of

(1) 23 Or. L. J. 125=65 I. C. 557=3 Pat. L. T. 991=A. I. R. (1912) Pat 371.

(2) *Sondhi Singh v. Sri Gobind*, 5 Pat. L. T. 237=25 Cr. L. J. 89=76 I. C. 25=2 Pat. L.R. 108 Cr. (1924) Pat. 780.

(3) *Bhagirathi v. Emperor*, 26 Cr. L. J. 1401=89 I. C. 713=A. I. R. 1926 Rang. 141.

(4) *Queen v. Radhoo*, 12 W. R. Cr. 44.

(5) 6 Rang. 53=(1927) M. W. N. 103=100 I. C. 227=1927 F. C. 44=31 C. W. N. 271=25 A. I. J. 117 P. C.=1927 M. W. N. 103=38 M. L. T. 64=8 Pat. L. T. 155=4 O. W. N. 283=28 Cr. L. J. 259=

6 Bur. L. J. 65=52 M. L. J. 585=29 Bom. L. R. 813=45 O. L. J. 441 P. C.

(6) *Amrita Lal v. Emperor*, 42 C. 957 (963); *Mohendra Nath v. Emperor*, 12 C. W. N. 845; *Jyotish Chandra Emperor* 22 C. W. N. 111.

(8) *Nga San v. Emperor*, U. B. R. (1911-12), 126; *Nga Paw U v. Emperor*, U. B. R. 1907-08, 11, Cr. Pro. 1; *Regu Singh v. Emperor*, 11 C. W. N. 568.

(9) *Adiladdi v. Emperor*, A. I. R. 1926 C. 423=26 Cr. L. J. 1016=87 I. C. 840.

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knowing what has been recorded by the court(1). The fact that the deposition of a witness is read over by the witness himself and is admitted by him to be correct, does not amount to sufficient compliance with the section(2). The provision is not complied with in terms by giving the witness an opportunity of reading the deposition over to himself and except in cases where reading over to the witness would be absurd, as, for example, with a stone, deaf person, the provision should be complied with(3). Where, however, a Magistrate who has recorded the confession of an accused person is examined in the Sessions Court to prove the confession and the certificate appended at the end of the Magistrate's deposition shows that the deposition has been read over by the witness and not read over to him as required by this section, the deposition is nevertheless legal evidence(4).

Proper time for reading—The requirements of this section are not complied with unless the deposition of each witness is read out to him as soon as it is completed. To record the depositions of a number of witnesses and read them over to them at the same time afterwards, is not a proper compliance and is illegal(5). This view is based on the wording of the section itself and on the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of deposition(6). The practice of reading over the depositions of all the witnesses examined on one day at the end of the day may commend itself as intended to save public time, but it is not in strict conformity with the requirements of the law(7). The practice of reading over depositions of several witnesses at one time may also defeat the object of the section. The accused or his lawyer may not remember the exact words used or the form of the answer given(8). Where the depositions of witnesses who are examined one after another until the midday adjournment are read over to them during the interval and the depositions of the witnesses examined in the afternoon are similarly read over to them in the afternoon after the close of the day there

(1) *Muhammad Yasin v. Emperor*, 52 C. 430—29 C. W. N. 650—89 I. C. 602—26 Cr. L. J. 1178—A. I. R. 1925 C. 784; *Hameshwar Singh v. Emperor*, 6 Pat. L. T. 493—A. I. R. 1925 Pat. 723—26 Cr. L. J. 927—65 I. C. 991—4 Pat. 439.

(2) *In re Sahorali Molla*, 87 I. C. 103—26 Cr. L. J. 951—A. I. R. 1925 Cal. 1120; *Emperor v. Jogendra Nath*, 21 I. C. 671—18 C. W. N. 1212—12 C. 210—15 Cr. L. J. 483.

(3) *Abdul Rahman v. Emperor*, 5 Rang. 53 (65)—28 Cr. L. J. 259—109 I. C. 247—39 M. L. T. 64—8 Pat. L. T. 155—4 O. W. N. 263—6 Bur. I. J. 65—51 M. L. J. 585—29 Bom. L. R. 813—45 C. L. J. 441—7 A. I. Cr. R. 352—1927 P. O. 44—45 C. L. J. 441 P. C.

(4) *Jagwa v. Emperor*, 5 Pat. 63—7

Pat. L. T. 306—27 Cr. L. J. 484—93 I. O. 841—A. I. R. 1926 Pat. 282.

(5) *In re Kuppas Mudali*, 49 M. 71—26 Cr. L. J. 1587—(1925) M. W. N. 795—90 I. C. 659—22 L. W. 839—49 M. L. J. 421—A. I. R. 1925 M. 1206.

(6) *Abdul Bari v. Emperor*, 27 Cr. L. J. 975 (376)—92 I. C. 897—30 O. W. N. 614—A. I. R. 1926 C. 157—42 O. L. J. 585; *Durgali v. Emperor*, 52 C. 449—88 I. C. 743—A. I. R. 1925 Cal. 831—26 Cr. L. J. 1219.

(7) *Abdul Bari v. Emperor*, 27 Cr. L. J. 375 (376)—92 I. C. 897—30 O. W. N. 614—A. I. R. 1926 Cal. 157—42 O. L. J. 585.

(8) See the case cited in the last note and *Ilural v. Emperor*, 52 C. 159—83 I. C. 905—28 O. W. N. 968—A. I. R. 1924 C. 889—26 Cr. L. J. 201—41 O. L. J. 224.

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(2) *Sondhi Singh v. Sri Gobind*, 5 Pat. L. T. 237=25 Cr. L. J. 89=76 I. C. 25=2 Pat. L. R. 108 Cr. (1924) Pat. 786.

(3) *Bhagirathi v. Emperor*, 26 Cr. L. J. 1401=89 I. C. 718=A. I. R. 1926 Rang. 141.

(4) *Queen v. Radhoo*, 12 W. R. Cr. 44.

(5) 5 Rang. 53=(1927) M. W. N. 103=100 I. C. 227=1927 P. O. 44=31 C. W. N. 271=25 A. L. J. 117 P. O.=1927 M. W. N. 103=38 M. L. T. 64=8 Pat. L. T. 155=4 O. W. N. 283=28 Cr. L. J. 253=

6 Bur. L. J. 65=52 M. L. J. 585=29 Bom. L. R. 813=45 C. L. J. 441 P. C.

(6) *Amrita Lal v. Emperor*, 42 C. 257 (1963); *Mohendra Nath v. Emperor*, 12 C. W. N. 845; *Jyotish Chandra Emperor* 28 C. 257.

(8) *Nga San v. Emperor*, U. B. R. (1911-12), 126; *Nga Paw U v. Emperor*, U. B. R. 1907-08, 1, Cr. Pro. 1; *Regu Singh v. Emperor*, 11 C. W. N. 668.

(9) *Adiladdi v. Emperor*, A. I. R. 1926 C. 423=26 Cr. L. J. 1016=87 I. C. 840.

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Proper time for reading—The requirements of this section are not complied with unless the deposition of each witness is read out to him as soon as it is completed. To record the depositions of a number of witnesses and read them over to them at the same time afterwards, is not a proper compliance and is illegal(5). This view is based on the wording of the section itself and on the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of deposition(6). The practice of reading over the depositions of all the witnesses examined on one day at the end of the day may commend itself as intended to save public time, but it is not in strict conformity with the requirements of the law(7). The practice of reading over depositions of several witnesses at one time may also defeat the object of the section. The accused or his lawyer may not remember the exact words used or the form of the answer given(8). Where the depositions of witnesses who are examined one after another until the midday adjournment are read over to them during the interval and the depositions of the witnesses examined in the afternoon are similarly read over to them in the afternoon after the close of the day there

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(2) *In re Saharali Mulla*, 87 I. C. 103=26 Cr. L. J. 951=A. I. R. 1925 Cal. 1120; *Emperor v. Jogendra Nath*, 21 I. C. 671=18 C. W. N. 1242=42 C. 240=15 Cr. L. J. 483.

(3) *Abdul Rahman v. Emperor* 5 Rang. 53 (65)=28 Cr. L. J. 259=100 I. C. 227=38 M. L. T. 64=8 Pat. L. T. 165=4 O. W. N. 263=6 Bur. L. J. 65=52 M. L. J. 585=29 Bom. L. R. 813=45 C. L. J. 441=7 A. I. Cr. R. 252=1927 P. O. 44=45 C. L. J. 441 P. C.

(4) *Jagta v. Emperor*, 5 Pat. 63=7

Pat. L. T. 396=27 Cr. L. J. 481=93 I. C. 841=A. I. R. 1926 Pat. 232.

(5) *In re Kuppu Mudali*, 49 M. 71=26 Cr. L. J. 1587=(1925) M. W. N. 795=90 I. C. 659=22 L. W. 339=49 M. L. J. 421=A. I. R. 1925 M. 1206.

(6) *Abdul Bari v. Emperor*, 27 Cr. L. J. 375 (376)=92 I. C. 887=30 C. W. N. 644=A. I. R. 1926 C. 157=42 O. L. J. 585; *Durgali v. Emperor*, 52 C. 449=88 I. C. 733=A. I. R. 1925 Cal. 831=26 Cr. L. J. 1213.

(7) *Abdul Bari v. Emperor*, 27 Cr. L. J. 375 (376)=92 I. C. 887=30 C. W. N. 644=A. I. R. 1926 Cal. 157=42 O. L. J. 585.

(8) *In re Saharali Mulla*, 87 I. C. 103=26 Cr. L. J. 951=A. I. R. 1925 Cal. 1120; *Emperor v. Jogendra Nath*, 21 I. C. 671=18 C. W. N. 1242=42 C. 240=15 Cr. L. J. 483.

is no compliance with the provisions of this section and the trial is vitiated(1). When a witness is examined-in-chief on one day and cross-examined on a subsequent day and his whole evidence is read over to him after cross examination, it is read over "as it is completed" within the meaning of this section, and there is no departure from the procedure laid down therein(2). The evidence of a witness is "completed" only after his cross examination, and re examination, if indeed he is cross-examined and re-examined. Completion does not mean end of the deposition for each particular day(3). It is not a sufficient compliance with the provisions of the section to read over each sentence of the statement of a witness as it is being recorded(4).

Reading over depositions to witness during examination of another witness by the court—The reading over of depositions to witnesses while the case is otherwise proceeding is not a violation of this section, the object of reading over being to secure an accurate record from the witness of what he means to say, not to enable the accused or his pleader to suggest corrections; it is however better that depositions, unless merely formal, should be read over so that the accused or his pleader may give their undivided attention. In other words, depositions should not be read over in the midst of distractions which make it impossible for the accused or his pleader to attend to them when being read over(5). But reading over the evidence of a witness when another witness is in the dock, is an irregularity cured by section 537 in the absence of failure of justice; and when the evidence in examination-in-chief is so read over by the peshkar, but the whole evidence is read over by the Magistrate himself after cross-examination and admitted to be correct the irregularity is made good, apart from section 537(6). The interpretation put upon this section in the following cases(7) has been disapproved and the cases have been declared as not laying down the correct rule of law. A deposition read out in the presence of the accused and his pleader, but while another witness in the case was being examined, is a deposition good in law so as to find a prosecution for perjury on it, especially when no objection was actually taken to the reading out of the deposition when the examination of the other witness was going on(8).

(1) *Samser Ali v. Emperor*, 53 C. 129=94 I. C. 736=1926 C. 563=27 Cr. L. J. 688.

(2) *Kamini Kumar v. Emperor*, 33 C. W. N. 664=2 Cr. Law. 514=1929 Cal. 390=1929 Cr. C. 26 (Even if there be any irregularity in reading over the whole evidence after cross-examination when the witness was examined-in-chief on a previous date, such irregularity is cured by § 537 when the correctness of the evidence recorded is not challenged and no failure of justice is proved.)

(3) *Ibid.*

(4) *Wadhawa Singh v. Emperor*, 22 Cr. L. J. 669=61 I. C. 461=3 U. P. L. R. (L.) 78.

(5) *Abdul Rahman v. Emperor*, 5

Rang. 53=54 I. A. 96 P. C.=28 Cr. L. J. 259=100 I. C. 227=38 M. L. T. 64=8 Pat. L. T. 155=4 O. W. N. 283=6 Bur. L. J. 65=52 M. L. J. 585=29 Bom. L. R. 813=45 C. L. J. 441=7 A. I. Cr. R. 352=1929 P. C. 44.

(6) *Kamini Kumar v. Emperor*, 33 C. W. N. 664=1929 Cr. C. 26=1929 Cal. 390.

(7) *Hira Lal v. Emperor*, 52 C. 159; *Dargahi v. Emperor*, 52 C. 499. To the same effect, see *Manik v. Emperor*, 41 C. L. J. 331=88 I. C. 1043=26 Cr. L. J. 1267=A. I. R. 1925 C. 933; *Abdul Bari v. Emperor*, 42 C. L. J. 585=27 Cr. L. J. 375=92 I. C. 887=30 C. W. N. 614=A. I. R. 1926 C. 157.

(8) *In re Muthuyumara*, 21 M. L. J. 411.

Deposition to be read over in accused's presence.—The evidence given by a witness must be read over to him in the presence of the accused or his pleader, and no practice to the contrary can alter the plain words of the law(1). The section says that the reading over of the deposition must be 'in the presence of the accused' and it must mean that it must be done in a manner so as to enable the accused to understand the deposition(2). The Judicial Committee have, however, held that although the depositions were read over at a time when the accused or his pleader could not attend to them(3). If the accused is in attendance, the evidence must be read over in his presence; it is only when the accused appears by a pleader that the reading of the evidence in the presence of the accused's pleader amounts to a sufficient compliance with the provisions of the section(4). Where a trial is set aside and re trial ordered on the ground that the depositions of the witnesses had not been read over to them in the presence of the accused in accordance with the provisions of this section, statements made by the witnesses in the previous trial can be referred to for the purpose of contradicting the statements made by them in the subsequent trial(5).

Reading of deposition in presence of accused's pleader.—There is nothing in the provisions of this section to indicate that the Legislature intended that the reading over in the presence of the pleader should be a compliance with the provisions of that section only in case where the personal appearance of the accused is dispensed with by the court. The natural meaning of the words is that if an accused person has engaged, a pleader who is in attendance, the reading over of the deposition in the presence, of the pleader will be a full compliance with the provisions of the section if the accused himself does not happen to be present at the time the deposition is read over(6).

Effect of non compliance.—The Judicial Committee in the case of *Abdul Rahman v. Emperor*(7) lays down that non-compliance with the strict provisions of s. 360 amounts only to an irregularity and is cured by s. 537. In the prior cases disapprovingly quoted by their Lordships it was held that omission to comply with the provisions of this section is an illegality which vitiates the trial, irrespective of whether the accused have been prejudiced or not, and is not a mere irregularity curable

(1) *Joytish Chandra v. Emperor*, 80 C. 955; *Emperor v. Jogendra Nath*, 42 C. 240.

(2) See *Hiralal v. Emperor*, 52 C. 113; *Dargahi v. Emperor*, 52 C. 499; *Abdul Bari v. Emperor*, 80 C. W. N. 644=42 C. L. J. 665=27 C. L. J. 375=92 I. C. 887=A. I. R. (1926) Cal. 167.

(3) *Abdul Rahman v. Emperor*, 1 Rang. 53=54 I. A. 96 P. C.=1927 M. W. N. 103=100 I. C. 227=1927 P. C. 44=31 C. W. N. 271=25 A. L. J. 117 P. C.

(4) *Kasim Ali v. Sarada Kripa*, 27 Cr. L. J. 609=93 I. C. 918=30 C. W. N. 236=A. I. R. 1926 C. 528.

(5) *Fazlur Rahman v. Emperor*, 6 Pat. 478=104 I. C. 100=28 Cr. L. J. 772=A. I. R. 1927 Pat. 316=8 Ind. L. T.

825=9 A. I. Cr. R. 870.

(6) *Emperor v. Jogendra Nath*, 42 C. 240.

(7) 5 Rang. 53=54 I. A. 96 P. C.=100 I. C. 227=28 Cr. L. J. 259=1927 P. C. 44=(1927) M. W. N. 103=31 C. W. N. 271=38 M. L. T. 61=8 P. L. T. 165, on appeal from 27 Cr. L. J. 669=4 Bur. L. J. 213 To the same effect, see *Mayeth v. Emperor*, 3 Rang. 612=27 Cr. L. J. 637=95 I. C. 937=4 Bur. L. J. 257=A. I. R. 1926 Rang. 78 and *Mohiuddin v. Emperor*, 4 Pat. 488=6 Pat. L. T. 154.

by section 537(1). Under the ruling of the Judicial Committee the omission or irregularity unaccompanied by a possible suggestion of a failure of justice will not vitiate the conviction. Following the Privy Council ruling it has been held that non-compliance with the provisions of this section does not vitiate a trial where it has not in fact occasioned any failure of justice(2). The fact that an evidence has not been read over in accordance with this section is not such an irregularity as to support the proposition that the Magistrate had decided the case on no evidence at all(3). The provisions of this section are no doubt mandatory, but non compliance with them does not legally result in rendering the whole record of the deposition inadmissible(4), though there is authority to the contrary also(5). Where the provisions of the section are not complied with by a committing Magistrate, the commitment to the Sessions Court will not be quashed on the application of the Crown where it is opposed by the accused who do not complain of any inaccuracy in the commitment record or in the record of the Sessions Court(6).

Conviction for perjury.—A witness cannot be convicted under s. 193 I. P. C., for having made false statements in his depositions before a criminal court when the deposition was not read to him in the presence of the accused or his pleader in accordance with the provisions of this section(7). But a conviction for perjury may be upheld if the deposition had been read over to the witness and acknowledged by him to be correct, even though the reading over was not in the presence of the Judge and of the accused and of the pleaders for prosecution and defence as required by law(8). A deposition before the Commissioners not read over to the witness cannot be used against him on a charge of perjury, this section being applicable to trials before Commissioners appointed under the defence of India Act(9).

(1) *Huralal v. Emperor*, 52 C. 159,

Darabhai v. Emperor, 52 C. 160.

(2) *Bajai v. Ram Sarup*, 102 I. C. 772=L. R. 8 A. 117 Cr.—28 Cr. L. J. 596

=8 A. J. Cr. R. 271; *Jewan Singh v.*

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(3) *Sandi Singh v. Sri Gouind*, 5 Pat. L. T. 237.

(4) *Pitoomal v. Emperor*, 86 I. C. 33=16 S. L. R. 255=26 Cr. L. J. 657

(5) *Pramanik v. Emperor*, A. I. R. 1928 C. 271.

(6) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(7) *Empress v. Mayadeb*, 6 C. 762=8 C. L. R. 292; *Jyotish Chandra v. Emperor*, 86 C. 955, *Mahendia v. Emperor*, 12 C. W. N. 845; *Ram Narain v. Dhanrai*, 3 Pat. L. T. 291=23 Cr. L. J. 195=65 T. C. 552=1900 L. T. R.

(8) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(9) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(10) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(11) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(12) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(13) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(14) *Emperor v. Abdul Rahim*, 88 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

Depositions can be used for contradiction.—Depositions of the witnesses in a previous case in which there has been no compliance with the provisions of this section may not possibly be used as evidence in the case in which they were made, but nevertheless they can be used on a subsequent occasion to contradict the witnesses under s.145, Evidence Act(1).

Endorsement—This section does not require that an endorsement or certificate should be made or given that the statement of a witness had been read over to him 2). The absence of such certificate does not of itself prove that the provisions of the section have not been observed(3). And where such statement is made but is defective it is impossible to hold that the depositions were not read over to the witness in the presence of the accused(4).

Sub section (2).—Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradiction which it may contain; and only the statement which the witness finally declares to be the true one must be taken to be the statement he intended to make(5). A witness honestly desiring to correct an error in his evidence should not be deterred from doing so by the risk of a criminal charge(6). If a court instead of allowing the correction to be made proceeds to make a memorandum under this sub-section, such memorandum must be appended to the deposition itself and care should be taken that the practice and form prescribed by law are strictly adhered to(7).

Sub section (3).—In the case of *In re Ok'oy Kumar*(8), Garth, C. J., and Maclain, J., held that section 339 of Act X of 1872 being for the protection of the witnesses only, the fact that witnesses did not understand their deposition when read over, although they may not have required them at the time to be interpreted, affords no ground for an application by the accused to set aside conviction. The case of *Queen v. Issur Raut*(9) holding otherwise does not appear to have been brought to the notice of the learned Judges who decided the foregoing case. The distinction between ss. 360 and 361 is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the former section when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused(10).

(1) *Fazlur Rahman v. Emperor*, A. I. B. 1927 Pat 815=6 Pat 478=101 I. C. 100=28 Cr. L. J. 772=8 P. L. T. 773=8 A. I. Cr. B. 555.

(2) *Arjun Kumari v. Emperor*, 99 I. C. 103=1927 Pat 100=8 Pat L. T. 166.

(3) *Bhagwat Singh v. Emperor*, 4 Pat. 231=6 Pat L. T. 73=66 I. C. 996=26 Cr. L. J. 931=A. I. R. 1915 Pat 878; *Rameshar Singh v. Emperor*, 25 Cr. L. J. 927=60 I. C. 991.

(4) *Arjun Kumari v. Emperor*, 8 Pat. L. T. 166=99 I. C. 103=1927 Pat.

100=28 Cr. L. J. 77.

(5) *Reg v. Balkrishna*, Rat. Un. Cr. Cas. 54.

(6) *Habibullah v. Empress*, 10 C. 937 (911).

(7) *Queen v. Komurooddee*, 13 W. R. Cr. 17.

(8) 7 C. L. R. 303.

(9) 8 W. R. Cr. 63.

(10) *Abdul Rahman v. Emperor*, 28 Cr. L. J. 259=5 Rang 53 P. C. =100 I. C. 227=1927 P. C. 44=(1927) M. W. N. 103=31 C. W. N. 271=38 M. L. T. 61=8 Pat. L. T. 165; see also *Hari*

by section 537(1). Under the ruling of the Judicial Committee the omission or irregularity unaccompanied by a possible suggestion of a failure of justice will not vitiate the conviction. Following the Privy Council ruling it has been held that non-compliance with the provisions of this section does not vitiate a trial where it has not in fact occasioned any failure of justice(2). The fact that an evidence has not been read over in accordance with this section is not such an irregularity as to support the proposition that the Magistrate had decided the case on no evidence at all(3). The provisions of this section are no doubt mandatory, but non-compliance with them does not legally result in rendering the whole record of the deposition inadmissible(4), though there is authority to the contrary also(5). Where the provisions of the section are not complied with by a committing Magistrate, the commitment to the Sessions Court will not be quashed on the application of the Crown where it is opposed by the accused who do not complain of any inaccuracy in the commitment record or in the record of the Sessions Court(6).

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(1) *Hiralal v. Emperor*, 52 O. 159, *Dargahi v. Emperor*, 52 O. 499 To the same effect, see *Haronath v. Ala Bur*, 76 I. C. 281=38 C. L. J. 291=(1924) A. I. R. (Cal) 182=38 O. W. N. 199=25 Cr. L. J. 299; *Sanatan v. Emperor*, 52 O. 632; *In re Kuppa Mudali*; 50 Cr. L. J. 108.

(3) *Sandi Singh v. Sri Gouind*, 5 Pat. L. T. 237.

(4) *Pitoomal v. Emperor*, 86 I. C. 33=16 S. L. R. 255=26 Cr. L. J. 657.

(5) *Pramanik v. Emperor*, A. I. R. 1928 C. 271.

(6) *Emperor v. Abdul Rahim*, 89 I. C. 1052=29 O. W. N. 698=A. I. R. 1925 C. 928=26 Cr. L. J. 1276.

(7) *Empress v. Mayadeb*, 6 O. 762=8 C. L. R. 292; *Jyotish Chandra v. Emperor*, 86 C. 955; *Mahendra v. Emperor*, 12 O. W. N. 845.

(2) *Bajai v. Ram Sarup*, 102 I. C. 772=L. R. 8 A. 117 Cr.=28 Cr. L. J. 596=8 A. I. Cr. R. 271; *Jewan Sinah v. Emperor*, 52 O. 159.

(8) *In re Bogra*, 8 M. L. T. 117=11 Cr. L. J. 482=7 I. C. 414; *Junya v. Emperor*, 12 Bur. L. T. 167.

(9) *Taj Mahammud v. Crown*, 15 Lah. 407.

100=8 A. I. Cr. R. 108.

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Sub section (2).—Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradiction which it may contain; and only the statement which the witness finally declares to be the true one must be taken to be the statement he intended to make(5). A witness honestly desiring to correct an error in his evidence should not be deterred from doing so by the risk of a criminal charge(6). If a court instead of allowing the correction to be made proceeds to make a memorandum under this sub-section, such memorandum must be appended to the deposition itself and care should be taken that the practice and form prescribed by law are strictly adhered to(7).

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(1) *Fazlur Rahman v. Emperor*, A. I. R. 1927 Pat 815=6 Pat 478=101 I. C. 100=28 Cr. L. J. 772=8 P. L. T. 773=8 A. I. Cr. R. 555.

(2) *Arjun Kumari v. Emperor*, 99 I. C. 109=1927 Pat 100=8 Pat. L. T. 166.

(3) *Bhagwat Singh v. Emperor*, 4 Pat. 231=6 Pat. L. T. 78=60 I. C. 996=26 Cr. L. J. 932=A. I. R. 1925 Pat. 878; *Rameshar Singh v. Emperor*, 25 Cr. L. J. 927=66 I. C. 991.

(4) *Arjun Kumari v. Emperor*, 8 Pat. L. T. 166=99 I. C. 109=1927 Pat.

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(5) *Reg v. Balkrishna*, Bat. Un. Cr. Cas. 54.

(6) *Habibullah v. Empress*, 10 C. 937 (911).

(7) *Queen v. Konurooddee*, 13 W. R. Cr. 17.

(8) 7 C. L. R. 393.

(9) 8 W. R. Cr. 63.

(10) *Abdul Rahman v. Emperor*, 28 Cr. L. J. 259=5 Rang. 53 P. C.=100 I. C. 227=1927 P. C. 44=(1927) M. W. N. 103=31 C. W. N. 271=38 M. L. T. 64=8 Pat. L. T. 165; see also *Hari*

361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language understood by him.

Interpretation of evidence to accused or his pleader.

(2) If he appears by pleader and the evidence is given in a language other than the language of the court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.

Distinction between s. 360 and s. 361.—The distinction between section 360 and this section is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the former section when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused. Thus if the depositions are taken down in English, and the language of the accused is Hindi, and the language of a witness is Burmese the depositions will have to be taken by getting the witness's answers in Burmese, having then interpreted to the court so that they may be taken down in English, and further interpreted to the accused so that he may understand them in Hindi. When, however, the deposition comes to be read over, as it will be in English, it will be interpreted to the witness in Burmese but not to the accused in Hindi; and if the accused knew neither English nor Burmese, he will be none the wiser(1).

Sub-section (1).—It has been held by the Madras High Court that under sub-section (1) depositions of witnesses given in English in the conduct of a trial ought to be translated to an accused person ignorant of English(2). The Madras High Court has not affirmed the view of the Calcutta High Court that the first two paragraphs of this section are mutually exclusive of each other(3). But the omission to so translate is an irregularity which can be cured under section 537 which, provided there is no failure of justice, covers any irregularity in the widest sense of that term, and applies even to the mandatory provisions of the Code(4).

Narayan v. Emperor, 46 C. L. J. 368—A. I. R. 1928 C. 27—29 Cr. L. J. 49—106 I. C. 545—9 A. I. Cr. R. 228.

(1) *Abdul Rahman v. Emperor*, 5 Rang. 53 (64) P. C.

(2) *In re Annai Errappa*, 125 I. C. 253—(1920) M. W. N. 698—A. I. R. 1930 Mad. 186—31 L. W. 386—3 Cr. Law. Mad. 80—Ind. Rul. (1930) Mad. 781—31

Cr. L. J. 827—1930 Cr. Cas. 186.

(3) *Hari Narayan v. Emperor*, 106 I. C. 545—29 Cr. L. J. 49—46 C. L. J. 368—A. I. Cr. R. 228.

(4) *Emperor v. Abdul Rahman*, 5 Rang. 53 P. C.

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Sub-section (2).—The circumstance that the evidence of the Civil Surgeon given in English was not interpreted to the accused was held to be of small importance, where it was understood by the prisoner's counsel and all necessary questions were put to the witness(1).

Sub section (3).—Although a prisoner has a right to have all or any part of any document used on his trial translated or interpreted to him, yet, where a document is put in for the purpose of merely giving a formal proof of that which is an incontestable fact, it is not necessary to interpret it at length. It would be sufficient if the prisoner was made to understand what the document was, and for what purpose it was used(2).

Interpreter.—A witness who has taken an active part during the police investigation, who has given evidence in the committing Magistrate's court on behalf of the prosecution and who is ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man, who was charged with very serious offences under sections 302 and 304, Indian Penal Code, should not be chosen to act as an interpreter in that case(3). A sworn interpreter is only required when the court and jury are ignorant of the language in which a witness is deposing(4).

362. (1) In every case tried by a Presidency Magis-

Record of evidence
in Presidency Ma-
gistrate's Courts.

trate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(2-A) In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.

(3) Sentences, unless they are sentences of imprisonment ordered to run concurrently, passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

(1) *Queen v. Bhobun*, 24 W. R. Cr. 60.

(2) *Queen v. Ameeroddeen*, 15 W. R. Cr. 25.

(3) *Ah So v. Emperor*, 53 O. 659-80 O. W. N. 696-95 I. C. 469-27 (r. L. J. 805-A I. R. 1926 C. 922).

(4) *Queen v. Mudun*, 18 W. R. Cr. 61.

(4) In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.

Amendment.—This section has been amended by section 97 of the Cr. P. Code Amendment Act, XVIII of 1923. The original words in sub-section (1) "in which a Magistrate imposes a fine exceeding Rs. 200 or imprisonment for a term exceeding six months" have been replaced by the words "tried by a Presidency Magistrate in which an appeal lies". The words "unless they are sentences of imprisonment ordered to run concurrently" have been inserted. Sub sections (2-A) and (4) have been newly added.

Sub section (1).—"The amendment of sub section (1) seems to effect nothing more than by the substitution of the words "in which an appeal lies" to bring the wording of the section in conformity with the language of ss. 263, 264. The difficulty still remains as to how the Magistrate is to make up his mind as to the sentence he will impose before the evidence is recorded. In some cases a right conjecture may be possible, in others not" (1). The Joint Committee in confirming the above amendment have also admitted it:—

"We are inclined to agree with those critics who point out that the redraft proposed in sub section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of; but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of sections 263 and 264, and we would, therefore, retain this sub clause.

"In order to meet difficulties that have arisen, we have introduced a sub section (2a) laying down that Presidency Magistrates, in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new clause making a consequential amendment in sub-sec. (4) of sec. 364.

"The non-official members, who constituted a majority in the committee, expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates, and in particular with regard to this clause would have liked to see Presidency Magistrates required, in warrant-cases at all events, to keep as full a record as any other Magistrate. But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status, powers and procedure. We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small committee to undertake this investigation" (2).

Cases.—This section prescribes that the evidence in appealable cases shall be duly recorded (3). It is, therefore, the duty of a

(1) Woodroffe, Cr. P. Code, p 409.

(2) Report of the Joint Committee (1922).

(3) *Emaman v. Emperor*, 31 C. 983—8 O. W. N. 839; *Shank Babu v. Emperor*, 33 C. 1036.

Presidency Magistrate, under this section, to make a full and proper record of all the material facts, whether appearing in the examination-in-chief or cross-examination, especially when the witness is the only independent prosecution witness and there is an appeal so as to enable the Appellate Court to deal with the case. Where the Magistrate recorded only a few sentences of the cross examination which took place on two days, the High Court looked into and compared the notes of the evidence made at the trial by a local pleader with the Magistrate's record(1). A Presidency Magistrate is bound, under this section, to record evidence of witnesses in a case where he imposes a sentence of imprisonment exceeding six months, even though the sentence is imposed for detaining the accused in a reformatory(2).

Sub section (2).—Evidence should be recorded in the form of direct narration. If a Presidency Magistrate in contravention of the provision of this sub section takes down the evidence in the form of indirect narration, the procedure is irregular. But the irregularity is such as will not vitiate the trial(3).

Sub-section (2-A).—Presidency Magistrates are not bound to record the examination of an accused in full. In appealable cases only, they are bound to record the substance of the examination of the accused. In non-appealable cases, no hard and fast rule can be laid down as to how the examination of an accused is to be recorded. So, where in a non appealable case, in the column provided in the form used by Presidency Magistrates for the record of the examination of the accused, the only entry was "denies", it was held that the entry was a sufficient compliance with section 370 (f)(4).

Sub-section (3).—The language of sub section(3) makes it clear that when sentences in excess of the one, are passed, which are ordered to run concurrently, it is the heaviest sentence which determines the applicability of this section(5).

Sub section (4).—There is no obligation in law to record evidence in cases other than those in sub-section (1); the discretion rests with the Magistrate(6). Under sub-sec. (4), a Presidency Magistrate may, if he likes, record evidence but his right to refuse to do so is, under this sub section, absolute and is not subject to revision by the High Court(7). It is to be observed that in 1907 when the case of *Emperor v. Harischandra*(8) was decided the wording of this section was in different terms to those in which it is now expressed. But the decision

(1) *Foong v Emperor*, 46 C. 411.

(2) *Emperor v Mohamed Roshan*, 26 Bom. L. R. 1232=A. I. R. (1925) B 147=26 Cr. L. J. 454=85 I. C. 134.

(3) *In re Ghulab Chand*, 18 Cr. L. J. 336=38 I. C. 448.

(4) *Sadagar v. Emperor*, 49 C. L. J. 261=115 I. C. 404=30 Cr. L. J. 526=33

O. W. N. 543=A. I. R. 1929 Cal. 406=56 Cal. 1067.

(5) Statements of Objects and Reasons (1914)

(6) *Emaman v. Emperor*, 31 C 983; *Shaik Babu v. Emperor*, 33 C 1036;

D'Souza v. Emperor, 56 B 200

(7) *D' Souza v. Emperor*, 56 B. 200 =A. I. R. 1932 B. 150=34 B. L. R. 286=1932 Cr. C. 239=187 I. C 168=33 Cr. L. J. 404.

(8) 10 Bom. L. R. 201=7 Cr. L. J. 194

(4) In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.

Amendment.—This section has been amended by section 97 of the Cr. P. Code Amendment Act, XVIII of 1923. The original words in sub-section (1) "in which a Magistrate imposes a fine exceeding Rs. 200 or imprisonment for a term exceeding six months" have been replaced by the words "tried by a Presidency Magistrate in which an appeal lies". The words "unless they are sentences of imprisonment ordered to run concurrently" have been inserted. Sub sections (2-A) and (4) have been newly added.

Sub section (1).—"The amendment of sub section (1) seems to effect nothing more than by the substitution of the words "in which an appeal lies" to bring the wording of the section in conformity with the language of ss. 263, 264. The difficulty still remains as to how the Magistrate is to make up his mind as to the sentence he will impose before the evidence is recorded. In some cases a right conjecture may be possible, in others not "(1). The Joint Committee in confirming the above amendment have also admitted it:—

"We are inclined to agree with those critics who point out that the redraft proposed in sub section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of; but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of sections 263 and 264, and we would, therefore, retain this sub clause.

"In order to meet difficulties that have arisen, we have introduced a sub section (2a) laying down that Presidency Magistrates, in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new clause making a consequential amendment in sub-sec. (4) of sec. 364.

"The non-official members, who constituted a majority in the committee, expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates, and in particular with regard to this clause would have liked to see Presidency Magistrates required, in warrant-cases at all events, to keep as full a record as any other Magistrate. But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status, powers and procedure. We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small committee to undertake this investigation." (2).

Cases.—This section prescribes that the evidence in appealable cases shall be duly recorded (3). — It is, therefore, the duty of a

(1) Woodroffe, Cr. P. Code, p. 409.
(2) Report of the Joint Committee (1922).

(3) *Emaman v. Emperor*, 31 C. 983 = 8 C. W. N. 839; *Shaik Habu v. Emperor*, 33 C. 1036.

Presidency Magistrate, under this section, to make a full and proper record of all the material facts, whether appearing in the examination-in-chief or cross-examination, especially when the witness is the only independent prosecution witness and there is an appeal so as to enable the Appellate Court to deal with the case. Where the Magistrate recorded only a few sentences of the cross examination which took place on two days, the High Court looked into and compared the notes of the evidence made at the trial by a local pleader with the Magistrate's record(1). A Presidency Magistrate is bound, under this section, to record evidence of witnesses in a case where he imposes a sentence of imprisonment exceeding six months, even though the sentence is imposed for detaining the accused in a reformatory(2).

Sub section (2).—Evidence should be recorded in the form of direct narration. If a Presidency Magistrate in contravention of the provision of this sub section takes down the evidence in the form of indirect narration, the procedure is irregular. But the irregularity is such as will not vitiate the trial(3).

Sub-section (2-A).—Presidency Magistrates are not bound to record the examination of an accused in full. In appealable cases only, they are bound to record the substance of the examination of the accused. In non-appealable cases, no hard and fast rule can be laid down as to how the examination of an accused is to be recorded. So, where in a non appealable case, in the column provided in the form used by Presidency Magistrates for the record of the examination of the accused, the only entry was "denies", it was held that the entry was a sufficient compliance with section 370 (f)(4).

Sub section (3).—The language of sub section(3) makes it clear that when sentences in excess of the one, are passed, which are ordered to run concurrently, it is the heaviest sentence which determines the applicability of this section(5).

Sub section (4).—There is no obligation in law to record evidence in cases other than those in sub-section (1); the discretion rests with the Magistrate(6). Under sub-sec. (4), a Presidency Magistrate may, if he likes, record evidence but his right to refuse to do so is, under this sub-section, absolute and is not subject to revision by the High Court(7). It is to be observed that in 1907 when the case of *Emperor v. Harischandra*(8) was decided the wording of this section was in different terms to those in which it is now expressed. But the decision

(1) *Foong v. Emperor*, 46 C. 411.

(2) *Mohamed Roshan*, 26 Bom. L. R. 1232=A. I. R. (1925) B. 147=26 Cr. L. J. 454=85 I. C. 184

(3) *In re Ghulab Chand*, 18 Cr. L. J. 836=38 I. C. 448

(4) *Sadargar v. Emperor*, 49 C. L. J. 261=115 I. C. 604=30 Cr. L. J. 526=83 C. W. N. 543=A. I. R. 1929 Cal. 406=46 Cal. 1067.

(5) Statements of Objects and Reasons (1914)

(6) *Emaman v Emperor*, 31 C. 983; *Shaik Babu v. Emperor*, 33 C. 1036; *D'Souza v. Emperor*, 56 B. 200

(7) *D' Souza v. Emperor*, 66 B. 200 =A. I. R. 1932 B. 110=34 B. L. R. 286=1932 Cr. C. 239=137 I. C. 168=33 Cr. L. J. 404.

(8) 10 Bom. L. R. 201=7 Cr. L. J. 194

has been acted upon in more recent cases(1). The court is not, however, justified in following a decision which is opposed to the plain words of a statute(2).

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness.

Remarks respecting demeanour of witness.—This section makes it incumbent on the Magistrate to record remarks, if any, as he may think material respecting the demeanour of a witness whilst under examination(3). But it is always unsafe for a Judge or a Magistrate to pronounce an opinion as to the credibility of a witness, until the whole of the evidence has been taken; a Judge may note the demeanour of a witness, but except there is very clear proof afforded by his own statements that the witness is unworthy of credit, it is unsafe to assume that he is so, till the evidence has been exhausted(4). The parties are entitled to claim that, unless expressly provided to the contrary by law, the Magistrate shall not prejudge their cases or form an opinion about the respective merits of their cases or about the depositions of the witnesses till they have been fully and finally presented to the Magistrate by counsel, if any, in their concluding arguments and after the entire evidence has been recorded. Any opinion formed and expressed by the Magistrate at an earlier stage of the case is bound to be prejudicial to the party concerned(5). It is dangerous to reject the evidence of defence witnesses, who are admittedly respectable men, on the sole ground that their demeanour in court has not been satisfactory, specially when the statements made by them are in themselves probable, and are made under the sanction of an oath(6).

Duty of appellate court to consider facts of case—Though in criminal cases an appellate court should be guided in its estimate of the evidence of a witness by remarks recorded by the first court, under this section, as to the demeanour of that witness, such appellate court is bound to independently consider the facts of the case, and the prisoner is entitled to the benefit of reasonable doubt in the appellate no less than in the first court(7). Where, however, a Sessions Judge of experience stated in the most emphatic terms that the demeanour of the eye-witness was evasive, that they inspired him with no confidence, and that no man could be convicted on their testimony, it was held that, before the court of appeal could justifiably accept their evidence, it must be assured in the most positive and convincing manner that there was

L. J. 129.

(4) *Re Palani Nandan*, 2 Weir. 435 (136).

(6) *Sikandar Lal v. Emperor*, 113 I. C. 321—A. I. R. 1928 Lah. 975=30 Cr. L. J. 129.

(6) *Crown v. Fazul Mahmad*, 9 Cr. L. J. 261.

(7) *Maula Bakhsh v. Empress*, 6 F. R. 1898 Cr.; see *Queen v. Rasool Kullah*, 12 W. R. Cr. 61.

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no ground for this criticism(1).

Transfer of case.—In *Golam Bari v. Yar Ali*(2) a Division Bench of the Calcutta High Court transferred a case from the court of a Magistrate because he had made a remark at the close of the testimony of a witness as follows :—"The witness falters and from his demeanour it appears that he has not told the truth." This case was referred to with approval in a Single Bench case of the Lahore High Court in *Sikandar Lal*(3), where it was held that although this section makes it incumbent on the Magistrate to record remarks, if any, as he may think material respecting the demeanour of a witness whilst under examination, it is quite a different thing to record a remark about the demeanour of the witness and to make or record a remark or opinion about the substance of the deposition of that witness.

364. (1) Whenever the accused is examined by any Magistrate, or by any court other than a High Court established by Royal Charter, or the Chief Court of Oudh, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or if that is not practicable, in the language of the court or in English; and such record shall be shown or read to him, or if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound * * * * * as the examination proceeds, to make a memorandum thereof in the language of the court, or in English, if he is sufficiently acquainted with the latter language, and

(1) *Emperor v. Bishan Singh*, 22 I. O. 987=125 P. L. R. 1914=27 P. W. R. 1914 Cr.=15 Cr. L. J. 203.
(2) 29 C. W. N. 316=86 I. C. 708=26

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(1) See *In re Hanifabai*, 32 Bom. L.R. 1490 = A. I. R. 1931 Bom. 142 = 129 I. C. 359 = 32 Cr. L. J. 276 = 1932 Cr. C. 190; *In re Chhagan Hargovan*, 34 Bom. L. R. 276 = A. I. R. 1932 Bom. 179 = 1932 Cr. C. 228 = 137 I. C. 27 = 33 Cr. L. J. 461.

(2) *D' Souza v. Emperor*, 56 B. 200 (1903) = A. I. R. 1932 Bom. 160 = 31 B. L. R. 286 = 1932 Cr. C. 239 = 137 I. C. 188 = 33 Cr. L. J. 404.

(3) *Sikandar Lal v. Emperor*, 118 I. C. 321 = A. I. R. 1928 Lah. 976 = 20 Cr.

L. J. 129.

(4) *Re Palani Nandon*, 2 Weir. 435 (136).

(5) *Sikandar Lal v. Emperor*, 118 I. C. 321 = A. I. R. 1928 Lah. 976 = 20 Cr. L. J. 129.

(6) *Crown v. Fazul Mahmad*, 9 Cr. L. J. 261.

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(1) *Emperor v. Bishan Singh*, 22 O. 987=125 P. L. R. 1914=27 P. W. R. 1914 Cr.=15 Cr. L. J. 203.

Cr. L. J. 852=A. I. R. (1925) C. 480

(2) 29 O. W. N. 316=26 I. C. 708=26

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(2) *D' Souza v. Emperor*, 56 B. 200 (1903)=A. I. R. 1932 Bom. 180=34 B L. R. 286=1932 Cr. C. 289=137 I. C. 188=33 Cr. L. J. 401.
(3) *Sikandar Lal v. Emperor*, 113 I. C. 221=A. I. R. 1928 Lah. 976=30 Cr.

L. J. 129.

(4) *Re Palani Nandan*, 2 Weir. 485 (1896).

(5) *Sikandar Lal v. Emperor*, 113 I. C. 221=A. I. R. 1928 Lah. 976=30 Cr. L. J. 129.

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(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound * * * * * as the examination proceeds, to make a memorandum thereof in the language of the court, or in English, if he is sufficiently acquainted with the latter language, and

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 I. O. 987=125 P. L. R. 1914=27 P. W. R. 1914 Cr.=15 Cr. L. J. 203. (3) 113 I. C. 321=A. I. R. 1928 Lsh.
 (2) 29 C. W. N. 816=86 I. O. 708=26 976=30 Cr. L. J. 129.

such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 203, [or in the course of a trial held by a Presidency Magistrate]

Statutory amendment—The words "or the Chief Court of Oudh" were inserted by s. 2 of Schedule of Act No. XXXII of 1925; the words "or the Chief Court of Sind" were added by s. 2 and Schedule of Act No. XXXIV of 1926; before 1919, the words "or the Chief Court of the Punjab or the Chief Court of Lower Burma" occurred after "Royal Charter"; "or the . . . Punjab," were omitted by Act XVIII of 1919 and "or the Chief Court of Lower Burma" by Act No XI of 1923. In sub-section (3), the words "unless he is a Presidency Magistrate" were omitted at the place indicated by asterisks by s. 2 of Act No. XXXVII of 1923 (see s. 264 (4)); in sub-section (4), the words within square brackets were substituted for "or section 362, sub-section (2A)" (which were inserted by s. 93 of Act No. XVIII of 1923) by the same provision(1).

Scope and object.—This section prescribes the mode in which an accused person ought to be examined by a Magistrate or by any court other than a High Court(2). The examination of an accused, under this section, is subject to the purpose referred to in s. 342, *viz.*, "to enable him to explain any circumstances appearing against him"; and not to supplement the case for the prosecution against him to show that he is guilty(3). This section authorises a Magistrate to put questions to the accused in order to enable him to explain any evidence that may have been produced against him during the inquiry or the trial. But it has no application where no evidence has yet been produced against the accused(4). Before criminating a man upon his own statement under examination, it is necessary to see that such statement was deliberately made and recorded; that, after being recorded, it has been shown or read to the accused; and that the examination has been attested by the signature of the Magistrate following a certificate to be given under his own hand(5).

Examination of accused during investigation.—After a person is taken as an accused, it is made obligatory upon the Magistrate who

(1) *Katju & Dass*, Cr. P. Code, pp 335, 336.

(2) *Parsolam Dass v. Emperor*, 6 Pat. 504 (505)=A. I. R. 1217 Pat. 402=8 Pat. L. T. 757=29 Cr. L. J. 1037=106 I. C. 221.

(3) *Empress v. Rangji*, 10 M. 225=2 Wely. 301; *Emperor v. Ganga*, 10 M. 225=2

1 M. H. C. R. 199; *Hossein Bulsh v. Empress*, 6 C 96

(4) *Pahlwan v. Emperor*, 128-1 C. 540=31 Cr. L. J. 533=Ind. Rul. (1930) Lah 460=A. I. R. (1930) Lah 454; *Empress v. Budha*, (1884) A. W. N. 106; *Tufani v. Emperor*, 15 C. L. J. 323.

(5) *Ganga*, 10 M. 225=2

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examines him to record the whole of the question put to him and the answers given by him, under this section. But statements, whether in the nature of information given by witnesses about a crime or admissions by persons who have taken part in a crime, if made during the course of an investigation before commencement of a trial or inquiry are governed by section 164 and that section permits Magistrates to record the same without compelling them to do so. Such confessions may be proved by the oral testimony of the Magistrate(1). But in some cases it has been held that the rules laid down in this section are equally applicable to confessions taken under section 164, in the course of an investigation(2).

Summary trial—In a summary trial of warrant-case, the Magistrate is bound to examine the accused under section 342, but he is not bound to record such examination as provided by this section (3). It is sufficient if he makes a brief note of the examination on the record(4).

Statement recorded during inquiry under s. 202.—A statement of the person complained against recorded during an inquiry under s. 202 cannot be regarded as having been recorded under section 164 of 364 and as such cannot be admitted in evidence as proving itself against him(5).

Examination prior to commitment.—The examination of an accused, prior to commitment, is in the discretion of the Magistrate; if the accused is unwilling to submit to examination, it is sufficient for the Magistrate to make a note to that effect. The provisions of this section have no application to such a note(6).

Record of questions and answers.—The whole of the examination of the accused including every question put to him and every answer given by him shall be recorded in full(7). In recording the statement of the accused under section 342 the provisions of this section must be complied with. A record of the examination of the accused must be made under this section and that record must be shewn or read over to him. Merely recorded in the order-sheet or judgment that "the statement and examination of the accused recorded by the committing Magistrate was put in and read out to him. He declines to have made such statement", is not a compliance with the requirements of this

(1) *In re Tangedypolle*, 45 M. 230 (233)=23 Cr. L. J. 680=1922 M. 40=42 M. L. J. 87=30 M. L. T. 107=(1921) M. W. N. 779=14 L. W. 542=69 I. O. 264; *Reg v Bai Ratan*, 10 Bom. H. C. R. 166, *Empress v. Anunt Ram*, 5 C. 954; *Barindra Kumar v. Emperor*, 37 C. 467.

(2) *Reg v Shirya*, 1 B 219; *Emperor v. Gajadhar*, (1883) A. W. N. 243.

(3) *Parshotim Das v Emperor*, 6 Pat. 504=8 Pat. L. T. 757=28 Cr. L. J. 1037=9 A. L. Cr. R. 161=106 I. O. 221=A. I. R. 1927 Pat 369.

(4) *Bhawani v. Emperor*, 3 O. W. N. 946=99 I. C. 108=1927 O. 42=28 Cr. L. J. 76.

(5) *Sat Narain v. Emperor*, 32 C. 1085=10 C. W. N. 51=9 Cr. L. J. 138.

(6) *Empress v. Dosu*, 18 Cr. L. J. 313=42 I. C. 145=11 S. L. R. 59.

(7) *Mata Din v. Emperor*, 32 Cr. L. J. 854=132 I. C. 228 (232)=A. I. R. 1931 O. 166=8 O. W. N. 228=16 A. I. Cr. R. 478=15 W. R. Cr. L. J. 3; *Gehna v. Emperor*, A. I. R. 1932 Lah. 180=23 P. L. R. 16=1932 Cr. C. 179=137 I. O. 95=23 Cr. L. J. 414=18 A. I. Cr. R. 110.

such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263, [or in the course of a trial held by a Presidency Magistrate]

Statutory amendment—The words "or the Chief Court of Oudh" were inserted by s. 2 of Schedule of Act No. XXXII of 1925; the words "or the Chief Court of Sind" were added by s. 2 and Schedule of Act No. XXXIV of 1926; before 1919, the words "or the Chief Court of the Punjab or the Chief Court of Lower Burma" occurred after "Royal Charter"; "or the . . . Punjab," were omitted by Act XVIII of 1919 and "or the Chief Court of Lower Burma" by Act No XI of 1923. In sub-section (3), the words "unless he is a Presidency Magistrate" were omitted at the place indicated by asterisks by s. 2 of Act No. XXXVII of 1923 (see s. 264 (4)); in sub-section (4), the words within square brackets were substituted for "or section 362, sub-section (2A)" (which were inserted by s. 98 of Act No. XVIII of 1923) by the same provision(1).

Scope and object.—This section prescribes the mode in which an accused person ought to be examined by a Magistrate or by any court other than a High Court(2). The examination of an accused, under this section, is subject to the purpose referred to in s. 342, viz., "to enable him to explain any circumstances appearing against him"; and not to supplement the case for the prosecution against him to show that he is guilty(3). This section authorises a Magistrate to put questions to the accused in order to enable him to explain any evidence that may have been produced against him during the inquiry or the trial. But it has no application where no evidence has yet been produced against the accused(4). Before criminating a man upon his own statement under examination, it is necessary to see that such statement was deliberately made and recorded: that, after being recorded, it has been shown or read to the accused; and that the examination has been attested by the signature of the Magistrate following a certificate to be given under his own hand(5).

Examination of accused during investigation.—After a person is taken as an accused, it is made obligatory upon the Magistrate who

(1) *Katju & Dass*, Cr. P. Code, pp. 335, 336.

(2) *Parsolam Dass v. Emperor*, 6 Pat. 504 (205)—A. I. R. 1927 Pat. 869—8 Pat. L. T. 757—28 Cr. L. J. 1037—106 I. C. 221.

(3) *Empress v. Rangji*, 10 M. 225—2 Weir. 361; *Ex parte Virabudra Gaud*,

1 M. H. C. R. 190; *Hossein Buksh v. Empress*, 6 C. 96

(4) *Pahlwan v. Emperor*, 128 I. C. 540—31 Cr. L. J. 583—Ind. Rul. (1930) Lab. 460—A. I. R. (1930) Lab. 454; *Empress v. Budha*, (1884) A. W. N. 106; *Tufani v. Emperor*, 15 C. L. J. 323.

(5) *Queen v. Nirumi*, 7 W. R. Cr. 49.

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examines him to record the whole of the question put to him and the answers given by him, under this section. But statements, whether in the nature of information given by witnesses about a crime or admissions by persons who have taken part in a crime, if made during the course of an investigation before commencement of a trial or inquiry are governed by section 164 and that section permits Magistrates to record the same without compelling them to do so. Such confessions may be proved by the oral testimony of the Magistrate(1). But in some cases it has been held that the rules laid down in this section are equally applicable to confessions taken under section 164, in the course of an investigation(2).

Summary trial—In a summary trial of warrant-case, the Magistrate is bound to examine the accused under section 312, but he is not bound to record such examination as provided by this section (3). It is sufficient if he makes a brief note of the examination on the record(4).

Statement recorded during inquiry under s. 202.—A statement of the person complained against recorded during an inquiry under s. 202 cannot be regarded as having been recorded under section 164 or 364, and as such cannot be admitted in evidence as proving itself against him(5).

Examination prior to commitment.—The examination of an accused, prior to commitment, is in the discretion of the Magistrate; if the accused is unwilling to submit to examination, it is sufficient for the Magistrate to make a note to that effect. The provisions of this section have no application to such a note(6).

Record of questions and answers.—The whole of the examination of the accused including every question put to him and every answer given by him shall be recorded in full(7). In recording the statement of the accused under section 342 the provisions of this section must be complied with. A record of the examination of the accused must be made under this section and that record must be shewn or read over to him. Merely recorded in the order-sheet or judgment that "the statement and examination of the accused recorded by the committing Magistrate was put in and read out to him. He declines to have made such statement", is not a compliance with the requirements of this

(1) *In re Tangedypolle*, 45 M 230 (233)=23 Cr. L. J. 680=1922 M. 40=42 M. L. J. 37=20 M. L. T. 107=(1921) M. W. N. 779=14 L. W. 542=69 I. O. 264; *Reg v Bai Ratan*, 10 Bom H. C. R. 166; *Empress v. Anunt Ram*, 5 C. 954; *Barindra Kumar v. Emperor*, 37 C. 467.

(2) *Reg v Shrivya*, 1 B 219; *Emperor v. Gajadhar*, (1893) A. W. N. 213.

(3) *Parshotam Das v Emperor*, 6 Pat. 501=6 Pat. L. T. 757=28 Cr. L. J. 1037=9 A. I. Cr. R. 161=106 I. O. 221=A. I. R. 1927 Pat. 809.

(4) *Bhawani v. Emperor*, 9 O. W. N. 916=99 I. C. 108=1927 O. 42=28 Cr. L. J. 76.

(5) *Sat Narain v. Emperor*, 32 O. 1085=10 O. W. N. 51=8 Cr. L. J. 138.

(6) *Empress v. Dovu*, 18 Cr. L. J. 313=42 I. C. 145=11 S. L. R. 52.

(7) *Mata Din v. Emperor*, 32 Cr. L. J. 854=122 I. C. 228 (232)=A. I. R. 1931 O. 166=8 O. W. N. 228=16 A. I. Cr. R. 478=15 W. R. Cr. 1st. 3; *Gehna v. Emperor*, A. I. R. 1932 Lah. 180=33 P. L. R. 16=1932 Cr. O. 179=127 I. O. 95=33 Cr. L. J. 414=18 A. I. Cr. R. 110.

section(1). Where the Court of Session did not record the examination of the accused taken under s. 342 at all, but merely noted in the order sheet that the accused declined to make any statement, and that, on being asked whether they would adduce any evidence, they replied in the negative, the High Court, on a reference under s. 307 of the Code, set aside the verdict of the Jury and directed a retrial(2). In another case where no record was made by the Court of Session, but a note entered in the order sheet that the statements of the accused were read out to each accused, that they were asked if they would add anything, whereupon they said they would not, except one accused and that, after the court had examined a witness called by itself, the accused were examined again, and stated they had nothing further to say, and declined to examine any defence witness, the High Court set aside the conviction and sentences and ordered a retrial(3). It is obligatory on the trial court to make a record of the examination of the accused in accordance with the provision of this section, and the omission to do so vitiates the trial(4). Where the examination has not been recorded in full, so as to include the questions and answers, as required by this section, it is not admissible in evidence without further proof(5). But it is not absolutely necessary for a Magistrate recording the confession of an accused person to put down all the questions put by him to the accused, if such questions were merely formal. The confession is not rendered inadmissible, if the accused has not been prejudiced, merely because it is taken down in narrative form. The irregularity, if any, is cured by the examination of the Magistrate under s. 533(6). A true confession made by the person who takes part in a murder invariably adds something to the knowledge already possessed by the investigating officer and that is the greatest test of its truth. Where a person accused of murder makes a confession, everything that he wishes to say must be recorded, even though he may not be very intelligent and may make a long and rambling statement. It is possible in such cases that there may be something in the statement, which may give a clue to the man's innocence(7).

Question eliciting confessional statement.—A Magistrate, in examining an accused under this section can only ask him to explain the circumstances which appeared against him. The Magistrate cannot

(1) *Fatu v. Emperor*, 6 Pat. L. J. 147 (148).

(2) *Emperor v. Nani Mandal*, 52 C. 403—41 O. L. J. 50—26 Cr. L. J. 761—86 I. C. 345—1925 Cal. 575.

(3) *Sarat Chandra v. Emperor*, 52 C. 416—26 Cr. L. J. 1344—A. I. R. 1935 C. 831—89 I. C. 560.

(4) See the cases in the last two notes and *Messer Depari v. Emperor*, 29 C.W. N. 939—26 Cr. L. J. 1032—87 I. C. 920—A. I. R. 1926 Cal. 430.

(5) *Reg. v. Kalla*, 2 Bom. H. O. R. 325; *Reg. v. Pecadi*, 2 Bom. H. O. R. 397; *Reg. v. Vithoji*, 2 Bom. H. O. R. 328.

(6) *Ahudiram v. Emperor*, 30 L.

J. 55; *Fekoo v. Empress*, 14 C. 539; *Balmokand v. Crown*, 17 P. R. 1916 Cr.; *Queen v. Goodith*, 15 W. R. 68 Cr.; see *Badan Singh v. Emperor*, 2 P. R. 1909 Cr.; 8 O. P. L. R. 21; but see *Empress v. Bhairub*, 2 O. W. N. 702; *Emperor v. Rajani Kanta*, 8 O. W. N. 22.

(7) *Mata Din v. Emperor*, 32 Cr. L. J. 854—132 I. C. 228—16 A. I. Cr. R. 478—1931 Cr. Cas. 438—8 O. W. N. 228—A. I. R. 1931 O. 166; *Gehna v. Emperor*, 33 P. L. R. 16—A. I. R. 1932 Lab. 180—33 P. L. R. 16—1932 Cr. C. 179—137 I. C. 95—33 Cr. L. J. 414—18 A. I. Cr. R. 110.

put him any question which may elicit a confessional statement(1). The object of the examination of an accused person under section 342 is only to enable him to explain any circumstances appearing in evidence against him, and the examination ought not to be conducted in the manner of the cross-examination of an adverse witness. A Judge or Magistrate is not entitled to establish a sort of a court of inquisition to force a prisoner to commit himself by making some incriminating or embarrassing admissions or statements after a series of questions, the exact effect of which he may not be able to comprehend(2). Where the examination of an accused is not such as is contemplated by the Code but is really a cross-examination it should be left out of consideration(3). The examination of the accused conducted by putting a long composite question is irregular and not in accordance with law(4).

Mode of recording confession.—The procedure of recording confession by questions and answers is ordinarily to be deprecated. The confessing person should be left to narrate his story as a whole without any unnecessary interference and allowed to give all the details that he remembers and wishes to describe(5). Where a Magistrate records the statement of an accused in English in a narrative form, after the Police is removed from the court room, and he is satisfied that the accused is not tutored by any body and the statement is translated to the accused who admits it to be correct and fixes his thumb-mark thereto, the statement is admissible in evidence and any formal defects that might have been made in the recording of it are cured by s. 533(6). The mere absence of the questions put by the Magistrate to the accused on the record, if the prisoner is not prejudiced in any way by the omission, does not make a confession illegal(7). The irregularity is curable under section 533 of the Code(8).

Record need not be in Magistrate's handwriting.—There is nothing in the Code which necessitates a Magistrate to take down such examinations in his own hand. It is enough if he appends a certificate that the examination was conducted in his presence, and contains accurately all that was said by the accused(9).

(1) *Tufani Sheikh v. Emperor*, 14 I. C. 667=15 C. L. J. 313=13 Cr. L. J. 283; *Emperor v. Dewan*, 72 I. C. 961=4 Pat. L. T. 186=1923 Pat. 13=24 Cr. L. J. 497.

(2) *Faqir Singh v. Crown*, 11 A. I. Cr. B. 1=20 Cr. L. J. 769=110 I. C. 801.

(3) *Niru v. Emperor*, 71 I. C. 219=1 Pat. 630=1922 Pat. 582=4 Pat. L. T. 76=24 Cr. L. J. 91.

(4) *Hasni v. Emperor*, 103 I. C. 847=1927 Lah. 650=28 Cr. L. J. 767.

(5) *Gehna v. Emperor*, 33 P. L. R. 16=A. I. R. 1932 Lah. 180=1932 Cr. C. 179=137 I. C. 95=33 Cr. L. J. 414=18 A. I. Cr. B. 110; *Mata Din v. Emperor*, 32 Cr. L. J. 854=132 I. C. 228=16 A. I. Cr. B. 478=8 O. W. N. 228=1931 O. 166.

(6) *Emperor v. Deo Datt*, 45 A. 106=21 Cr. L. J. 6=71 I. C. 54=20 A. L. J. 975; *Empress v. Raghu*, 23 B. 221; *Empress v. Bachanna*, (1891) A. W. N. 55; *Empress v. Anta*, (1892) A. W. N. 60; cf. *Jai Narain v. Empress*, 17 O. 862.

(7) *Nawab v. Emperor*, 100 I. C. 821=1927 Lah. 295=28 Cr. L. J. 341; *Empress v. Sagambur*, 12 C. L. R. 120; *Emperor v. Muhammad Ali*, 56 A. 302; cf. *Hari Krishnaji v. Emperor*, A. I. R. 1934 Nag. 213; *Ram Sakha v. Emperor*, A. I. R. 1934 Pat. 651=15 P. L. T. 686=1934 Cr. C. 1832.

(8) *Emperor v. Muhammad Ali*, 56 A. 302.

(9) *Queen v. Lucky Narain*, 20 W. R. Cr. 50.

Language—The law requires that ordinarily the statement of the accused should be recorded in the language of the person making it, the object being to represent the very words and expressions used so as to ensure accuracy, and prevent misrepresentation or misconstruction of what was said(1). The whole of the statement of the accused should be accurately recorded as nearly as possible in the words used by him(2). The Full Bench of the Calcutta High Court, in the case of *Nilmadhab v. Empress*(3) expressed a doubt whether the provisions of s. 164 read with s. 364 could be complied with where the answers made by an accused to a Magistrate in one language are taken down in another, unless it could be shown to be impracticable to have taken down the answers in the language in which they were given and whether the defect could be cured by s. 533. This decision was a subject of consideration in a later case of the same court, reported as *Jai Narain v. Emperor*(4), in which Macpherson and Hill, JJ., held that if it were impracticable to record a confession in the language in which it was made, the impracticability should be shown by the prosecution. The next case in which the matter has been dealt with more exhaustively is *Lal Chand v. Empress*(5). In this case, the court did not agree in the view of the law which formed the grounds of the judgment in *Jai Narayan's* case and held that where a confession was recorded in another language, it might be presumed that the law had been complied with and that it had been impracticable to record the confession in the same language as that in which it was made. But according to Oudh and Madras Courts where a statement made in vernacular to a Magistrate, under this section, is taken in English, it cannot be presumed, without evidence, that the statement has to be recorded in English, as they could not be recorded in the language in which they have been made(6). Where the accused was examined by the Magistrate in Marhatti and gave his answers in Marhatti, the statement should be recorded in Marhatti. It is illegal to record them in English(7). Where a confession of an accused given in Bengali was recorded by the committing Magistrate in English and the Magistrate in his evidence before the Sessions Court deposed that he could not write Bengali well and that he had no mohurrir at the time when the confession was recorded, it was held that the provisions of this section had been sufficiently complied with(8). Where an accused, a Manipuri, was examined before the Magistrate through an interpreter, who obtained his answers in Manipuri, and they were recorded in that language and the interpreter translated them into Bengali and they were recorded by the Magistrate in English and the statements in English and that in Manipuri were found to differ it was held that the statement recorded in Manipuri must be taken to be the record in

(1) *Emperor v. Nani Mandal*, 52 C. 403 (406) = 41 C. L. J. 50 = 26 Cr. L. J. 761 = 86 I. O. 345 = 1925 Cal. 575; *Empress v. Sagal*, 21 C. 642.

(2) *Empress v. Vaimbilee*, 5 C. 826 (830).

(3) 15 C. 595 F. B.

(4) 17 C. 861.

(5) 19 C. 649.

(6) *Bauar v. Emperor*, 10 O. O. 112 = 6 Cr. L. J. 94; *Empress v. Viru*, 9 M. 224.

(7) *Emperor v. Surmal*, Rat Un. Cr. C. 633; *Empress v. Visram*, 21 B. 495.

(8) *Empress v. Hazai Mia*, 22 C. 817; see also *Khudiram v. Emperor*, 9 C. L. J. 55.

the case. It was said that had the Manipuri statement not been made, the Magistrate by recording the statement in English would not have strictly complied with the spirit and intention of s. 364 though the record in English might not necessarily have been inadmissible in evidence(1). Where the statement of the accused was recored in English but it was translated to him and he admitted it to be correct and affixed his thumb mark thereto, it was held that section 533 completely cured any formal defect which might have been made in the recording of the confession(2). Where the confession of an accused given partly in Bengali and partly in English was recorded in English and the accused read through his statement and corrected it, it was held that the provisions of this section were complied with(3). The Magistrate need not record the statement of an accused in the words of the very language in which it is made, when it is a foreign language, the record must be in the language in which it is interpreted(4). In the absence of any inference of prejudice, a confession does not become inadmissible against the maker merely because it is written down by the Reader of the Magistrate(5). But a Police Officer cannot be employed even as a scribe to take down such a confession(6).

'Record to be shown to the accused.'—The record shall be shown or read to the accused. In the absence of evidence that the record was shown or read to the accused the statement made by him cannot be used as evidence against him(7). Before a statement can be admitted in evidence, it is necessary to see that such statement has been deliberately made and recorded, and that after being recorded, it has been shown or read over to the accused so that he might be assured that his words have been correctly taken down(8). A Magistrate who shows or reads a confession taken in English to a native who does not understand English, cannot be said to comply with the provisions of this section(9).

Sub-section (2).—The statement shall be signed by the accused(10), or, if he is illiterate his thumb impression should be taken(11). It shall also be signed by the Magistrate. The signature or thumb-impression of the accused should be taken in the presence and under the control of the Magistrate himself(12). A confession which bears neither the signature of the Magistrate nor of the accused is not in strict accordance with the provisions of this section. But the fact that it has been duly made by

(1) *Empress v. Sagal*, 21 O 642.

(2) *Emperor v. Deo Dat*, 45 A 166; *Empress v. Autu*, (1894) A. W. N. 60; *Empress v. Visram Babaji*, 21 B. 495; *Ratti Ram v. Empress*, 7 P. R. 1699 Cr.; *Empress v. Chaiter*, 16 O P. L. R. 122.

(3) *Nilmadhab v. Emperor*, 5 Pat 171 (body)=27 Cr. L. J. 957 (963)

(4) *Empress v. Vaimbilee*, 5 O. 826.

(5) *Badan Singh v. Emperor*, 2 P. R. 1909 Cr.

(6) *Khudiram v. Emperor*, 9 C. L. J. 65=3 I. O. 625.

(7) *Emperor v. Dewan*, 24 C. L. J. 497=4 Pat. L. T. 186; *Fatu v. Emperor*, 6 Pat. L. J. 147.

(8) *Queen v. Naruni*, 7 W. R. Cr. 40.

(9) *Queen v. Bhcebeckee*, 4 N. W. P. H. C. R. 16.

(10) *Sadananda v. Emperor*, 32 C. 550 (If the accused can write, his thumb impression is not sufficient)

(11) See the case cited in the last note and *Emperor v. Deo Dat*, 45 A. 166.

(12) *Empress v. Bhika*, Rat. Un. Cr. Cas. 687.

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(1) *Emperor v. Nani Mandal*, 62 C. 403 (406)—41 L. J. 50—26 Cr. L. J. 761—66 I. O. 345—1915 Cal. 575; *Empress v. Sagol*, 21 C. 642.

(2) *Empress v. Vaimbilee*, 5 C. 826 (330).

(3) 15 C. 528 F. B.

(4) 17 C. 661.

(5) 18 C. 549.

(6) *Baizar v. Emperor*, 10 C. C. 112—6 Cr. L. J. 94; *Empress v. Viru*, 9 M. 224.

(7) *Emperor v. Sural*, Rat. Un. Cr. C. 633; *Empress v. Visram*, 21 B. 495.

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(1) *Empress v. Saqal*, 21 C. 642.

(2) *Emperor v. Deo Dat*, 45 A. 166;
Empress v. Autu, (1894) A. W. N. 60;
Empress v. Visram Babaji, 21 B.
495, *Ratti Ram v. Empress*, 7 P.
R. 1899 Cr.; *Empress v. Chaiter*, 18
C. P. L. R. 122.

(3) *Nilmadhab v. Emperor*, 5 Pat
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(4) *Empress v. Vaimbilee*, 5 C. 826.

(5) *Badan Singh v. Emperor*, 2 P.
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(6) *Khudiram v. Emperor*, 9 C. L.
J. 55—3 I. C. 626.

(7) *Emperor v. Dewan*, 24 C. L. J.
497—4 Pat. L. T. 186; *Fatu v. Empe-
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(8) *Queen v. Naruni*, 7 W. R. Cr.
49.

(9) *Queen v. Bheebeekee*, 4 N. W. P.
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(11) See the case cited in the last note
and *Emperor v. Dev Dat*, 45 A. 166.

(12) *Empress v. Bhika*, Rat. U. Cr.
Cas. 687.

the accused can be proved by further evidence under s. 533 and except perhaps in cases which are not easily conceivable, the accused is not likely to be injured in his defence on the merits on account of such an omission(1). The statement not signed by the accused is, however, inadmissible until the defect is cured in a manner prescribed by s. 533(2). The absence of the accused's signature is a defect which does not really affect the merits of the confession and is one which can be remedied by the examination of the Magistrate or some one who was present when the confession was recorded(3). Under s. 533, if the record of a confession is inadmissible owing to failure to comply with the law, such as an omission to obtain the signature, or mark of the person confessing to the document, parol evidence, notwithstanding anything contained in s. 91, Evidence Act, may be given of the terms of the confession, and those terms, if and when proved, may be admitted and used as evidence in the case, if the defect is such that it has not affected the merits of the defence(4).

Refusal to sign.—A Magistrate recorded the confession of the accused in accordance with the provisions of this section; but through an oversight he did not take the signature of the accused. He tried to obtain the signature of the accused in jail the next day but the accused refused to sign. The Magistrate and his clerk were examined as to the confession by the Sessions Judge at the trial. It was held that the confession was admissible in evidence and the failure to secure the signature was cured under the provisions of s. 533, the irregularity not having injured the accused as to his defence on the merits(5). An accused person who refuses to sign the record of his examination does not commit an offence punishable under s. 190 of the Indian Penal Code(6), though there is authority to the contrary also(7).

Certificate of Magistrate or Judge.—The record of confession must bear the certificate required by this section. It is not enough if it bears the signature of the Magistrate(8). The certificate need not be written by the presiding officer of the court. It is sufficient if it is signed by him(9). A certificate which contained the words "taken by me", but in which the Magistrate omitted to record that the prisoner's statement was taken in his hearing, was treated to be substantially a compliance with this section(10). A defect in the certificate can be cured by examining and taking the evidence of the recording officer(11),

(3) *Reg v. Dayal*, 11 Bom. H. C. B. 237 (232).

(4) *Empress v. Raghu*, 23 B. 221.

(5) *Ba Yin v. Emperor*, 7 R. 759 = 121 I. C. 782.

(6) *Emperor v. Ba Tin*, 3 L. B. R. 199 = 4 Cr. L. J. 205; *Imperatrix v. Sursopa*, 4 B. 15.

(7) *Emperor v. Umar Khan*, 39 A. 399 = 18 Cr. L. J. 559 = 39 I. C. 703.

(8) *Queen v. Bheebekke*, 4 N. W. P. H. C. R. 16 (21); *Empress v. Lal Sheikh*, 3 C. W. N. 387 (389).

(9) *Queen v. Rezza Hossain*, 8 W. R. Cr. 85.

(10) *Nisai v. Empress*, 6 C. L. R. 353 = 5 C. 958.

(11) *Empress v. Balasur*, 8 O. P. L. R. 6; *Emperor v. Lal Sheikh*, 3 O. W. N. 387; *Reg v. Peradi*, 2 Bom. H. C. R. 397; *Empress v. Auga Valayan*, 22 M. 15; *Empress v. Raghu*, 23 B. 221; *Badan v. Emperor*, 2 P. R. 1909 Cr.

though there is authority to the contrary also(1). But it cannot be cured by examining a witness to prove that it was taken down in the handwriting of the Magistrate himself(2). The absence of the certificate is not necessarily fatal to the admissibility of the statement(3). But the defect cannot be cured by the addition of the certificate at the direction of the District Magistrate after an appeal is disposed of(4).

Sub section (3).—The memorandum which is referred to in this sub section is the memorandum of the examination of the accused, that is, the statements made by the accused. It is to be written in the Magistrate's own hand(5). The record of confession, upon which a prisoner is convicted need not be attested by the Magistrate trying the accused, as required by this section(6). Failure to keep a memorandum of the statement of an accused cannot vitiate a trial by Presidency Magistrate(7).

Sub-section (4).—The last words of sub-section (4) namely "or in the course of a trial held by a Presidency Magistrate" were inserted by the Amending Act of 1923, thus making the other sub-sections of this section inapplicable to a record by a Presidency Magistrate in the course of a trial held by him(8). A Presidency Magistrate is not bound to record the examination of the accused either in full or in substance, in the case of non-appealable cases. In such cases the column provided for this purpose in the form prescribed by the section 370 must be filled up some how. Even the entry of the word "denies" may be sufficient(9).

Examination of accused collectively.—The recording of the statement of two accused persons collectively, instead of separately, is an illegality which vitiates the proceedings(10).

Non-compliance with the section.—It is obligatory on the trial court to make a record of the examination of the accused in accordance with the provisions of this section, and the omission to do so vitiates the trial(11). The omission to comply with the formalities may, however, be cured in the manner stated by section 533, which provides a remedy by allowing evidence to be taken that the accused duly made the statement recorded(12). Section 533 is intended to apply

(1) *Empress v. Munnoo*, 4 C. L. R. 137

(2) *Empress v. Balasur*, 6 C. P. L. R. 6

(3) *Reg v. Vyankatray*, 7 Bom. H. C. R. 50

(4) *Ibid.*

(5) *Tukaram v. Emperor*, 55 B. 336 (345)=34 Cr. L. J. 555=118 I. C. 280=85 Bom. L. R. 234=A. I. R. 1933 B. 145=(1933) Cr. Cas. 457=Ind. Rul. (1933) B. 261 F. B.; *Tekoo v. Empress*, 14 C. 539.

(6) *In re Chuman Shah*, 3 C. 756=2 C. L. R. 317

(7) *Sadagar v. Emperor*, 56 C. 1067.

(8) *Sadagar v. Emperor*, 56 C. 1067 (1069)=49 C. L. J. 261=115 I. C. 604=1929 C. 406.

(9) *Ibid.*

(10) *Ghasita v. Crown*, 6 Lah. 554=93 I. C. 72=1926 Lah. 155=27 Cr. L. J. 408=27 P. L. R. 85.

(11) *Sarat Chandra v. Emperor*, 52 C. 446, *Bepari v. Emperor*, 29 C. W. N. 939=26 Cr. L. J. 1032=87 I. C. 920=A. I. R. 1926 C. 430; *Emperor v. Mandal*, 52 C. 403=41 C. L. J. 50.

(12) *Jai Narain v. Empress*, 17 C. 862; *Lal Chand v. Empress*, 18. O. 549; *Reg. v. Vithoji*, 2 Bom. L. R. 898; *Ahmed Din v. Empress*, 1881 P.R. 20 Cr.; *Sher Singh v. Empress*, 21 P. R. 1881 Cr.

to all cases in which the directions of the law have not been fully complied with and would apply to omissions to comply with the law as well as to infractions of the law(1). A statement irregularly recorded by a Magistrate may be cured by examining the Magistrate(2). Even if a statement be not recorded strictly in conformity with section 164 so long as the Magistrate purports to have recorded it under this section, and even after the statement has been received in evidence, section 533 can be resorted to and evidence taken, that an accused person duly made the statement recorded(3). Magistrates should in all cases be careful to observe all the provisions of section 164 and this section, for although various defects can be cured, the value of the confession may be very much diminished by non-compliance with the strict letter of law(4). The true principles which should govern such cases are those which are laid down in *Queen-Empress v. Viran*(5), viz., that s. 533 merely gives legal sanction to the maxim *Omnia proesumuntur rite esse acta*. The test laid down is that whenever no attempt has been made to comply with the provisions of the law, s. 533 would not render a confession admissible. Where no record whatever has been made of a confession, such confession cannot be proved merely by oral evidence(6). The evidence which is made admissible by s. 533 is the confession itself and not the evidence of the Magistrate of its contents(7).

365. Every High Court established by Royal Charter, and the Chief Court of Oudh shall, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the court, and the evidence shall be taken down in accordance with such rule.

Amendment explained.—The word “shall” was inserted by the Amending Act of 1923, thus making it compulsory upon High Courts to prescribe by rules the manner in which evidence should be taken down. It is not necessary the Judges of the Court should take down the evidence themselves. But there should certainly be some record(8). The words “and the Chief Court of Oudh” have been added by the Oudh Courts Act, XXXII of 1925.

(1) *Rama Kariyappa v. Emperor*, 120 I. C. 350=31 Bom. L. R. 565=1929 B. 317; *Empress v. Viram Babaji*, 21 B. 495; *Empress v. Raghu*, 23 B. 211; *Empress v. Viran*, 9 M. 224=2 Weir. 125; *Emperor v. Deo Dutt*, 45 A. 166; *Ramai v. Emperor*, 3 Pat. 572=81 I. C. 458=26 Cr. L. J. 314=A. I. R. 1925 Pat. 191.

(2) *Rama Tarayappa v. Emperor*, 120 I. C. 350=31 Bom. L. R. 565=1929 Bom. 317; *Bayin v. Emperor*, 121 I. C. 782=7 Rang. 759; *Bala Udini v. Emperor*, A. I. R. 1931 Lah. 18; *Ratti Ram v. Empress*, 7 P. B. 1889; cf. *Nga San Ya v. Emperor*, 4 I. C.

759=U. B. R. 1909, 1, Est. P. 8=11 Cr. L. J. 41; *Harphul v. Emperor*, 75 I. C. 761=1922 Lah. 429=25 Cr. L. J. 58.

(3) *Bayun v. Emperor*, 121 I. C. 782=7 Rang. 759=1930 B. 53=31 Cr. L. J. 297.

(4) *Ratti Ram v. Empress*, 7 P. B. 1893 Cr.

(5) 9 M. 224=2 Weir. 125.

(6) *Emperor v. Gulabu*, 35 A. 260=14 Cr. L. J. 24.

(7) *Ram Kariyappa v. Emperor*, 120 I. C. 350=1929 B. 317=81 Bom. L. R. 565.

(8) Report of the Joint Committee 1922.

CHAPTER XXVI OF THE JUDGMENT.

366. (1) The judgment in every trial in any criminal court of original jurisdiction shall be pronounced or the substance of such judgment shall be explained,—

- Mode of delivering judgment.*
- (a) In open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and
 - (b) In the language of the court, or in some other language which the accused or his pleader understands :

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the court to attend to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader.

(3) No Judgment delivered by any criminal court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders or any of them, the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 537.

Judgment.—The Code does not define a Judgment: this section only speaks of a judgment on trial and the next section only says what "every such judgment," *i. e.*, every judgment on trial, should contain(1). There is no reason why an order of conviction on a plea of

(1) *Giribala v. Madar*, 60 C. 233 = 1932 C. 699 (703) = 56 C. L. J. 79.

guilty or an order finally terminating the case at that stage (*i. e.*, before empanelling a Jury) cannot be regarded as a judgment(1). But it is hardly open to argument that a refusal by the Magistrate under s. 476, to file a complaint against an accused person, amounts to judgment within the meaning of sections 366 and 369 which may not therefore be subsequently reviewed(2). Judgment means the expression of opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments(3). An order of dismissal under s. 203 or s. 253 is not a judgment(4). An order of a Presidency Magistrate dismissing a case for default of appearance of the complainant is not a judgment(5). An order of a District Magistrate dismissing an appeal in default of appearance is not a 'judgment' in any sense, and s. 369 *infra*, affords no obstacle to the restoration of the appeal(6). But an order under s. 204 directing the issue of a summons is not a judgment(7). An order under s. 421, *infra*, summarily rejecting an appeal is a judgment(8). It is more than doubtful whether the final order of acquittal on a petition of compromise is a judgment(9).

In every trial.—Trial begins when the accused is charged and called on to answer and then the question before the court is whether the accused is to be convicted or acquitted, and not whether the complaint is to be dismissed or the accused discharged(10). Hence an order of discharge by a Magistrate under section 253 upon a withdrawal of complaint by the complainant is not a judgment within the meaning of this section(11). A trial, as the word is used in the Code, is completed, before the judgment is pronounced(12).

Shall be pronounced in open court.—The judgment of the court does not become operative until it is pronounced in open court(13). The delivery of judgment and the passing of sentence is an integral part of a criminal trial. It is not a mere formality and, consequently, where a judgment is signed and dated before delivery and is translated to the accused by the court interpreter, the Judge himself being absent, it amounts to a breach of the provisions of s. 357 and cannot be treated as a mere irregularity to be cured by section 537. It has been so held by the Lower Burma Chief Court(14). But it has been held by the Allahabad High Court that where a Magistrate after finishing the trial of a case, but before delivery the judgment, is physically incapacitated to come

(1) *Ibid*(2) *Rajabali v. Emperor*, A. L. R. 1930 B. 315=1930 Cr. C. 1147=24 B. L. R. 446.(3) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(4) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(5) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(6) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(7) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(8) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(9) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(10) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(11) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(12) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(13) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(14) *Datta v. State of Bihar*, 1930 Cr. C. 1147.(7) *Lalit v. Emperor*, 25 Cr. L. J. 464=77 I. C. 816.(8) *Empress v. Bhimappa*, 19 B. 739.(9) *Hasta v. Crown*, 29 P. R. 1014 Cr. at p. 92.(10) *Per Wallis, J. in Narayanaswamy v. Emperor*, 32 M. 220 (234).(11) *Ahmad Hussain v. Mahomed Askari*, 29 C. 726 F. B.(12) *Pub. Pros v. Chockalingam*, 52 M. 255=118 I. C. 274=29 L. W. 103=

(1929) M. W. N. 60=1929 M. 201.

(13) *Empress v. Abdul Majid*, (1892) A. W. N. 167.(14) *Ramdit v. Emperor*, 24 Cr. L. J. 681=1 Bur. L. J. 122=78 I. C. 828.

to court, and, therefore, writes and signs his judgment and sends it to be delivered by another Magistrate who delivers it, the wrong procedure thus adopted is a mere irregularity and is completely covered by section 537(1). There is no provision which requires that the High Court, after pronouncing a judgment in open court, should date and sign the same. The criminal appeals disposed of by a Judge of the High Court by the delivery of the judgment in open court, and taken down by his judgment-writer must be deemed to have been finally disposed of by him; the omission to initial the fair copy of the judgments is in no way a serious defect(2).

Judgment of Bench of Magistrates—This section requires that the judgment of a criminal court should be pronounced by the court. When the members composing the bench leave the bench, there is no court at all. The mere fact that the presiding officer sits in the court room and writes his judgment, will not make that a court. The mere delivery of a judgment may be left to the presiding officer by the other members of the bench, but they must be aware of what the judgment contains(3).

Pronouncement of judgment written out by the predecessor.—It has been held in Calcutta that the presiding officer delivering the judgment in a criminal case should be the officer who is responsible for the reasons therefor and the Magistrate who makes himself responsible for the judgment must always be the Magistrate who before delivery of the judgment had considered the evidence on record and had also listened to the arguments, if any, on behalf of the accused. Where, therefore, a Magistrate delivers a judgment written out by his predecessor the judgment is passed without jurisdiction(4). This view is in accord with that taken by the Allahabad High Court(5), but is opposed to that taken by the Madras High Court(6) and Oudh Chief Court(7). According to Madras and Oudh Courts the succeeding Magistrate can date, sign and pronounce a judgment written by his predecessor and thus adopt it as his own.

Judgment written by officer while on leave.—A judgment written and signed by a Magistrate who has proceeded on leave and has ceased to exercise jurisdiction in the case is, in fact, no judgment at all(8).

Pronouncement of judgment in accused's absence.—An accused was present throughout a trial whilst the evidence was taken; but he

(1) *Mir Md v Emperor*, 24 Cr. L. J. 173=21 A. L. J. 137=71 I. C. 525.

(2) *Pragmadho Singh v. Emperor*, 34 Cr. L. J. 703=A. I. R. 1933 A. 40=55 A. 132.

(3) *Ramakotiah v. Subba Rao*, A. I. R. 1928 M. 1172=28 L. W. 498=(1928) M. W. N. 785=112 I. C. 61.

(4) *Jogesh v. Surendra*, 134 I. C. 1265=33 Cr. L. J. 60=A. I. R. 1931 O. 637=35 O. W. N. 838=1931 Cr. O. 837; *Mahomed Rafique v. Emperor*, 93 I. C. 70=A. I. R. 1926 O. 507=27 Cr. L.

J. 406=43 O. L. J. 10; *Baisnab Charan v. Amin Ali*, 50 O. C. 664=38 O. L. J. 702=24 Cr. L. J. 489=72 I. C. 953=A. I. R. 1924 O. 55.

(5) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(6) *In re-Sankara Pillai*, 18 M. L. J. 197=7 Cr. L. J. 459

(7) *Chandika v. Emperor*, 28 O. C. 109=11 O. L. J. 725

(8) *Chandra Kishore v. Emperor*, 18 Cr. L. J. 10=36 I. C. 842=21 O. W. N. 755.

having thereafter absconded, the Magistrate passed sentence upon him in his absence, and on his re-arrest re-pronounced his judgment. It was held that the case might be regarded as falling under s. 537 at least for the purposes of a review not sought by the accused, but that the Magistrate should not have pronounced judgment in the absence of the accused(1). Sub-section(2) contemplates the absence of the accused upto the stage of judgment and even after that stage where the judgment is one of acquittal or one awarding a sentence of fine(2).

Judgment to be delivered without delay.—In criminal cases, judgments would be delivered without undue delay, because delay is not only unjust to the accused as it prevents them from appearing at once, but it is opposed to the principles of law(3).

Omission to pronounce portion of judgment.—The omission to pronounce a portion of the judgment imposing fine which the Magistrate has written, and his omission to date and sign the judgment at the time of pronouncing it are omissions covered by s. 537(4).

Conviction or acquittal before judgment.—In *Queen-Empress v. Hargobind*(5) the sentence was passed first and the judgment written afterwards, and it was held that inasmuch as the sentence in the case of a conviction, and the direction to set the accused at liberty in the case of an acquittal, can only follow on the decision and cannot precede it, and inasmuch as the decision must be contained in a written judgment the sentence is illegal when there is no written judgment when it is passed. This decision was approved by a Bench of the Madras High Court in the case of *Bandaru Atchayya v. Emperor*(6). There too the Sessions Judge passed sentences on the accused persons and wrote the judgment some days afterwards. The learned Judges held that this was a violation of sections 366 and 367 and was more than an irregularity and that it was a defect which vitiated the convictions and sentences. But a Bench of the Calcutta High Court in *Tilak Chandra v. Baisagouroff*(7), held a contrary view. The learned Judges held that the omission of the Magistrate in recording a judgment before pronouncing his sentence was an omission or irregularity which fell within the purview of s. 537 and so the sentence itself, by reason of this irregularity, was not an illegal sentence so as to render the trial nugatory. The trend of the modern decisions is that though it is desirable that Magistrates should obey the express provisions of the law, yet the omission to write a judgment before pronouncing a sentence should not necessarily vitiate the trial, unless such omission has in fact occasioned a failure of justice(8). But in a

(1) *Empress v. Gholiram*, Rat. Un. Cr. C. 324; *Crown v. Sardar*, 20 P. R. 1217 Cr.

(2) *Emperor v. Jamal Khatun*, 19 I. C 544 (Lodg)—G. S. L. R. 106—14 Cr. L. J. 272.

(3) *Empress v. Baldev*, 56 P. L. R. 21; see also *Fanindra v. Emperor*, 26 C. 241.

(4) *Re Venkataramanayya*, 2 Weir. 711; *Kamakshamma v. Emperor*, 33 M. 498—14 Cr. L. J. 625.

(5) 14 A. 212.

(6) 27 M. 237.

(7) 23 C. 501.

(8) *Hayat Mulla v. Emperor*, 7 Rang. 370—30 Cr. L. J. 1166—A. I. R. 1930 Rang. 77—1930 Cr. Cas. 203; *Dhondha Kandoo v. Sitaram*, 55 A. 886; *Crown v. Moriokham*, 58 L. R. 131; *Emperor v. Thari Isajji*, 13 Bom. L. R. 646; *Dawn v. Sridhar*, 21 C. 121; *Sankaralingai v. Narayan*, 45 M. 913; *Ala Mohammad v. Emperor*, 25 Cr. L. J. 705; *Re Kamakshamma*, 33 M. 498.

recent Patna case it has been held otherwise(1).

Death of Magistrate after conviction but before writing judgment.—Where a Magistrate died after pronouncing the sentence but before writing the judgment, the High Court reversed the conviction and sentence and ordered a retrial(2). But in one case it has been held that a conviction on a trial regularly held will not be set aside merely because the Magistrate has been unavoidably prevented from recording a judgment in accordance with the requirements of s. 357. In such circumstances the right of appeal is not taken away by the absence of a complete judgment(3). Where certain criminal appeals were disposed of by a Judge of the High Court by the delivery of judgments in open court, which were taken down by his judgment-writer, and in some of the cases the release warrants were signed by the Judge, but the judgments after being fairied out, remained unsigned by the Judge owing to his death, it was held that the omission to sign the fair copies of the judgments was in no way a serious defect and the appeals must be deemed to have been finally disposed of, and the judgments should be certified to the court below (4).

Loss of judgment.—Where a judgment is lost it may be re-written from memory, a court having inherent power to re-construct its record when they have been lost or destroyed(5).

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court or from the dictation of such presiding officer in the language of the court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open court at the time of pronouncing it, and where it is not written by the Presiding officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) When the conviction is under the Indian Penal Code, and it is doubtful under which of two sections or under which of two parts of the same section of that Code the offence falls, the court shall distinctly express the same and pass judgment in the alternative.

Language of judgment. Contents of judgment.

Judgment in alternative.

(1) *Jhar Lal v. Emperor*, 8 Pat. 904.

(2) *Empress v. Kamthia*, 1 Bom. L. R. 160.

(3) 2 Weir, 498.

(4) *Emperor v. Pragmadho*, 55 A.

192.

(5) *Kamakshamma v. Emperor*, 28 M. 498.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall, in its judgment, state the reason why sentence of death was not passed :

Provided that, in trials by Jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the Jury.

(6) *For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment.*

Amendment.—The italicised words in sub-section (1) and sub-section (6) were inserted by s. 100 of Act No. XVIII of 1923. The amendment in sub section (1) overrides the undernoted cases(1) which held that a judgment could not be written by a clerk and signed by the court.

Contents of judgment.—A judgment must comply with the provisions of this section, that is to say, it must contain the point or points for determination and the decision thereon and the reasons for the decision(2). The judgment should be thus one complete document containing the charge, the finding and the reasons for the finding, the offence of which the accused is convicted and the punishment to which he is sentenced(3). A judgment should state sufficient particulars to enable a court of appeal to know what facts were found and how(4). A Magistrate cannot supplement his judgment by his explanation to the superior court. If there are no material findings in the judgment, the defect cannot be cured by the Magistrate's explanation(5). The judgment should set out the effect of the evidence fully, the accused's case, the attacks which are made upon the evidence by either side, the Judge's own criticisms of it and the reasons for his conclusions(6). A Judge is not bound to discuss in his judgment all the evidence produced by the prosecution and the defence. A judgment has not to be a resume of the entire evidence or a discussion of the relevancy of all the evidence. A court is entitled to select such evidence as it considers important and sufficient to prove the point for considera-

(1) *Empress v. Lakshmbai*, Rat. Un. Cr. Cas. 543; *Subramanya v. Queen* 6

(4) *Empress v. Dhurmiya*, Rat. Un. Cr. C. 833

(5) *Jurakhan v. Emperor*, 7 C. L. J. 278

(6) *N. 1933 M. Mad. Cr. L. W. 1481, L. Cr. too long*

tion(1). The object, no doubt, of the Legislature in formulating rules as to judgments is partly to insure that a criminal court should consider the case before it in its different bearings and should on such consideration arrive at definite conclusions. The judgment should show that the criminal court had considered the evidence in a case of first instance or in a case of appeal, and had found in case of a conviction that the facts proved to the satisfaction of the court brought an offence home to the accused person whom the court convicted(2). Where a judgment, though not long and elaborate one, affords a clear indication that the court duly considered the evidence, it is a good judgment(3). Where, however, the judgment is so meagre that it is impossible to form an opinion as to the merits of the case or to say whether there has been a miscarriage of justice or not, the judgment must be set aside(4). The judgment in a criminal case should commence with a statement of the facts in respect of which the accused is charged and not with circumstances which might be held to provide a motive for the offence(5).

Points for determination.—Every judgment of a criminal court must contain a clear statement of the points for determination(6). A judgment of an appellate court which contains neither the facts of the case nor the points for determination or the discussion of those points, is not a judgment in accordance with law(7). Where the Sessions Judge convicted the accused without stating the facts of the case or the points for determination or even the section under which the accused was convicted, the judgment was set aside(8). The three elements, namely, (i) the point or points for decision; (ii) the decision therein and (iii) the reasons for the decision are intended to constitute the substance, as distinguished from mere form, of every legal judgment passed by any criminal court exercising original jurisdiction(9). When the judgment omits to state the points for decision and reasons therefor, the case should be returned for rehearing(10). S. 537, *infra* cannot cure defects in a judgment which is clearly opposed to the directions contained in this section(11). Where, however, the judgment showed that the Judge had appreciated the points which the prosecu-

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J. 967.

(2) *Empress v. Pandeh Bhat*, 19 A. 506 (507).

(3) *Kasimuddi v. Empress*, 1 C. W. N. 169.

(4) *Rupa Mandal v. Keshab*, 5 C. L. J. 452.

(5) *Bala v. Emperor*, A. I. R. 1935 Nag 81.

(6) Bom. H. C. Cr. Clr., p. 38; *Mitho v. Emperor*, A. I. R. 1934 B 89=28 S. L. R. 12.

(7) *Kali Charan v. Geli Beva*, 22 Cr. L. J. 640=63 I. C. 836=2 Pat. L. T.

228; *Kalikaram v. Emperor*, 9 A. I. Cr. R. 557; *Deo Naram v. Chhatoo Raut*, 3 Pat. L. T. 203=66 I. C. 825=23 Cr. L. J. 261.

(8) *Ektar Khan v. Emperor*, 9 C. W. N. xxiv.

(9) *Jai Ram v. Emperor*, 8 N. L. R. 84 (85).

(10) *Dalip Singh v. Crown*, 2 Lah. 808; followed in *Hurmut v. Emperor*, 27 Cr. L. J. 114=91 I. C. 690; *Kali v. Geli*, 22 Cr. L. J. 640=63 I. C. 836; *Jairam v. Emperor*, 18 Cr. L. J. 559=15 I. C. 975; *Emp v. Morso*, 12 Cr. L. J. 610=12 I. C. 986; *Surya v. Lachmi*, 18 Cr. L. J. 48=18 I. C. 288.

(11) *Kanhai Singh v. Emperor*, 10 A. L. J. 435=13 Cr. L. J. 859=17 I. C. 795.

tion had to establish, and that he had clearly in view the points for determination, viz., the credibility of the evidence of the witnesses for the prosecution, and he expressed his opinion on that point, it was held that the judgment was good and should not be set aside(1). It should be made clear to a court of appeal that the mind of the Assessors and the mind of the Judge himself has been distinctly directed to each and every one of the points which must be decided before a conviction on the charges can be safely recorded(2). A judgment of an appellate court which does not set out the points for determination or discuss the evidence on which the conclusions are based is not a proper judgment and is liable to be set aside(3).

Points for determination explained.—The points for determination are practically the issues involved in the case and are both questions of fact and law. They must be based upon the actual contention of the parties and upon the facts alleged or established, and not upon imaginary or hypothetical cases(4). If a person deals injuriously with property in the *bona fide* belief that it is his own, he cannot be convicted of mischief. But in coming to a conclusion about the guilt or innocence of the accused the court has to determine what was the intention of the alleged offender and whether he was not acting in the exercise of a *bona-fide* claim of right(5). On a charge under s. 143 of the Penal Code, the judgment of the court should contain, as one of the points for determination, a statement as to the existence of the elements constituting the unlawful assembly in the particular case and the decision thereon, bearing in mind the provisions of section 141 of the Penal Code(6). The judgment on a charge under s. 379 of the Penal Code should contain, as one of the points, the question as to the dishonest intention and a finding on it, especially when the taking of property is admitted, but a *bona fide* claim of right thereto is set up by the accused(7). In a proceeding under s. 107 Cr. P. C., the point for determination is: Does the evidence on the record prove that from their conduct and actions, the accused are likely to commit a breach of the peace and disturb the public tranquility?(8). In a charge of a murder the Judge should raise as one of the points for decision the question whether accused is guilty of murder(9).

Decisions thereon—In a case of rioting with the common object of taking possession of the complainant's land, a finding on the question of possession being necessary for a proper decision of the case if a judgment of acquittal is passed without arriving at a finding on the

(1) *Rohimuddi v. Empress*, 20 O. 323.

(2) *Ditto v. Emperor*, A. I. R. 1935 B. 23.

(3) *Dalip Singh v. Emperor*, 112 I. C. 229=10 I. A. L. J. 817=20 Cr. L. J. 1011; *Jai Ram v. Emperor*, 8 N. L. R. 44; *Ullain v. Crutch*, 6 P. R. 1876 Cr.

(4) D. C. Singh's Adm. of Cr. Justice p. 15.

(5) *Empress v. Budh Singh*, 2 A 101.

(6) *Ram Lal v. Hari Charan*, 37 C. 194.

(7) *Ibid*.

(8) D. C. Singh's Adm. of Cr. Justice p. 57.

(9) *Fateh Mahomed v. Emperor*, A. I. R. 1911 S. 183=1931 Cr. C. 1070=152 I. C. 816=86 Cr. L. J. 83.

point, it may be set aside and a re-trial ordered(1). The only satisfactory way of writing a judgment in a dacoity case is to give at first a general outline of the case, the dacoity, the course of the investigation and the arrest of the various accused; then the case against and for each accused should be dealt with in detail, and a conclusion arrived at with regard to each individual(2). All that this section requires, however, is, that the point for determination should be stated, the decision thereon and the reasons for the decision. It cannot be assumed that, because a Magistrate has not referred to the oral evidence, but has drawn inferences from documents and from probabilities, therefore, he has not considered the evidence; if he gives strong and legal reasons for his conclusions, it cannot be said that his judgment is defective(3). The Judge should, however, be careful to record findings on all the charges under which the prisoner is sent up for trial(4). It is the duty of the Judge to decide, where several alternative common objects of the unlawful assembly are alleged in the charge which of the common objects is made out(5).

Reasons for decision.—A court should give reasons for decision(6). Section 421, no doubt empowers an Appellate Court to dismiss an appeal summarily, but in doing so the court, must record an order giving reasons for the dismissal and showing that the points raised were duly considered by it. An order couched in general terms.—“The appeal is dismissed summarily” does not comply with the requirements of the law, as laid down in this section(7). The Legislature does not render the writing of “reasons” necessary where an accused person is discharged after the trying Magistrate has heard all the evidence for the prosecution. But it is desirable that the Magistrate should record his reasons for discharge, though it is not compulsory(8). The court should so far as necessary state reasons showing that it has devoted judicial attention to the case of each accused(9). If the case be a simple case in which no intricate questions of fact are involved or where the evidence is clear, strict compliance of the rule contained in this section as regards the absence of detailed reasons for coming to a decision will not be taken to be a non-compliance with the provisions of the law; but where the facts are intricate and the evidence is contradictory it is incumbent on the court of appeal to set out the points for decision, the decision, and the reasons for the decision with sufficient clearness in order to enable the High Court, in case of an application in revision being filed, to satisfy itself

(1) *Surendra Nath v. Janki Nath*, 53 O. 471=96 I. C. 527=27 Cr. L. J. 975=A. I. R. 1926 C. 945.

(2) *Nga Mu v. Emperor*, 76 I. C. 573=2 Bur. L. J. 199=1924 Rang. 67=25 Cr. L. J. 205.

(3) *Durga Singh v. Emperor*, 71 I. C. 597=24 Cr. L. J. 181=2 Pat. L. R. Cr. 154=1924 Pat. 181.

(4) *Queen v. Mahomed Ali*, 18 W. R. Cr. 50.

(5) *Manaruddi v. Emperor*, 35 C. 718; *Dasrathi v. Raghu*, 36 C. 158.

(6) *Empress v. Kana*, Rat. Un. Cr. Cas. 310.

(7) *Gobind Behari v. Emperor*, 22 Cr. L. J. 821=61 I. O. 49=1 Pat. L. T. 10; *Emperor v. Kundan*, 36 A. 496; *Ramrao v. Emperor*, 13 N. L. R. 169=18 Cr. L. J. 993=42 I. C. 711.

(8) *Emperor v. Nabi Fakira*, 5 Cr. L. J. 255=9 Bom. L. R. 250.

(9) *Inatullah v. Emperor*, 1924 C. 518=39 O. L. J. 117=25 Cr. L. J. 1014=81 I. O. 820.

that the matter has been properly considered by the court of appeal(1). The question whether the expression 'I am satisfied that the accused took part in the offence' amounts to giving reasons for the decision, is a difficult question to answer in the abstract(2). Whether ss. 366 and 371 do or do not apply to an order under s. 145, the Magistrate must give reasons for his decision sufficient to enable the High Court to determine whether he has complied with the terms of sub-section (4) and directed his mind to the consideration of the evidence, and whether he has acted with jurisdiction in making his final order(3).

Remarks and comments—A judgment is a privileged document, and it is well to remind judicial officers that the immunity which they enjoy in writing judgments carries with it the duty of circumspection. Any temptation to pillory or pour ridicule on strangers should be restrained, and comments on the conduct of parties and witnesses should not go beyond what is really necessary for the elucidation of the case(4). The testimony or conduct of the Police Officers concerned should be scrutinized and commented on in the same degree as those of other material witnesses, and no further(5). A Judge should not allow irrelevant matter to go on to the record. A judgment should confine itself to a consideration of the issues before the court together with fair and legitimate comment on any errors or irregularities that may be disclosed in the course of the trial. The language of a judgment should be temperate and sober and not satirical(6). Remarks to the effect that the prisoner was a person of wealth and influence, and had prevented truth from appearing, ought not, unless established in evidence, to find a place in a judgment(7). A Magistrate should not in his judgment in a criminal case make observations prejudicial to the character of a person who is neither a witness in, nor a party to, the proceedings, and who has had no opportunity of being heard, and upon material which is not legal evidence in the case(8). Nor should the court describe the suggestion made by the accused's pleader as a daring attempt to mislead the court when the pleader is justified in making the suggestion(9). Nor should the judgment contain any damaging remarks regarding a witness in criminal trial(10). Imputations regarding the motives of a Magistrate whose judgment is under appeal should not find a place in the judgment of the appellate court(11).

Shall be dated and signed by the presiding officer in open court at the time of pronouncing it.—This section says that a judg-

(1) *Aghore Datta v. Emperor*, 11 Pat. 113=A. I. R. 1931 Pat. 379=12 Pat. L. T. 601=16 A. I. Cr. R. 175=1931 Cr. L. 107=32 Cr. L. J. 1197=184 I. C. 619; *Shanker v. Emperor*, 5 A. I. Cr. R. 291.

(2) *Shanker v. Emperor*, 5 A. I. Cr. R. 291.

(3) *Bhutan Chandra v. Nisaran Chandra*, 49 C. 187=25 C. W. N. 687.

(4) *Ma Kya v. Kin Lat*, 4 Bur. L. T. 173=11 I. C. 1000; *Empress v. Baldeo*, 5 C. P. L. R. 21.

(5) *Queen v. Budri*, 23 W. R. 16 Cr.

(6) *Emperor v. Thomas Pellako*, 5 Bur. L. T. 20=13 Cr. L. J. 259=14 I. O. 649.

(7) *Queen v. Dhurum*, 8 W. R. Cr. 13.

(8) *Benarsi Dass v. Emperor*, 6 Lab. 166=26 Cr. L. J. 1326=89 I. O. 270=A. I. R. 1925 (Lab.) 291.

(9) *Lachchu v. Emperor*, 1 O. L. J. 141=15 I. L. J. 420=24 I. C. 156.

(10) *In re Malik Umar*, 2 P. W. R. 1910 Cr. L. J. 178=5 I. C. 611.

(11) *Re Yacoub*, 2 Weir. 535.

ment shall be dated and signed by the presiding officer in open court at the time of pronouncing it. The signature of the Magistrate must be appended to the judgment at the time of pronouncing it in open court(1). But an omission to sign and date a judgment by a Magistrate in open court at the time of pronouncing it as required by this section, amounts to a mere irregularity curable by s. 537(2). Another case is *Emperor v. Ram Sukh*(3) which was before one Judge of the Allahabad High Court. There a Magistrate who wrote a judgment with his own hand but forgot to sign and date it, and it was held that this did not amount to more than an irregularity; such as would be cured by section 537. The trial of a criminal case terminates as soon as the Magistrate has determined the issue of guilt or innocence of the accused; the mere pronouncing of the judgment is not a part of the trial. Where a Magistrate who signs a judgment but does not pronounce it is transferred and the judgment is pronounced by his successor there is no irregularity, much less illegality, and the accused is not entitled to a *de novo* trial(4). A judgment though written and signed, is inoperative until it is pronounced in court and until that is done, it is only an expression of opinion and so the court can change its opinion before pronouncing it(5). The dating and signing of the judgment must be done by the presiding officer of the court; it cannot be delegated to anybody else(6). The signature of the Magistrate should be in writing and should not be impressed with a stamp(7). Mere initialling is not signing(8).

Bench of Magistrates.—Under s. 265, cl. (2), in the trial of a criminal case by a Bench of Magistrates, if the record or judgment is prepared by a member of the bench and not by the presiding officer, it shall have to be signed by each member of the bench taking part in the proceedings. But where the presiding officer himself prepares the record or judgment, it is not necessary that the other members of the bench should sign it(9). In a case where the President of a Bench of Honorary Magistrates is in minority as to conviction or acquittal, the judgment should be written by some member of the majority since, otherwise, there will be a conviction based on an acquitting judgment, without any reason for conviction which, under the provisions of the Code the bench is bound to set out(10).

(1) *Empress v. Ganpat*, Rat. Un. Cr. Cas. 429; *In re Savarimuthu*, 40 M. 108.

(2) *Hayet Mulla v. Emperor*, 7 Rang. 370; see also *Re Venkata-ramanayya*, 2 Weir. 711 (719).

(3) 47 A. 284 = A. I. R. 1925 All. 290 = 23 A. L. J. 8 = L. R. 6 A. 41 Cr. = 86 I. C. 64 = 26 Cr. L. J. 688.

(4) *In re Bhogole China*, A. I. R. 1933 M. 251 = 141 I. C. 174 = (1933) M. W. N. 95 = 84 Cr. L. J. 117 = 36 M. L. W. 881 = 19 A. I. Cr. R. 243 = 1933 Cr. O. 365.

(5) *Ramdhun Rai v. Emperor*, 11 A. L. J. 745 = 14 Cr. L. J. 562 = 21 I. C. 162.

(6) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(7) *Subramanya v. Queen*, 6 Mad. 396.

(8) *Empress v. Nanhu*, O. S. C. 248.

(9) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(10) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(11) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(12) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(13) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(14) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(15) *Empress v. Jia Lal*, (1889) A. W. N. 181.

Sub-section (2).—This sub-section lays down that the offence of which the accused is convicted must be specified, as also the punishment to which he is sentenced. The sentence is a part of the judgment and follows a conviction. It is incumbent on a court to pass a formal sentence of but a single day's imprisonment, in order to make the record legally complete(1). A court is not entitled, in estimating the sentence to be passed, to treat the defence put forward by the accused as matter of aggravation(2). The Sessions Judge cannot alter or set aside a conviction and sentence once made and signed by him. The sentence may be altered in reference to the High Court(3).

Sub-section (3).—The provisions of sub-section(3) apply only to cases where the "actual facts" are established and there is a doubt as to the application of the law to the proved facts and are consequently inapplicable to a case where there is a doubt as to the guilt of the accused in regard to one of the offences charged(4). It has, however, been held that, as the section allows a judgment to be given in the alternative where it is doubtful under which of two sections or of two parts of the same section an offence falls, an alternative finding that a trespass was committed with one or other of two intents, either of which would make it criminal trespass as defined by s. 441 of the Penal Code, is sufficient(5). Where a licensee allows the stay-wire in the road to be in an unsafe state, he fails to perform an obligation imposed upon him under the Electricity Act and is guilty of breach of r. 3 and can be convicted under r. 107 of the Electricity Rules framed under the Electricity Act. A conviction in the alternative under r. 107 and s. 47 is not in accordance with law(6). An omission to state in a judgment in express terms, under which of two sections the offence fell, would amount, at the most, to an irregularity and would vitiate the judgment(7).

Sub-section (4).—A prisoner is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced, when there is no other charge pending against him, and his further detention is illegal. It is for the jail authorities in whose custody a prisoner remains until the trial is concluded to satisfy themselves of the result of the trial; and no formal warrant of release addressed by the court to the Superintendent of jail is necessary(8). Where a judgment of acquittal is passed without arriving at a finding on a vital point in the case, the order of acquittal may be set aside and re-trial ordered(9).

Sub-section (5).—The normal sentence for murder is death, and the passing of the alternative sentence would be justified only where there is a mitigating circumstance, such as the absence of an actual intention to kill(10). A sentence of death should ordinarily be passed

(1) *Empress v. Kalua*, (1884) A.W.N. 219.

(2) *Empress v. Cheda Lal*, (1883) A.W.N. 170.

(3) *Queen v. Poran*, 23 W. R. Cr. 49.

(4) *Partapa v. Crown*, 11 P. R. 1913 Cr.

(5) *Bura v. Empress*, 5 P. R. 1886 Cr.

(6) *Rangoon Electric Supply Co.*

v. Emperor, 34 Cr. L. J. 1040=145 I. C. 710=A. I. R. 1933 Rang. 70=11 Rang 162=(1933) Cr. Cas. 447.

(7) *Re Boya Takirugadu*, 2 Weir. 440.

(8) *Anonymous*, 5 M. H. C. R. App 2.

(9) *Surendra Nath v. Janki Nath*, 7 A. I. Cr. R. 55.

(10) *Kra Chan U. v. Emperor*, 2 Bur. L. J. 103=(1923) R. 247=25 Cr. L. J. 207=76 I. O. 575; *Emperor v.*

for the crime of murder unless there are extenuating circumstances, and a mere absence of aggravating circumstances is not enough to justify a sentence of transportation for life(1). In some cases it has been held that the fact that the murder was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating circumstance(2), but there is preponderating weight of authorities to the contrary(3). The age or sex of a murderer cannot generally of itself be sufficient reason for a leniency in sentence. If there are other reasons which very nearly justify the passing of a lesser sentence, but do not quite do so or when it is doubtful whether they do so or not, then the youth or sex of the criminal may certainly tip the scale to the side of mercy(4). A Judge should not sentence a person accused of murder to transportation for life, instead of sentencing him to death, merely on the ground that the evidence is not strong enough to justify an irrevocable sentence. If the court has any doubt as to the guilt of the accused it should acquit him(5). The duty of a Sessions Judge under sub-sec (5) is to pass sentence of death in cases of conviction of murder under s. 302, I. P. C., unless there are reasons for not passing such sentence(6). The reasons justifying the infliction of the lesser penalty under sub sec. (5) must be such as are in accordance with established legal principles. The drunkenness of the accused is not a sufficient reason for not inflicting capital sentence. Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation and is not a reason for inflicting a sentence of transportation for life instead of a death sentence(7).

Shree Ala U. 23 Cr. L. J. 437=67 I. C. 613=11 L. B. R. 323, *Crown v. Tha Sin*, 1 L. B. R. 216

(1) *Emperor v. Nga Mayat Kaing*, 37 I. C. 465=18 Cr. L. J. 113; *Local Govt. v. Sitria*, 30 N. L. B. 9 (A High Court will enhance a sentence of transportation for life passed by a Session Judge only when the Judges are of opinion that sentence of death is the only possible sentence that should be passed).

(2) *Emperor v. Nga Mayat King*, 37 I. C. 465=18 Cr. L. J. 113; *In re Bhyari Bajappa*, 22 Cr. L. J. 613=63 I. C. 149=13 L. W. 612.

(3) *Sheo Prasad v. Emperor*, 4 O. W. N. 443=(1927) O. 174=101 I. C. 481=28 Cr. L. J. 452, *Abdul Alim v. Emperor*, 98 I. C. 608=L. R. 7 A 186 Cr.=(1927) A. 105=6 A. I. C. R. 462=27 Cr. L. J. 1392; *Preman v. Emperor*, 105 I. C. 678=26 P. L. R. 363=28 Cr. L. J. 966=A. I. R. 1928 Lah. 93; *Shree Cho v. Emperor*, 3 L. B. R. 111; *Pirithi v. Crown*, 5 Lah. L. J. 323=(1924) Lah. 654=26 Cr. L. J. 349=84 I. C. 653; *Gaman v. Emperor*, 110

I. C. 621=A. I. R. 1928 Lah. 918=11 L. J. 1.

(4) *Kachria v. Emperor*, 18 N. L. R. 101=64 I. C. 277=22 Cr. L. J. 757; 234=

3 Lah.

Emperor,

A. I.

112 I.

29 Cr.

1 L.

B R 359.

(5) *Shree Prasad v. Emperor*, 110

I. C. 621=A. I. R. 1928 Lah. 918=11 L. J. 1.

(6) *Local Govt. v. Sitria Arjuna*,

A. I. R. 1933 Nag. 307=146 I. C. 118=

1933 Cr. C. 1266=34 Cr. L. J. 1168;

Mosaddi Rai v. Emperor, A. I. R.

1933 P. 100=11 Pat. 807=1933 Cr. C.

253=142 I. C. 841=34 Cr. L. J. 421.

(7) *Waryam v. Crown*, 7 Lah. 141

=27 Cr. L. J. 764=95 I. C. 284=1926

L. 428.

L. J. 721.

Reasons to be assigned : Sufficiency or otherwise of reasons.—Where the sentence of death is not passed for conviction in a case punishable with death, the Sessions Judge should state his reasons for the departure(1). The discretion to pass the lighter sentence must be exercised only when the Judge can satisfy himself that his reasons for doing so are adequate and covered by authority(2). There is no unwritten rule or principle standing in the way of the imposition of a death sentence in cases where the evidence is purely circumstantial(3). Absence of eye-witness to a murder does not justify remission of capital sentence(4). The fact that the accused is a woman is not a sufficient ground for passing a sentence of transportation instead of one of death(5). Capital sentence should be pronounced on a conviction for murder even if the accused be pregnant, although the execution of the sentence should be deferred till after delivery(6), though there is authority to the contrary also(7). The fact that the body of the murdered man has not been found is not a sufficient ground(8). But in one case a Judge was held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found(9). In one case though the evidence was held to be sufficient to convict the accused of murder, yet, as the evidence gave rise to doubts as to the precise part taken by the prisoner, it was thought safer to remit the capital sentence, and pass one of the transportation for life(10). As s. 396, Penal Code, is one for which the death penalty can be imposed, it is necessary to give reasons for not imposing it(11).

Proviso : Heads of charge.—The proviso to sub-section (5) does not require that the "heads of charge to the Jury" should be a *verbatim* reproduction of the Judge's summing up; nor it is necessary that the charge should be written out before it is delivered. But whether the heads of charge are written out or not, they should be placed on record by the Judge, and he should explain to the Jury what he said, and what he intended him to do so and so, and what he intended the heads of charge to be. The heads of charge need not be meticulous or lengthy but must give accurately the substance of what the Judge said to the Jury so that the High Court may, if occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the Jurors(13). Under this section the Judge is not required to write out in

(1) *In re Kurumba Hasakeri*, 7 I. C. 397—8 M. L. T. 81—11 Cr. L. J. 481

(2) *Ma Shwe Yi v. Emperor*, 1 Rang. 751—81 I. C. 945—2 Bur. L. J. 277—(1924) R. 179—25 Cr. L. J. 1121.

(3) *Muniandi Allis v. Emperor*, (1915) M. W. N. 34

(4) 2 W. R. Cr. 19 Letter

(5) *Ma Shwe Yi v. Emperor*, 1 Rang. 751—81 I. C. 945—1924 R. 179—25 Cr. L. J. 1121; *Mi She v. Emperor*, 25 Cr. L. J. 1121; *Empress v. Nibbia*, (1889) A. W. N. 131

(6) *Queen v. Panhee*, 15 W. R. 66 Cr.

(7) *Queen v. Tepoo*, 3 W. R. 15 Cr.

(8) *Empress v. Bhagirath*, 3 A. 393;

Empress v. Sanawa, (1882) A. W. N. 160; *Empress v. Rogi*, (1881) A. W. N. 112.

(9) *Queen v. Budduruddeen*, 11 W. R. 20 Cr.

(10) *Queen v. Baboolal*, 1 W. R. 48 Cr.

(11) *Nga Sein Tun v. Emperor*, A. I. R. 1933 Rang. 61(1)—144 I. C. 146—34 Cr. L. J. 699

(12) *Queen v. Panhee*, 15 W. R. 66 Cr.

(13) *Queen v. Panhee*, 15 W. R. 66 Cr.

(14) *Queen v. Panhee*, 15 W. R. 66 Cr.

(15) *Queen v. Panhee*, 15 W. R. 66 Cr.

(16) *Queen v. Panhee*, 15 W. R. 66 Cr.

(17) *Queen v. Panhee*, 15 W. R. 66 Cr.

(18) *Queen v. Panhee*, 15 W. R. 66 Cr.

(19) See the case cited in the last note.

extenso the charge which he addresses to the Jury. He is to record merely the heads of the charge, because it is impossible for the Judge to write down every thing he says to the Jury(1). It is essential, however, that the heads of charge to the Jury should represent with absolute accuracy the substance of the charge and be such as to enable to High Court, in the event of an appeal, to see distinctly whether the case was fairly and properly placed before the Jury(2). The object of the heads of charge is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the Jury and the nature of his summing up of the evidence not only of the prosecution, but also for the defence(3). The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence(4). It is the duty of the Judge fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence, respectively. In doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoner's counsel in considering his presentation of the evidence of the Jury(5). The heads of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the Judge to the Jury, and the record should represent with accuracy the substance of the charge by the Judge(6). If in substance it can be seen from the frame of the heads of charge what were the directions which the Judge gave to the Jury and that they were right and proper then there can be no ground of complaint, even though the phraseology and form adopted might be open to question(7). It is incumbent on the Judge to explain the law relating to the particular offence charged against the accused in order to enable the Jury to apply the law to the special facts of the case. A mere mention of the sections of the Penal Code under which the accused were charged is insufficient(8). But in one case where the heads of charge stated, "sections 361 and 366 of the Penal Code read and explained to the Jurors", the High Court held this to be a sufficient compliance with the law(9). A conviction cannot be set

(1) *Keamuddi v. Emperor*, 51 O. 79 (82).

(2) *Fanindra Nath v. Emperor*, 9 Cr. L. J. 452=26 C. 281.

(3) *Eknath v. Emperor*, 1 Pat. L. J. 317.

(4) *Ibid*.

(5) *Eknath v. Emperor*, 1 Pat. L. J. 317.

(6) See the case cited in last note and *Panchu v. Emperor*, 34 C. 698; *Phanindra v. Emperor*, 26 C. 281=9 Cr. L. J. 452.

evidence has been properly laid before the Jury, *Queen v. Kasim* 23 W. R. 32 Cr.; *Emperor v. Baijnath*, 1903 A. W. N. 232, *In re Shambhulal*, 10 Bom. L. R. 565.

(9) *Dhanpat v. Emperor*, 9 Pat. 148=135 I. C. 131=A. I. R. 1930 Pat. 243=Ind. Rul. (1930) Pat. 483=31 Cr. L. J. 286=11 P. L. T. 646=1930 Cr. C. 511.

aside on the mere ground that the record made by the Judge of the heads of charge to the Jury is not sufficient to show that the Jury was adequately directed on the questions of law arising in the case(1).

Appellate judgment.—In view of the provisions of s. 424 an appellate court's judgment must comply with the provisions of this section(2). The rule embodied in the sections is based on sound principles and has to be observed by every court of criminal appeal other than the High Court(3). A judgment of any appellate court other than a High Court, must comply with the provisions of this section, that is to say, it must contain the point or points for determination, the decision thereon and the reasons for the decisions(4). A judgment of an appellate court which contains neither the facts of the case nor the points for determination or the discussion of those points, is not a judgment in accordance with law(5). A judgment of an appellate court which does not discuss the points urged in the memorandum of appeal and without giving any reasons, holds that a conviction is correct, is not a legal judgment under s. 424 read with this section(6). It is the duty of the Sessions Judge, in disposing of an appeal to record a judgment according to law; any deficiency in that judgment cannot be made up by a reference to the judgment of the Magistrate. It is his duty to go into the evidence and try the appeal in a proper manner. Where the Sessions Judge in appeal did not state facts and gave no reasons in his judgment for the conclusion arrived at by him, the appeal must be reheard(7). Though it is not necessary for an appellate court to write a long and elaborate judgment it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appellant has been properly tried and that the points urged by the appellant have been duly considered and decided. An appellate court fails in the discharge of the duty imposed upon it by law if it writes a judgment which cannot be followed without reference to the judgment of the trial court(8).

(1) See the case cited in the last note and *Chotan Singh v. Emperor*, 7 Pat. 261=10 P. L. T. 26=29 Cr. L. J. 801=111 I. C. 308=1928 Pat. 420.

(2) *Safar Jamma v. Satya Niranjan*, A. I. R. 1915 C. 286=62 I. C. 290, *Aghore Dutta v. Emperor*, 11 Pat. 143; *Patilbua v. Emperor*, 6 A. I. Cr. R. 451, *Ramlal v. Hari Charan*, 37 C. 194.

(3) *Aghore Dutta v. Empress*, 11 Pat. 143=12 P. L. T. 601=16 A. I. Cr. R. 175=1931 Cr. C. 297=32 Cr. L. J. 1197=131 I. C. 619=A. I. R. 1931 Pat. 379.

(4) *Duarka v. Emperor*, 92 I. C. 855=27 Cr. L. J. 843=6 A. I. Cr. R. 38; *Emperor v. Devendra*, 17 Bom. L. R. 1085; *Mangla v. Emperor*, 2 Pat. L. T. 616=63 I. C. 416=22 Cr. L. J. 656=1 P. L. T. 616; *Kali Charan v. Geli Beuca*, 2 Pat. L. T. 229; *Hindrabai v. Emperor*, 21 Cr. L. J. 223=54 I. C.

1007=2 U. P. L. R. (L.) 44=127 P. L. R. 1920.

(5) *Kali Charan v. Geli Beuca*, 29 Cr. L. J. 610=63 I. C. 336; *Surya v. Lachmi Narain*, 19 I. C. 289=23 Cr. L. J. 48; *Shanmukh v. Emperor*, A. I. R. 1930 B. 163=82 Bom. L. R. 353=125 I. C. 710=31 Cr. L. J. 925=126 I. C. 872.

(6) *Kalikram v. Emperor*, 107 I. C. 665=9 A. I. Cr. R. 557=29 Cr. L. J. 270.

(7) *Bhola Nath v. Emperor*, 7 O. W. N. 80; *Ektar v. Emperor*, 9 O. W. N. XXIII; *Beni v. Emperor*, 18 Cr. L. J. 689=40 I. C. 689=4 O. L. J. 80; *Pitambar v. Emperor*, 110

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Rang. 188=24 Cr. L. J. 920. An order dismissing an appeal on the ground that

Appellate judgment must be self contained.—An appellate judgment must be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial court(1). A judgment of an appellate court which does not discuss the evidence in the case and from which it is not possible to find out what the occurrence was which is dealt with in the judgment is not a judgment which complies with the provisions of this section and must be set aside(2). Reasons for the decision should be given by an appellate court in its judgment in order that the superior court may at once know the facts found and the reasons therefor without reference to the record and satisfy itself that the lower court has done its duty by an honest and careful consideration of the case. There must be sufficient material in the appellate judgment itself to show that the appeal has been properly tried and the judgment or order must bear marks of such intelligent appreciation on the part of the appellate court of the necessary facts and material as would warrant the superior court to infer that the conclusions were properly arrived at by the lower appellate court(3). Where the judgment of a criminal appellate court, is in the nature of a stereotyped one, which might answer for any 'case, it is not one in accordance with ss. 367, 424; but where the judgment, though not a long and elaborate one, affords a clear indication that the court duly considered the evidence, it is a good judgment and should not be set aside(4).

Judgment of appellate court affirming conviction.—A judgment of an appellate court affirming a conviction by the lower court need not re-state or state in different words the evidence or the conclusions at which the court of first instance has arrived, but it must contain sufficient materials to enable the High Court, in revision, to come to a decision upon the points arising in the case(5). Where the court of appeal merely refers to the decision of the trial court and says that nothing has been urged in appeal which affects the reasons given by the trial court for the conviction, such a decision is clearly not in accordance with law inasmuch as it offends against this section(6). Where all that the appellate court writes is that it is satisfied that the judgment of the trial court is substantially right the judgment is not in accordance with the provisions contained in this section(7).

a copy of the judgment has not been filed does not amount to a judgment *Emperor v. Basangopal*, 56 A 299

(1) *Solhu v. Krishna Ram*, 1924 Lah. 660=25 Cr. L. J. 113=76 I. C. 177; *Jamail v. Emperor*, 35 C. 138, *Mangla v. Emperor*, 2 Pat. L. T. 616, *Thakur Singh v. Emperor*, 20 Cr. L. J. 444, *Darngi v. Emperor*, 20 Cr. L. J. 645; *Bach v. Emperor*, 1 Rang 981.

(2) *Gaharab v. Emperor*, 81 I. C. 437=25 Cr. L. J. 901; *Pahrsi v. Emperor*, 16 I. C. 520=(1912) M. W. N. 881=12 M. L. T. 335=13 Cr. L. J. 712; *Sheo Naranjan v. Emperor*, 18 Cr. L. J. 994=42 I. C. 722=1 Pat. L. W. 673; *Hurmat Ali v. Emperor*, A. I. R. 1926

Jour. 93; *Dalip Singh v. Emperor*, 112 I. C. 359=10 Lah. L. J. 347

(3) *Maroti v. Kasaba*, 98 I. C. 716=27 Cr. L. J. 1404=A. I. R. 1927 Nag. 88

(4) *Kasumuddi v. Emperor*, 1 C. W. N. 169, *Abdul Rahman v. Emperor*, A. I. R. 1935 C. 316

(5) *Arindra v. Emperor*, 18 Cr. L. J. 294=38 I. C. 326=20 C. W. N. 1296.

(6) *Aghore Dutta v. Emperor*, 11 Pat. 143=134 I. C. 619=32 Cr. L. J. 1197=1931 Cr. C. 907=16 A. I. Cr. R. 175=12 Pat. L. T. 601=A. I. R. 1931 Pat. 379

(7) *Baishnab Charan v. Emperor*, 24 Cr. L. J. 311=72 I. C. 71.

aside on the mere ground that the record made by the Judge of the heads of charge to the Jury is not sufficient to show that the Jury was adequately directed on the questions of law arising in the case(1).

Appellate judgment.—In view of the provisions of s. 424 an appellate court's judgment must comply with the provisions of this section(2). The rule embodied in the sections is based on sound principles and has to be observed by every court of criminal appeal other than the High Court(3). A judgment of any appellate court other than a High Court, must comply with the provisions of this section, that is to say, it must contain the point or points for determination, the decision thereon and the reasons for the decisions(4). A judgment of an appellate court which contains neither the facts of the case nor the points for determination or the discussion of those points, is not a judgment in accordance with law(5). A judgment of an appellate court which does not discuss the points urged in the memorandum of appeal and without giving any reasons, holds that a conviction is correct, is not a legal judgment under s. 424 read with this section(6). It is the duty of the Sessions Judge, in disposing of an appeal to record a judgment according to law; any deficiency in that judgment cannot be made up by a reference to the judgment of the Magistrate. It is his duty to go into the evidence and try the appeal in a proper manner. Where the Sessions Judge in appeal did not state facts and gave no reasons in his judgment for the conclusion arrived at by him, the appeal must be reheard(7). Though it is not necessary for an appellate court to write a long and elaborate judgment it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appellant has been properly tried and that the points urged by the appellant have been duly considered and decided. An appellate court fails in the discharge of the duty imposed upon it by law if it writes a judgment which cannot be followed without reference to the judgment of the trial court(8).

(1) See the case cited in the last note and *Chotan Singh v. Emperor*, 7 Pat. 561=10 P. L. T. 26=29 Cr. L. J. 801=111 I. C. 303=1928 Pat. 420

(2) *Safar Jama v. Satya Niranjan*, A. I. R. 1925 O. 266=32 I. C. 290; *Aghore Dutta v. Emperor*, 11 Pat. 143; *Patilbuvu v. Emperor*, 6 A. I. Cr. R. 451; *Ramlal v. Hars Charan*, 37 C. 194.

(3) *Aghore Dutta v. Empress*, 11 Pat. 143=12 P. L. T. 601=16 A. I. Cr. R. 175=1931 Cr. C. 907=32 Cr. L. J. 1197=131 I. C. 619=A. I. R. 1931 Pat. 379.

(4) *Dicarka v. Emperor*, 92 I. C. 855=27 Cr. L. J. 343=6 A. I. Cr. R. 38; *Emperor v. Devendra*, 17 Bom. L. R. 1095; *Mungla v. Emperor*, 2 Pat. L. T. 615=63 I. C. 416=22 Cr. L. J. 656=2 P. L. T. 616; *Kali Charan v. Geli Bewa*, 2 Pat. L. T. 223; *Bindrabau v. Emperor*, 21 Cr. L. J. 223=54 I. C.

1007=2 U. P. L. R. (L.) 44=127 P. L. R. 1920.

(5) *Kali Charan v. Geli Bewa*, 22 Cr. L. J. 640=63 I. C. 336; *Surya v. Lachmi Narain*, 18 I. C. 288=13 Cr. L. J. 48; *Shanmukh v. Emperor*, A. I. R. 1930 B. 163=32 Bom. L. R. 353=125 I. C. 710=31 Cr. L. J. 925=126 I. C. 872.

(6) *Kalikram v. Emperor*, 107 I. C. 665=9 A. I. Cr. R. 557=29 Cr. L. J. 270.

(7) *Bhola Nath v. Emperor*, 7 O. W. N. 30; *Ektar v. Emperor*, 9 O. W. N. XXIII; *Beni v. Emperor*, 18 Cr. L. J. 689=40 I. C. 689=4 O. L. J. 80; *Ullam v. Crown*, 6 P. R. 1876 Cr.

(8) *Qadir Bakhsh v. Emperor*, 110 I. C. 449=47 C. L. J. 441=A. I. R. 1928 C. 909; *Bagh v. Emperor*, 76 I. C. 297=2 Bur. L. J. 101=1 Rang. 301=1923 Rang. 188=24 Cr. L. J. 920. An order dismissing an appeal on the ground that

Appellate judgment must be self contained.—An appellate judgment must be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial court(1). A judgment of an appellate court which does not discuss the evidence in the case and from which it is not possible to find out what the occurrence was which is dealt with in the judgment is not a judgment which complies with the provisions of this section and must be set aside(2). Reasons for the decision should be given by an appellate court in its judgment in order that the superior court may at once know the facts found and the reasons therefor without reference to the record and satisfy itself that the lower court has done its duty by an honest and careful consideration of the case. There must be sufficient material in the appellate judgment itself to show that the appeal has been properly tried and the judgment or order must bear marks of such intelligent appreciation on the part of the appellate court of the necessary facts and material as would warrant the superior court to infer that the conclusions were properly arrived at by the lower appellate court(3). Where the judgment of a criminal appellate court, is in the nature of a stereotyped one, which might answer for any 'case, it is not one in accordance with ss. 367, 421; but where the judgment, though not a long and elaborate one, affords a clear indication that the court duly considered the evidence, it is a good judgment and should not be set aside(4).

Judgment of appellate court affirming conviction.—A judgment of an appellate court affirming a conviction by the lower court need not re-state or state in different words the evidence or the conclusions at which the court of first instance has arrived, but it must contain sufficient materials to enable the High Court, in revision, to come to a decision upon the points arising in the case(5). Where the court of appeal merely refers to the decision of the trial court and says that nothing has been urged in appeal which affects the reasons given by the trial court for the conviction, such a decision is clearly not in accordance with law inasmuch as it offends against this section(6). Where all that the appellate court writes is that it is satisfied that the judgment of the trial court is substantially right the judgment is not in accordance with the provisions contained in this section(7).

a copy of the judgment has not been filed

Darogi v. Emperor, 20 Cr. L. J. 615,
Bach v. Emperor, 1 Rang 381.

Jour. 93; *Dalip Singh v. Emperor*,
 112 I. O. 359=10 Lah. L. J. 347

(3) *Maroti v. Kasabai*, 98 I. O. 716
 =27 Cr. L. J. 1401=A. I. R. 1927 Nag.
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(4) *Kasumuddi v. Emperor*, 1 O.
 W. N. 169, *Abdul Rahman v. Empe-
 ror*, A. I. R. 1935 C. 316.

(5) *Arindra v. Emperor*, 18 Cr. L. J.
 294=38 I. O. 325=20 C. W. N. 1296.

(6) *Aghore Datta v. Emperor*, 11
 Pat. 149=134 I. O. 619=32 Cr. L. J.
 1197=1931 Cr. C. 907=16 A. I. Cr. R. 175
 =12 Pat. L. T. 601=A. I. R. 1931 Pat.
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(7) *Baishnab Charan v. Emperor*,
 24 Cr. L. J. 311=72 I. O. 71.

Summary dismissal.—An appellate court is not required by law to write judgment when dismissing an appeal summarily but it is necessary that it should give reasons for dismissing the same(1). But in one case it has been held otherwise(2).

Sub-section (6).—This section has been inserted in deference to the opinion of Ayling, J., in *Venkatachinnaya v. Emperor*(3). It supercedes *In re Ramasamy Chetty*(4) which held that an order passed in security proceedings was not a "judgment". Where a District Magistrate disposes of an appeal against an order under section 110, Cr. P. Code, passed in a case in which 42 witnesses were examined for the prosecution and 106 for the defence, in a few lines making only some general observations on the volume of evidence the judgment is perfunctory and not in accordance with law, and should be set aside(5). An order under s. 123 (3) should show on the face of it that the Sessions Judge has considered the case of each accused on its own merits and separately from that of the others(6).

368. (1) When any person is sentenced to death,
Sentence of death. the sentence shall direct that he be hanged by the neck till he is dead.

(2) No sentence of transportation shall specify the
Sentence of transportation. place to which the person sentenced is to be transported.

Sentence of death.—Sub-section (1) lays down that the capital sentence should direct that the offender be hanged by the neck till he is dead. Capital sentence is passed by the Sessions Judge subject to confirmation by the High Court, to whom the case is submitted under s. 374, *infra* for confirmation.

Sentence of transportation.—In cases in which the sentence passed is one of transportation, the place of transportation is not to be specified by the court passing the sentence. The Governor-General in Council is empowered to appoint places in British India to which persons sentenced to transportation may be sent, and it is the duty of the Local Government to make arrangements for the removal of such persons(7). By the words "transportation" is meant not merely the conveying of the convict to the place of transportation, but his being so conveyed and remaining during the term for which he is ordered

(1) *Jagar Nath v. Emperor*, 82 I. C. 165=25 Cr. L. J. 1237=A. I. R. 1925 Pat. 183; *Ram Rao v. Emperor*, 13 N. L. R. 169; *Emperor v. Kundan*, 86 A. 496=12 A. L. J. 851=24 I. O. 800=15 Cr. L. J. 512; *Thakur Sahu v. Emperor*, 11 Pat. L. T. 242=125 I. O. 121; *Empress v. Gopalala*, 1 Bom. L. R. 225; *Maroti v. Kasabi*, 7 A. I. Cr. R. 472=93 I. C. 716=1927 Nag. 88; *Dhabani Prosad v. Hari Charan*, 73 I. C. 938=38 C. L. J. 7=24 Cr. L. J. 714.

(2) *Rash Behari v. Balgopal*, 21 C. 92.

(3) 43 M. 511.

(4) 27 M. 510 (512)

(5) *Sunehari v. Emperor*, 23 Cr. L. J. 378=67 I. C. 202; see also *Bunsi Dhar v. Emperor*, 4 O. L. J. 141=18 Cr. L. J. 649=40 I. C. 297; *Daju v. Emperor*, A. I. R. 1933 Pat. 112=34 Cr. L. J. 476=146 I. O. 934.

(6) *Kallu v. Emperor*, 87 C. 91.

(7) See Act 111 of 1900.

to be transported; and, therefore, a person convicted is not restored to his civil rights till after the expiration of the terms of which he is ordered to be so transported(1). So in cases in which the sentence is one of transportation for life, the judgment must be preserved until a report is received of the convict's death or release(2).

369. *Save as otherwise provided by this Code or by any other law for the time being in force, or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no court, when it has signed its judgment, shall alter or review the same, except * * * to correct a clerical error*

Amendment explained.—The opening words of the section in italics are new. In lieu of the italicised words the former section ran "no court other than a High Court." The words "other than a High Court" appeared, it was said, to imply a power in the court to alter or review its own judgment but if so, these words did not enable a High Court to do so. They were merely equivalent to the words "this section does not apply to the High Court." There was no substantive enactment in this section giving the High Court such power. All that it did was to reserve whatever powers may have existed in that Code before the passing of this section, so that if there be such powers they were in no degree taken away by these provisions. And this is the effect of the amendment which enacts that a High Court has no such powers except as provided by this Code or by its Letters Patent(3).

Scope of the section.—This section expressly negatives the power of court to review. The Code has been amended a number of times, and the Legislature has not chosen to give a power of review to any court in a criminal case(4). Hence a criminal court cannot review its own judgments(5). The section refers to judgments under this Chapter, but the principle laid down has been held to apply to final orders in the nature of judgments(6). A Magistrate has no power to review his own previous orders passed on full inquiry, and after hearing both sides the only course open to the Magistrate is to make a reference to the High Court, and have his own order cancelled(7). The principle laid down in this section applies to an order passed under s. 488 of the Code, inasmuch as proceedings under that section are judicial proceedings and the final order or the reasons given for such order in any such proceedings are in effect a judgment(8). But it is open to a Magistrate who dismisses a complaint to rehear even when such order of dismissal

(1) *Bullock v. Dodds*, 2 B. and Ald. 258=20 R. R. 420

(2) M. H. C. Letter. 14th January 1897

(3) Woodroffe Cr. P. C. p. 418

(4) *In re Kunhammad*, 46 M. 382 at p. 403.

(5) *Hira v. Emperor*, 8 P. R. 1903 Cr.; *Parbati Charan v. Sajjad Ahmad*, 35 O. 350; *In re Hiralal Buch*, 22 B. 949; *Narasingha Rao v. Vittoba Rai*, 30 I. C. 128=16 Cr. L. J.

584; *Empress v. Gobind Sahai*, 38 A. 134; *Ram Dulare v. Ajudhia Singh*, 21 I. C. 477=16 O. C. 192=14 Cr. L. J. 605; *Ct. In re Umar Hayat*, 2 P. W. R. 1910 Cr.; and see *Official Receiver v. Ganga Ram*, 25 P. R. 1916 Cr.=18 Cr. L. J. 332=38 I. C. 444

(6) *In re Harilal Buch*, 22 B. 949

(7) *Ibid.*

(8) *Nanda Narain v. Manmaya Kamini*, 18 Cr. L. J. 556=39 I. C. 700=21 C. W. N. 314.

has not been set aside by a higher court. An order of dismissal under s. 203 is not a judgment within the meaning of this section(1). It is, however, not open to a Magistrate to review an order which is final order, so far as one party is concerned, under section 145(2).

Judgment.—See notes under s. 367 above. The term "judgment" is not defined in the Code. "Judgment" contemplated by this section is only a decision on the merits. A dismissal for default of appearance, therefore, is not a judgment and High Court has power to review a dismissal order for default of appearance passed in its appellate jurisdiction(3), though there is authority to the contrary also(4). A "judgment" means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments(5). This section applies to judgments and not to orders of rejection on the ground of formal defect. Where, therefore, an appeal is rejected because the copy of the judgment is not attached to it the order rejecting the appeal is not a judgment within the meaning of this section(6). The word "judgment" in this section means and refers to the judicial act of the court in finally disposing of the case and indicates the order of the court when it is read out and signed by the Judge and not the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officer of the court. When the court delivers and signs the judgment it becomes final and it has no power thereafter to review its order or alter the judgment in any manner or to any extent(7).

When it has signed its judgment.—This section clearly lays down that a criminal court has no power to review a judgment after it has signed the same(8). A judgment or order of the court is not complete until it has been signed(9) and sealed(10). Judgment must be taken to mean and refer to the Judicial Act of the court in finally disposing of the case and must therefore indicate only the order of the court when it is read out and signed by the Judge and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officer of the court(11). The mere fact of an addition being made to a judgment after it has been signed and delivered, where such addition does not materially prejudice the accused and has not occasioned a failure of justice, does

(1) *Empress v. Chinna*, 29 M. 126; *Makhatabi v. Hassan Ali*, 1 N. L. R. 18.

(2) *Nagappa v. Chinnappa*, 29 M. 126; *Chinnappa v. Nagappa*, 29 M. 126; *Chinnappa v. Nagappa*, 29 M. 126.

(3) *Ibrahim v. Emperor*, A. I. R. 1928 Rang. 288, *Rajab Ali v. Emperor*, 46 C. 60=50 I. C. 25=20 Cr. L. J. 265.

(4) *Shahu v. Emperor*, A. I. R. 1935 S. 84 F. B.

(5) *Sanapuli v. Sreedhar*, 21 C. 121 (127).

(6) *Banasgopal v. Emperor*, A. I. R. 1934 A. 206=56 A. 299=147 I. C. 847=1934 A. L. R. 156=1934 Cr. C. 354=1934

A. L. J. 329=35 Cr. L. J. 441.

(7) *In re Arumuga Padaya*, 91 I. C. 1000=23 L. W. 56=27 Cr. L. J. 184=50 M. L. J. 51=(1926) M. W. N. 147=A. I. R. 1926 M. 420.

(8) *In re Avinappa*, 7 Mys. L. J. 142.

(9) *Amodini v. Darson*, 38 C. 838=13 I. C. 776=13 Cr. L. J. 120; *Empress v. Lalit*, 21 A. 177; *In re Gibbons*, 14 C. 42; *Cl. Empress v. Fox*, 10 B. 176.

(10) See the cases cited in the last note.

(11) *In re Arumuga Padaya*, (1926) M. W. N. 147; *Jhari Lal v. Emperor*, 8 Pat. 904=122 I. C. 531=1930 Pat. 148=31 Cr. L. J. 416=I. R. 1930 Pat. 211=11 Pat. L. T. 195.

not vitiate the whole judgment and justify an order for re-trial(1).

Dismissal for default.—Where a case is disposed of merely for default of appearance, or an order is passed to the prejudice of the accused, and by mistake or inadvertence no opportunity was given him to be heard the High Court may review the same(2). But an order dismissing a summons-case for default of appearance under section 247 is in the nature of a judgment, and a Magistrate cannot revive the case once dismissed for default(3).

Order summarily rejecting an appeal.—The High Court has no power to review an order passed in its criminal appellate jurisdiction rejecting an appeal summarily (4). But it is open to the appellate court to rehear an appeal which has been summarily dismissed by itself for default of appearance of the pleader (5).

Orders under ss. 203 and 204.—An order of dismissal under s. 203 is not a judgment within the meaning of this section. It is, therefore, open to a Magistrate to rehear a complaint which he himself has dismissed under s. 203(6). A Magistrate has jurisdiction to rescind an order under s. 204 directing issue of summons against an accused person and direct a Subordinate Magistrate to hold an inquiry to which the provisions of this section are applicable(7). A Magistrate who has discharged an accused under section 253, can take fresh proceedings and issue process against the person discharged in respect of the same offence without such order being set aside by a higher court(8).

Order under ss. 145, 146, if can be reviewed.—It is not open to a Magistrate to review an order which is a final order, so far as one party is concerned, under section 145(9). Nor can an order under s. 146 be reviewed and one under s. 147 be passed instead(10). But the question of a clerical error is expressly exempted from the section(11).

Review of judgment by a Sessions Court.—A Sessions Court is not competent to review its own judgment(12). It is not open to a Sessions Judge when he has once accepted the verdict of the Jury and has postponed the case for passing sentence, to reconsider his order and to refer the case to the High Court under s. 307, Cr. P. C., but he must

(1) *Empress v. Husenuddin*, (1898)
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(4) *Rajah Ali v. Emperor*, 46 C 60, *Nasar Muhammad v. Hara Singh*, 26 P L R. 616; *Empress v. Yasin*, 4 B 101

(5) *Anonymous*, 7 M. H. C. R.
 App. 29.

(6) *Empress v. Chinna*, 29 M 126;
Makhatambi v. Hassan Ali, 1 N. L.

(7) *Lalit Mohan v. Nonilal*, 39 C. L. J. 329=25 Cr. L. J. 464=77 I. C.

816=27 C. W. N 651=1923 Cal. 662.

(8) *Emperor v. Maheshwar*, 4 I C. 1113=5 M L T 184=11 Cr L J. 190.

See *Debi Das v Emperor*, 3 Cr. Law. 22. Cf *Phonsia v Emperor*, A. I. R.

(9) *Narayan v Chandra Bhaga.*

5 A I r. R. 132=A I R. 1925 Nag
457=26 Cr. L J 1289=89 I C. 153.

(10) *Ram Dullare v. Ajodhia*, 16 O. C. 192=14 Cr. L. J. 605-21 I. C.

477, *Lachmi v. Bhusi*, 19 Cr. L. J
225=431 C. 817.

(11) *Lachmi v. Bhusi*, 19 Cr L J 225=43 I C 817

(12) *Official Receiver v. Ganga Ram*, 25 P. R. 1916 Cr = 18 Cr L J 932 = 38 I. C. 444

pass sentence on the person awaiting sentence on the verdict(1). A Sessions Judge, having once refused to revoke a sanction (now abolished) granted by a Subordinate Court under s. 195 of the Code, has no jurisdiction afterwards to review his order and set aside the sanction(2).

Expunging remarks in judgment.—A Judge has power to reconsider and expunge damaging remarks about a witness in his judgment in a criminal case. This does not amount to a review of judgment(3).

Accidental omission.—Where in setting aside a conviction for theft an appellate court omits to pass orders under section 520 of the Code for restoration of the property taken from the accused if the omission is accidental it can be subsequently corrected under this section(4). Where, however, a criminal court erroneously passes an order of acquittal instead of discharge, it has no power to review its own order and alter it to one of discharge nor can it entertain a fresh complaint in respect of the same facts. A clear distinction exists between acquittal and discharge and hence, the use of the expression "acquitted" in place of "discharged" is not a mere clerical error which can be corrected under this section(5). Even where the accused obtains a judgment of acquittal under section 247 by means of a fraud on the court (e.g., by preventing the complainant from appearing when the case was called on, by wrongfully arresting and detaining him on a false charge), the Code does not permit the court to cancel the judgment of acquittal on proof of fraud and to restore the case to the file(6). When, however, a Sessions Judge on appeal annuls the conviction of Magistrate for want of jurisdiction and omits to order a re-trial at the time under s. 423, cl. (b), he is not precluded, by virtue of this section, from passing such an order subsequently(7).

Interpolation in judgment after signing and publishing.—No Magistrate can add to or alter the proceedings or judgment in any case after they are signed and published. It is especially irregular when made in the absence of the accused and without notice to him(8). Where a Magistrate after signing and pronouncing judgment in open court, on the same day, enhanced the imprisonment by one day, on the request of the accused so as to make his order appealable, it was held that though the Magistrate acted with the best of motives yet the alteration of the sentence was illegal(9). The same view was taken in another case where the accused was charged with offences under ss. 379 and 75 but was at first tried and sentenced on the first charge alone and thereafter the further charge of previous convictions was inquired into(10). It is most unwarrantable proceeding on the part of the Judge to add a note to

(1) *Emprass v. Mojahur Rahman*, 4 C. W. N. 683.

(2) *Emprass v. Ganeshi*, 23 B. 50.

(3) *In re Umar Hayat*, 2 P. W. R. 1910 Cr.

(4) *In Subba Naidu*, 43 M. L. J. 87—A. I. R. 1912 M. 329.

(5) *Narasimha v. Abdul Gaffoor*, 7 Mys. L. J. 177.

(6) *In re Sinnu Goundan*, 33 M. 2028—15 Cr. L. J. 236.

(7) *In re Ramireddi*, 3 M. 43—2

Weir, 756.

(8) *In re Surendra Nath*, 10 C. W. N. 1062—4 Cr. L. J. 210; *Emprass v. Ganeshi*, 23 B. 50, *Official Receiver v. Ganga Ram*, 25 P. R. 1916 Cr; *Emperor v. Vankatesh*, 12 Bom. L. R. 521.

(9) *Qurban Ali v. Azizuddin*, (1893) A. W. N. 16.

(10) *Emperor v. Mari Parsu*, 42 B. 202—19 Cr. L. J. 279—20 Bom. L. R. 87—44 I. C. 183.

his judgment, by which he tries to throw doubts on the conclusion at which he had arrived on the evidence(1). A Magistrate after passing the sentence and signing it, cannot even alter the date from which sentence is to run(2). Unless it can be shown that there is a legislative enactment giving a power to that effect, cessation by the order of a Magistrate of any criminal proceeding must, until that order is set aside, operate not only as staying the proceedings but as destroying them(3). When a Subordinate Magistrate finds that he has passed an illegal sentence, his proper course is to submit the record to the District Magistrate for action under s. 438, *infra* (4). A Magistrate who omits to pass a sentence of imprisonment in default of payment of fine cannot pass the same subsequently. He must submit the proceedings to the High Court and ask that court to inflict the same(5). But the making of an order for costs where no such order has been previously passed is not an alteration of the previous judgment(6).

Further inquiry.—The terms of this section must be read as controlled by s. 437. Section 437 does not limit the power of a District Magistrate to make further inquiry into a case in which an order of dismissal or discharge may have been passed by a Subordinate Magistrate. There is no bar to a District Magistrate making further inquiry himself into a case in which such order may have been passed by himself(7). But where a District Magistrate has already dealt with a case in revision and decided that there was no cause for interfering with the order of discharge of the accused, he cannot subsequently order further inquiry under section 437. Such an order is an order reviewing the earlier one and is prohibited by this section(8).

Proper procedure.—Where a Magistrate erroneously dismisses an appeal as time-barred or passes an illegal sentence, it is not open to him to review his own order and admit the appeal again; the only course open to him is to submit the case to the High Court for revision(9).

Review of a judgment by a High Court.—See notes above under "Amendment" explained. Neither this section nor section 439 empowers the High Court to revise or review the judgment of one or more of its Judges in a criminal appeal or revision(10). A High Court Judge cannot revise the order of another Judge of the same court(11). The verdict and judgment of a Division Bench of a High Court, coupled with the sentence, in a criminal case, are absolutely final, and as soon

(1) *Emperor v Chatter*, 2 A 33

(2) *Empress v. Sahadat*, Rat Un Cr Cas 801.

(3) *Gajo v Debi*, 72 I C 945=1 Pat. L. R. 97 Cr.=24 Cr. L J 481

(4) *Emperor v. Maung Cho*, 2 L B. R. 43

(5) *In re Dhondi*, 23 Bom. L R 846.

(6) *Nafar Chandra v. Siddhartha*, 47 O. 974

(7) *Bidhu Chandalini v. Moti*, 28 C. 102.

(8) *Nga Than v. Emperor*, 14 L C 765=5 Bur L T. 37=13 Cr. L J 301.

(9) *Emperor v Raghunath*, 6 Bom. L R 860; *Mga E. v. Emperor*, 1 Bur.

L R, 354; *Queen v. Poran Mal*, 23 W. R. Cr. 49, *In re Harilal*, 22 B 949, *In re Dhondi*, 23 Bom. L R 846.

(10) *In re Kunhammad*, 46 M 382, *Empress v. Durga Charan*, 7 A 672, *Empress v. Fox*, 10 B 176 F. B.; *Banwari Lal v. Emperor*, A I. R. 1935 A 466; *In re Gibbon*, 14 O. 42 F B.; *Paras Ram v. Emperor*, 1 O W N 891=26 Cr. L J 543=85 I C. 383=10 O. and A L R. 1328=1 O. W. N. 891=A I R 1925 O 476.

(11) *Kale v. Emperor*, 24 Cr L J 766=45 A 143=74 I. C. 270=A I R 1923 A. 473.

as they have been pronounced and signed by the Judges, the High Court is *functus officio*, and neither the court itself nor any bench of it, has any power to revise that decision or interfere with it in any way(1). So it has been held that the High Court has no power to review an order dismissing an application for revision made by an accused person, and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government(2). But it is competent to a Division Bench of the High Court, which has erroneously discharged a rule on a point of law and a misapprehension of the facts in connection therewith, to review its judgment before it has been signed(3). Even if a single Judge of the High Court has passed an order dismissing an appeal, a Division Bench of the High Court cannot review that order by re-hearing the appeal(4). The High Court will not review its order passed in appeal or revision, even on the ground of discovery of fresh evidence, because such evidence ought to have been produced at the trial(5).

Dismissal for default.—Where a case is disposed of merely for default of appearance, or where an order is made without hearing the accused the High Court may review the same(6). The Bombay High Court in *Empress v. Mahomed Yishun*(7) takes a narrow view with regard to the power to rehear criminal appeals and revision petitions dismissed for default. In *In re Ranga Rao*(8) it was held that if a criminal revision petition is dismissed on account of the non-appearance of the petitioner who has filed it, the High Court is not competent to restore to its file such a petition. Similarly it has been held in another case that if a revision case is dismissed by the High Court for default of payment of printing charges, it is not competent for the High Court to rehear the case or entertain a fresh application for revision(9). Where a criminal appeal is dismissed without reasonable opportunity having been given to the appellant or his counsel of being heard, the court has inherent power to make an order that the appeal should be re heard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the appeal(10). Where, however, an appeal is dismissed in the absence of the appellant and his pleader after giving them a reasonable opportunity of being heard in support of

(1) *In re Gibbons*, 14 C. 42 at p. 48; *Dahu v. Emperor*, A. I. R. 1933 C. 870 = 61 C 155 = 145 I. C. 937 = 38 C W. N. 25 = 34 Cr. L. J. 1100 = 1933 Cr. C. 1481.

(2) *Empress v. Durga Charan*, 7 A. 672; *Reg v. Godai Raoul*, 5 W. R. Cr.

(3) *Emperor v. Kale*, 45 A. 143 (145) A. single Judge of the High Court has no power to alter or revise an order passed by him in revision. *In re Soma Naidu*, 47 M. 428 (431).

(4) *Amodini v. Darsan*, 38 C. 828.

(5) *In re Kunhammad*, 46 M. 382.

(6) *Empress v. Chimbaz*, Rat. Un.

Cr. Cas. 458; *Emperor v. Kale*, 45 A. 143.

(7) *Rajjab Ali v. Emperor*, 46 C. 60; *In re Kunhammad*, 46 M. 382 (402), 403; *In re Soma Naidu*, 47 M. 428 (484) = 46 M. L. J. 456 = 34 M. L. T. 218 = 26 Cr. L. J. 370 = 64 I. O. 850 = 20 L. W. 18 = A. I. R. 1924 M. 640; *Kishen Singh v. Girdhari*, 23 Cr. L. J. 750 = 69 I. C. 638.

(8) 4 B. 101.

(9) 23 M. L. J. 371.

(10) *Appayya Venkatappayya*, 44 M. L. J. 27 = 21 Cr. L. J. 746 = 23 Cr. L. J. 746 = 69 I. C. 634 = 17 L. W. 23 = (1923) M. W. N. 821 = (1923) A. I. R. (M.) 276.

(11) *Mohammad Sadiq v. Crown*, 7 Lah. L. J. 108 = 26 Cr. L. J. 1169 = A. I. R. 1925 Lah. 355 = 84 I. C. 593.

the appeal, the dismissal must be taken to be under s. 421 and is not open to review(1). Once a criminal appeal has been dismissed, another appeal cannot be heard at the instance of the same appellant on the ground that on the previous occasion owing to some mistake, counsel did not appear for the appellant(2).

Section 561-A.—Section 561-A of the Code (as amended) does not confer upon the High Court any new powers but merely declares that such inherent powers as the court may possess shall not be deemed to be limited or affected by anything contained in the Code. The High Court has therefore no power to alter or review its own judgment in a criminal case, once it has been pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits, or to correct a clerical error; nor is there any conflict between that section and section 369(3).

Enhancement of sentence.—The exception in s. 430, as regards the cases provided for in s. 417 and Chap. XXXII, covers the powers of enhancement of sentence. Where after a single Judge has disposed of a Jail appeal preferred by an accused, the Local Government applies for enhancement of the sentence, the High Court in exercising the power of enhancement does not in any way violate the provisions of this section inasmuch as the provisions of this section should be read subject to the provisions of s. 430. Further, the jurisdiction to enhance can only be exercised by a Bench and not by a Single Judge. Consequently, when a Single Judge disposes of a jail appeal, the order cannot be taken to have been made in the exercise of the jurisdiction of the High Court under Chap. XXXI, so far as the . . . of
An order of enhancement of sentence
given to the accused of being
null and void *ab initio*, as being without jurisdiction, and does not bar the court from dealing with the matter a second time(5).

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate's judgment. Magistrate shall record the following particulars:—

(a) The serial number of the case;

(1) *Nazar Mohammad v. Hara Singh*, 27 Cr L J 23=26 P L R 616 =91 I. C 55=2 L C 103=A. I R. 1926 L 196

(2) *In re Arumuga* 91 I C. 1000=32 L W 56=1926 M. W. N. 147=27 Cr L J 184=50 M L J. 51=A. I R 1926 M. 420

(3) *Raju v. Crown*, 10 Lah. 1=10 A. I. Cr. R. 494=29 Cr. L J 609=110 I C. 221=A. I R 1928 Lah 463 (overruling *Mathra Das v. Crown*, 9 Lah. L J 42). See *Asst. Govt. Advocates v. Ramdas Math* A. I R. 1931 P. L. R. 101

(4) *Emperor v. Abdul Qayum*, 55 A. 715=34 Cr L J 1205=146 I C. 157=A. I R. 1933 A. 485 In *Emperor v. Kallu*, 27 A. 92, it was held that a Judge who passed an order on a jail appeal to the effect that no appeal lay and that no sufficient ground appeared for interference in revision was not precluded from entertaining the application for revision.

- (b) The date of the commission of the offence ;
- (c) The name of the complainant (if any);
- (d) The name of the accused person, and (except in the case of an European British subject) his parentage and residence ;
- (e) The offence complained of or proved ;
- (f) The plea of the accused and his examination (if any) ;
- (g) The final order ;
- (h) The date of such order ; and
- (i) In all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

Scope of the section.—In view of the provisions contained in this section, Presidency Magistrates are not bound to write judgments complying with the requirements of s. 367. All that is required is that they should record certain particulars and in case of conviction and sentence of imprisonment or fine exceeding Rs. 200, a brief statement of the reasons for the conviction(1). Clause (i) which a Presidency Magistrate must follow when he awards imprisonment or a fine exceeding two hundred rupees, is not complied with by merely recording evidence and saying that the case is proved. He must give his reasons in a manner that discloses a critical examination of the evidence and the grounds for rejecting the defence(2). A sentence of fine of less than Rs. 200, with an order for imprisonment in default of payment of the fine of less than Rs. 200, is not a sentence of imprisonment within the meaning of the section(3). The meaning of the section is that where the offence is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons so as to enable the party to bring the matter upto the court. But in petty cases, in which a less fine only is imposed as a substantive sentence, the decision may be recorded shortly(4).

Special privilege of not being bound to state reasons for conviction.—It is the privilege of Presidency Magistrates that they are exempted from the duty of recording reasons for conviction in cases where they merely impose a fine not exceeding Rs. 200 as cl.(i) speaks of recording reasons only in cases where the Magistrate inflicts a punishment of imprisonment or imposes a fine exceeding Rs. 200(5). A Presidency Magistrate, inflicting a fine below Rs. 200, need not, in his order, make any brief statement giving reasons for the conviction; but, in the event of his delivering a written judgment in such a case, he should

(1) *Bishunpada v. Emperor*, 97 I. C. 651—80 C. W. N. 951—27 Cr. L. J. 1181—1925 A. L. 1103.

(2) *Shamlal v. Emperor*, 36 C. W. N. 852—A. I. R. 1932 C. 635—1932 Cr. C.

632—139 I. C. 244—33 Cr. L. J. 729

(3) *Mateeram v. Belaseerani*, 14 C. 174.

(4) *Ibid* Per Petheram, C. J.

(5) (1926) M. W. N. LXXX.

come to proper findings in support of the conviction in the same(1).

Non compliance.—Omission to record some of the particulars required by this section in the usual way in the printed form is only a mere irregularity and not an illegality which vitiates a trial(2). But not recording the particulars required to be recorded by this section makes an order meaningless and is seriously to be condemned(3). Merely recording the order of conviction without recording who is the complainant or what was the offence, what was the date of commission, etc., amounts to an order without complying with the provisions of this section and is to be severely condemned(4).

Breach of contract by workmen—In the trial of a case under the Workmen's Breach of Contract Act (XIII of 1859) the Magistrate is not bound to frame his record in accordance with the provisions of this section. It is doubtful whether a proceeding under the first clause of section 2 and under section 3 of Act XIII of 1859 is a criminal proceeding. There is no offence committed and there is no accused. The provisions of this section are, therefore, inapplicable to a case of this nature(5).

Clause (f).—In a non-appealable case tried by a Presidency Magistrate the column provided for recording "the plea of the accused and his examination if any" in the form prescribed by this section, must be filled up but no hard and fast rule is contemplated as to how that should be done. The mere entry of the word "denies" in the column may be sufficient in a case in which when the plea of the accused was taken and again when he was examined he merely denied having committed the offence(6). But it is the duty of the Magistrate to record not only the plea of the accused but also the substance of his examination if he is examined under section 342 of the Code(7).

Clause (g).—This section requires that in a case in which the accused is sentenced to imprisonment a Presidency Magistrate shall record a brief statement of the reasons for the conviction. It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reasons for the conviction(8). The law does not demand a full and complete statement of reasons, but only a brief one. But the Magistrate should state the reasons for conviction in such a manner that the High Court on revision may judge whether there are sufficient materials before him to support the conviction(9). A mere statement to the effect

(1) *Nishikanta v Behari*, 60 C 656 = A. I. R. 1931 C 532 = 37 C. W. N. 368 = 1933 Cr. G. 891 = 145 I. C. 600 = 34 Cr. L. J. 1059.

(2) *Bishunpada v. Emperor*, 97 I. C. 651 = 30 C. W. N. 981 = 27 Cr. L. J. 1131 = 1926 C. 1109.

(3) *Prabodh Chandra v Calcutta*

868 = 1932 Cr. C. 10 = 33 Cr. L. J. 264 = 136 I. C. 185 = 17 A. I. R. 399.

(4) *Amarnath Das v Abdul Rahim*.

(7) *Ismail Shah v Emperor*, 27 Cr. L. J. 110 = 91 I. C. 542 = 5 A. I. R. 385 = A. I. R. 1926 C. 692.

(8) *Natabar v Provash*, 27 C. 461.

(9) *Emaman v. Emperor*, 31 C. 983.

"I believe the evidence for the prosecution and the evidence of the complainant, and I convict the accused" is not a statement of reasons(1). Where the notes of the evidence taken by the Magistrate did not afford sufficient materials upon which the prisoner could be legally convicted, it was held that the conviction must be set aside, notwithstanding the provisions of section 537(2). Even, in a non-appealable case, the Presidency Magistrate should state his reasons so as to enable the High Court in revision to judge the sufficiency of material before the Magistrate to support the conviction(3). Honorary Magistrates in the Presidency towns are as Presidency Magistrates governed by this clause and are bound to record the reasons for the conviction, where the sentence inflicted is imprisonment(4). The omission to record reasons is only an irregularity and where it has not prejudiced the accused, the High Court will not interfere in revision(5). But the omission to do so in a case where no record is made of the evidence, which, therefore, is not available to the High Court, is a grave irregularity which in most cases would be sufficient ground for interference(6). But where the reports submitted under s. 441 of the Code contain good grounds for the decision they may be considered as setting forth the reasons for the conviction, and if no substantial failure of justice has resulted, the High Court will not interfere(7). Section 441 is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given, but to enable them to supply reasons where in exercise of their privilege under this section they have given no reasons at all(8).

371. (1) On the application of the accused a copy of the judgment, or when he so desires, a translation in his own language, if practicable, or in the language of the court, shall be given to him without

Copy of judgment, etc., to be given to accused on application.

delay. Such copy shall, in any case other than a summons-case, be given free of cost.

(2) In trials by Jury in a Court of Session, a copy of the heads of the charge to the Jury shall, on the application of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

(1) *Emperor v. Shankar*, 17 Bom. L. R. 890=16 Cr. L. J. 771=81 I. C. 371.

(2) *Yacob v. Adamson*, 13 C. 272; *Toolsey v. Emperor*, 8 C.W. N. 557;

L. J. 602; *In re Dervish Hussain*, 46 M. 253=17 L. W. 18.

(3) *In re Thurman*, 20 L. W. 330.

(4) *In re Dervish Hussain*, 46 M. 259=17 L. W. 18=71 I. C. 212=44 M. L. J. 84=1923 M. 185=32 M. L. T. 100=24 Cr. L. J. 81.

(7) See the cases cited in the last note.

(8) *Starnammal v. Munusicami*, 122 I. C. 800=(1929) M. W. N. 6931=3

Court fee on copy of judgment appealed against.—The court-fee is remitted on the copy of a judgment, in an appeal from a conviction in a warrant-case, when given under this section(1).

Right of prosecutors to obtain copies.—All prosecutors, whose charges are dismissed, are affected, by the order of discharge, and are, therefore, entitled to obtain copies of the order made by, and of the depositions taken before, the Magistrate(2).

372 The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the court and the accused so requires, a translation thereof into the language of the court shall be added to such record.

373. In cases tried by the Court of Session, the court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

Court of Session
to send copy of find-
ing and sentence to
District Magistrate.

Cr. L. J. 460—A. I. R. 1930 Mad. 225—
Ind. Rul. (1930) Mad. 416.

(1) *Empress v. Haghba*, Rat. Un.

Cr. Cas. 364.

(2) *Bank of Bengal v. Dinonath*, 8
C. 106—10 C. L. R. 190.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR
CONFIRMATION.

374. When the Court of Sessions passes sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death
to be submitted by
Court of Sessions.

Reference for confirmation of death sentence.—In a reference for confirmation of death sentence the High Court must satisfy itself that the finding of fact arrived at is justified by the evidence on record(1). If the evidence in a case affords such a degree of certainty of the guilt of the accused as is mentioned in s. 3 of the Evidence Act, the sentence including that of death must be based on the facts found proved by howsoever little the proof of them exceeds the standard stated in the section, otherwise the accused must be acquitted and the Judge or Magistrate contradicts himself if he says that an accused person is proved guilty but should be lightly punished because the proof of the guilt is weak(2). A High Court may decline to confirm a death sentence when it is of opinion that it would be wrong and improper that the sentence should be carried out(3). Ordinarily, however, in cases of deliberate murder the capital sentence should be confirmed(4). The High Court will not, of course, confirm the sentence unless it is satisfied on both the facts as well as law applicable to the case that the conviction is right(5).

Privy Council appeal.—Where the High Court confirms the sentence on a reference made by a Court of Sessions under this section, or where the Judge disagreeing with the verdict of the Jury refers the case to the High Court which convicts and sentences the accused on such reference, the jurisdiction exercised by the High Court is of an appellate character and the order or sentence can in no sense be said to be made, "in the exercise of original criminal jurisdiction." In such cases where there is no right of appeal granted by the Letters Patent or by the Privy Council *the accused may proceed direct without an intermediate certificate to His Majesty for leave or case*(6).

(1) *Arshed Ali v. Emperor*, 27 Cr. L. J. 378=92 I. C. 820=30 C. W. N. 150.

(2) *Dadi v. Emperor*, 27 Cr. L. J. 731=95 I. C. 53=1916 Nag 368.

(3) *Madho v. Emperor*, 96 I. C. 507=22 N. L. R. 101=27 Cr. L. J. 935=1916 Nag 461.

(4) *Madaru v. Emperor*, A. I. R. 1923 O. 221=5 O. W. N. 22=107 I. C.

177=23 Cr. L. J. 230=9 A. I. Cr. R. 438

(5) *Queen v. Abdul*, Rat. Un. Cr. Cas. 710; *Emperor v. Daji*, 17 Bom. L. R. 1072; *Empress v. Chatradhari*, 2 O. W. N. 49; See *Amode Ali v. Empress*, 68 C. 1223.

(6) *Rahman v. Emperor*, 14 Pat. 318.

375. (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

Power to direct further inquiry to be made or additional evidence to be taken.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of Jurors or Assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such court.

The High Court has power itself to make a further inquiry as to take additional evidence. In the case noted, a confession rejected by the Sessions Judge was admitted by the High Court(1). In another case the Punjab Chief Court admitted further evidence and made an inspection of scene of crime(2). The High Court when recording further evidence under this section can dispense with the presence of the accused especially where the additional evidence is recorded by itself(3). But in deciding an appeal against a death sentence and in confirming that sentence a High Court cannot test the credibility of the witnesses called at the trial by reference to the statements made by such witnesses to the police and entered in the police diary and treated what was thus entered as evidence for that purpose(4).

376. In any case submitted under section 374, whether tried with the aid of Assessors or by Jury, the High Court—

Power of High Court to confirm sentence or annul conviction.

(a) May confirm the sentence, or pass any other sentence warranted by law, or

(b) May annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a

(1) *Empress v. Basvanta*, 25 B. 168.

(2) *Bhagwan Kaur v. Emperor*, 16 P. W. B. 1911 Cr.=12 Cr. L. J. 412=11 I. C. 596.

(3) *Emperor v. Tirumal*, 24 M. 523.

(4) *Dal Singh v. Emperor*, 44 C. 876 =39 J. C. 311=15 A. L. J. 475=1 Pat. L. W. 661=19 Bom. L. R. 510=21 C. W. N. 818=26 C. L. J. 18=6 L. W. 71=22 M. L. T. 81=(1917) M. W. N. 522=18 Cr. L. J. 471 P. C.

new trial on the same or an amended charge,
or

(c) May acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Death reference : Power of High Court.—In a death reference under s. 374 the powers of the High Court are not limited as they are ordinarily limited in the case of an appeal from a trial held by a Jury(1). In a confirmation case the High Court has power under this section to go into questions of fact and disturb the unanimous verdict of the Jury approved of by the trial Judge. As a matter of practice, however, it will not generally allow the verdict to be attacked arbitrarily, it being necessary for the convict to show *prima facie* that the verdict is unsupported by evidence(2). It is not open to the convict to attack the verdict of the Jury merely on the ground that the Jury should not have believed the evidence nor that the evidence was insufficient, provided there appear sufficient grounds for the verdict, but he must attack the sentence on the ground that the evidence was irrelevant or improperly admitted, or that it is extremely inadequate so much so that it was the duty of the trial Court to tell the Jury that there was no case against the accused(3). The questions of misdirection of the Jury are of less importance in a case of reference under section 374 for in a case of reference the High Court has to come to its own independent conclusion as to the guilt or innocence of the accused person independently of the verdict of the Jury or of the opinion of the Judge(4). The High Court will undoubtedly interfere with the verdict if it is perverse or if evidence has been improperly admitted or excluded, or if there is a misdirection by the Judge(5). Where there has been a misdirection in the summing up to the Jury the conviction and sentence should be set aside and a re-trial ordered(6).

Whole case is re-opened.—Where a prisoner has been sentenced to death even though the conviction was bad on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law(7). It is open to the High Court to come to the conclusion that the finding of the Jury was not justified by the evidence. But the court has not to deal with the case merely on the paper book. It should attach proper weight to the

(1) *Emperor v. Panchu*, 82 Cr. L. J. 190—128 I. C. 811—34 C. W. N. 1154—A. I. R. 1931 C. 178.

(2) *Gul v. Crown*, 15 S. L. R. 103—23 Cr. L. J. 33 F. D.—64 I. C. 657.

(3) *Ibid.*

(4) *Hazrat v. Emperor*, 47 C. L. J. 240—10 A. I. Cr. R. 259—32 C. W. N. 845—22 Cr. L. J. 546—109 I. C. 482.

(5) *Gul v. Crown*, 15 S. L. R. 103—

23 Cr. L. J. 33 F. D.—64 I. C. 657.

(7) *Queen v. Jaffir Ali*, 19 W. R. 57; *Empress v. Chitradhari*, 2 C. W. N. 49; *Emperor v. Daji*, 17 Bom. L. R. 1072—16 Cr. L. J. 818—31 I. C. 994.

conclusions of the Judge and Jury who had the advantage of seeing the witnesses in the box and noticing the development of the prosecution and defence cases(1). But if there is no sufficient evidence to warrant a conviction, the High Court has an obligation to say so and acquit the accused(2). In a reference under this section for confirmation of a sentence of death passed by a Sessions Judge, the High Court must be satisfied that the finding of fact arrived at by the Jury is justified on the evidence on the record(3). When in a reference under section 374 the charge to Jury is found defective and there is no chance of further evidence coming to light in case of a re-trial, the question is decided whether there is to be a re-trial or acquittal; it is whether, if the Jury were properly directed were to convict the accused again, it would be prudent to sustain the conviction on the evidence on a second reference(4).

Trial of several persons by a Jury.—Section 415 of the Code restricts appeals in Jury cases as a general rule to matters of law. This restriction, however, does not apply to references under section 374, and sub-sec. (2), which was added to section 415 in 1923, provides that where in a case tried by a Jury any person is sentenced to death, any other person convicted in the same trial may appeal on a matter of fact as well as on a matter of law(5).

Question of jurisdiction.—Where a Division Court of the High Court at Allahabad ordered a Magistrate who had refused to inquire into a charge of murder on the ground that he had no jurisdiction to inquire into the charge, and the Magistrate inquired into the case and committed the prisoner to the Court of Session, by which court the prisoner was convicted and sentenced to death, it was held, on the case being referred to a Full Bench of the High Court for confirmation, that in determining whether the sentence should be confirmed, the Full Bench was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a court of competent jurisdiction(6).

Commutation of sentence.—Where the hanging of a convict might not, owing to an aperture in the neck communicating with the larynx, result in his death, and where it was also uncertain whether a untoward or distressing accident, such as the complete severance of the head, could take place, the High Court commuted the sentence of death into one of transportation for life(7). As the law stands in India where the alternative sentences of death and transportation are prescribed for

(1) *Emperor v. Panchu*, 32 Cr. L. J.

2116—27 Cr. L. J. 378—92 I. C. 890; *Empress v. Abdul Razaq*, Ind. Un. Cr. C. 710.

(2) *Emperor v. Asraf Ali*, 37 C. W. N. 895—A. I. R. 1933 G. 425—143 I. C. 273—1933 Cr. C. 611—34 Cr. L. J. 823—20 A. I. Cr. R. 20.

(3) *Emperor v. Hashbhar*, 13 Pat. L. T. 440—A. I. R. 1931 Pat. 804—1033 Cr. C. 774—140 I. C. 816—34 Cr. L. J. 83; *Empress v. Chitradhari*, 2 C. W. N. 42.

(4) *Emperor v. Sarimukh*, 2 A. 218.

(5) *In re Boodhoo*, 2 C. L. R. 210.

(6) *Emperor v. Asraf Ali*, 37 C. W. N. 895—A. I. R. 1933 G. 425—143 I. C. 273—1933 Cr. C. 611—34 Cr. L. J. 823—20 A. I. Cr. R. 20.

(7) *Arshed Ali v. Emperor*, 30 C. W. N. 895—A. I. R. 1933 G. 425—143 I. C. 273—1933 Cr. C. 611—34 Cr. L. J. 823—20 A. I. Cr. R. 20.

new trial on the same or an amended charge,
or

(c) May acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Death reference : Power of High Court.—In a death reference under s. 374 the powers of the High Court are not limited as they are ordinarily limited in the case of an appeal from a trial held by a Jury(1). In a confirmation case the High Court has power under this section to go into questions of fact and disturb the unanimous verdict of the Jury approved of by the trial Judge. As a matter of practice, however, it will not generally allow the verdict to be attacked arbitrarily, it being necessary for the convict to show *prima facie* that the verdict is unsupported by evidence(2). It is not open to the convict to attack the verdict of the Jury merely on the ground that the Jury should not have believed the evidence nor that the evidence was insufficient, provided there appear sufficient grounds for the verdict, but he must attack the sentence on the ground that the evidence was irrelevant or improperly admitted, or that it is extremely inadequate so much so that it was the duty of the trial Court to tell the Jury that there was no case against the accused(3). The questions of misdirection of the Jury are of less importance in a case of reference under section 374 for in a case of reference the High Court has to come to its own independent conclusion as to the guilt or innocence of the accused person independently of the verdict of the Jury or of the opinion of the Judge(4). The High Court will undoubtedly interfere with the verdict if it is perverse or if evidence has been improperly admitted or excluded, or if there is a misdirection by the Judge(5). Where there has been a misdirection in the summing up to the Jury the conviction and sentence should be set aside and a re-trial ordered(6).

Whole case is re-opened.—Where a prisoner has been sentenced to death even though the conviction was based on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law(7). It is open to the High Court to come to the conclusion that the finding of the Jury was not justified by the evidence. But the court has not to deal with the case merely on the paper book. It should attach proper weight to the

(1) *Emperor v. Panchu*, 92 Cr. L. J. 190=133 I. C. 811=34 C. W. N. 1154= A. L. R. 1931 C. 178.

(2) *Gul v. Crown*, 15 S. L. R. 103= 23 Cr. L. J. 33 F. B.=64 I. C. 657.

(3) *Ibid.*

(4) *Hazrat v. Emperor*, 47 C. L. J. 240=10 A. I. Cr. R. 259=32 C. W. N. 345=29 Cr. L. J. 546=109 I. C. 482.

(5) *Gul v. Crown*, 15 S. L. R. 103=

7 N. =46
A. L. R. 318.

(7) *Queen v. Jaffir Ali*, 19 W. R. 57; *Empress v. Chatradhari*, 2 C. W. N. 49; *Emperor v. Daji*, 17 Bom. L. R. 1072=16 Cr. L. J. 618=31 I. C. 994.

conclusions of the Judge and Jury who had the advantage of seeing the witnesses in the box and noticing the development of the prosecution and defence cases(1). But if there is no sufficient evidence to warrant a conviction, the High Court has an obligation to say so and acquit the accused(2). In a reference under this section for confirmation of a sentence of death passed by a Sessions Judge, the High Court must be satisfied that the finding of fact arrived at by the Jury is justified on the evidence on the record(3). When in a reference under section 374 the charge to Jury is found defective and there is no chance of further evidence coming to light in case of a re-trial, the question in deciding whether there is to be a re-trial or acquittal is whether, if the Jury upon proper direction were to convict the accused again, it would be possible to sustain the conviction on the evidence on a second reference(4).

Trial of several persons by a Jury.—Section 418 of the Code restricts appeals in Jury cases as a general rule to matters of law. This restriction, however, does not apply to references under section 374, and sub-sec. (2), which was added to section 418 in 1923, provides that where in a case tried by a Jury any person is sentenced to death, any other person convicted in the same trial may appeal on a matter of fact as well as on a matter of law(5).

Question of jurisdiction.—Where a Division Court of the High Court at Allahabad ordered a Magistrate who had refused to inquire into a charge of murder on the ground that he had no jurisdiction to inquire into the charge, and the Magistrate inquired into the case and committed the prisoner to the Court of Session, by which court the prisoner was convicted and sentenced to death, it was held, on the case being referred to a Full Bench of the High Court for confirmation, that in determining whether the sentence should be confirmed, the Full Bench was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a court of competent jurisdiction(6).

Commutation of sentence.—Where the hanging of a convict might not, owing to an aperture in the neck communicating with the larynx, result in his death, and where it was also uncertain whether no untoward or distressing accident, such as the complete severance of the head, could take place, the High Court commuted the sentence of death into one of transportation for life(7). As the law stands in India where the alternative sentences of death and transportation are prescribed for

(1) *Emperor v. Panchu*, 32 Cr. L. J. 190=128 I.C. 811=34 C.W.N. 1151=Ind. Rul. (1931) Cal. 107=A.I.R. 1931 Cal. 178=1931 Cr. Cas. 242; *Emperor v. Ashraf Ali*, 37 C. W. N. 595=A. I. R. 1933 C. 426=143 I. O. 173=1933 Cr. O. 624=34 Cr. L. J. 533=20 A. I. Cr. R. 20.

(2) *Emperor v. Asraf Ali*, 37 C. W. N. 595=A. I. R. 1933 C. 426=143 I. O. 173=1933 Cr. O. 624=34 Cr. L. J. 533=20 A. I. Cr. R. 20; *Panchu v. Emperor*, 111 I. C. 885=32 C. W. N. 702=29 Cr. L. J. 833.

(3) *Ashraf Ali v. Emperor*, 30 C.W. Cr. P. C.—87

N 166=27 Cr. L. J. 378=92 I. C. 890; *Empress v. Abdul Razak*, Rat. Un. Cr. C. 710.

(4) *Emperor v. Asraf Ali*, 37 C. W. N. 595=A. I. R. 1933 C. 426=143 I. O. 173=1933 Cr. O. 624=34 Cr. L. J. 533=20 A. I. Cr. R. 20.

(5) *Emperor v. Sarmukh*, 2 A. 218.

(7) *In re Boodhoo*, 2 C. L. R. 215.

murder, the fact that the accused had the capital sentences suspended over their heads for nearly six months is a matter for the consideration of the Judge of the High Court who finally disposes of the appeal, and he ought not to confirm the sentence of death which might have been rightly passed by the Sessions Judge in the first instance, unless he personally thinks that such sentence should be carried out at the time final orders are passed by him, and delay such as that mentioned above is a sufficient reason for refraining from imposing the extreme penalty(1).

Conviction for any other offence.—An accused person who has been acquitted of the charge of murder may be convicted under section 201 of the Penal Code for causing disappearance of evidence of the murder when also tried for that offence, although the Sessions Judge omitted to give any finding upon the minor charge(2). But in one case it has been held that the High Court, as a court of reference, has no power under s. 288, to alter a conviction for murder into one for culpable homicide not amounting to murder, unless there is a petition of appeal although with the reference(3).

Re-trial—In a reference under section 374, the High Court may order a re-trial where there has not been a proper trial in the case(4), or where the evidence taken by the Sessions Judge is incomplete and further evidence is necessary before judgment can be properly pronounced against the accused(5), or where the accused is undefended in the Sessions Court(6).

377. In every case so submitted, the confirmation of the sentence or any new sentence or order passed by the High Court, shall, when such court consists of two or more judges, be made, passed and signed by at least two of them.

Confirmation or new sentence to be signed by two Judges.

378. When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure in case of difference of opinion.

Procedure in case of difference of opinion.—When a sentence of death is referred to the High Court for confirmation and the Judges differ the matter should be referred to a third Judge, under ss. 378 and

(1) *Autor Singh v. Emperor*, 17 O. W. N. 1213

(2) *Muhammad Shah v. Crown*, 8 P. R. 1913 Cr.

(3) *Reg v. Balapa*, 1 B. 639.

(4) *Emperor v. Rajab Ali*, 103 I. O. 790—31 C. W. N. 881—46 O. L. J. 31—28

Cr. L. J. 742—A. I. B. 1927 Cal. 631—8 A. I. Cr. R. 316.

(5) *Emperor v. Daulat*, 6 C. W. N. 921.

(6) *Emperor v. Mohar Ali*, 19 O. W. N. 556—16 Cr. L. J. 481—29 I. O. 321—21 O. L. J. 495.

429 and should not be decided, according to the opinion of the Judge for acquittal(1).

379. In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session.

380. Where proceedings are submitted to a Magistrate of the first class or a Sub-Divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

Procedure in cases submitted by Magistrate not empowered to act under s. 562.—This section provides a procedure to be followed when a Magistrate not empowered under s. 562 is of opinion that a first offender should be dealt with under the provisions of that section. A Magistrate to whom proceedings are submitted as provided by section 562, may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him(2). When, however, an accused person comes before a Magistrate under this section, he can be treated only as a convicted person and the Magistrate acting under this section is not empowered to set aside the conviction already recorded by the referring Magistrate, and acquit him. The order which a Magistrate is permitted to pass under this section can only be such an order as can be passed upon a convicted person(3). A District Magistrate to whom a case is sent by a second class Magistrate cannot send back to the Subordinate Magistrate even as if the case had

Appeal.—An appeal from the conviction and sentence passed by a Magistrate of the first class under this section, lies to the Court of Sessions and not to the District Magistrate(5).

(1) *Empress v. Hundu*, (1897) A. W. N. 125; *Cl. Empress v. Debi Singh*, (1886) A. W. N. 275.

(2) *Mi Tji v. Mi Kin*, 2 U. B. R. (1914—1916) 55; *Morali v. Emperor*, 4 L. B. R. 277.

(3) *Pub. Pros. v. Gurappa Naidu*, 27 M. G. A. I. R. 1923 M. 738—(1923)

M. W. N. 716—65 M. L. J. 405—39 M. L. W. 428—145 I. C. 639—54 Cr. L. J. 1045—1933 Cr. C. 1312.

(4) *Emperor v. Abdul*, 4 L. B. R. 150—7 Cr. L. J. 419.

(5) *Emperor v. Bhimappa*, 17 Bom. L. R. 895.

CHAPTER XXVIII.

OF EXECUTION.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Time within which the sentence is to be executed: Bengal and Assam.—In Bengal and Assam, the date named by the Sessions Court, on its warrant for the execution of a sentence of death, shall not be less than fourteen, or more than 21 days from the date of the issue of such warrant(1).

Madras—In Madras, the sentence is not to be executed until the 15th day after receipt of the warrant from the Court of Sessions after confirmation(2).

Bombay.—In the Presidency of Bombay, on the receipt of a confirmation by the High Court of a capital sentence, it should be specified in the warrant addressed to the jailor, that the execution is not to be carried out until a day therein named, that shall be at least fourteen days from the date of receipt of the order of confirmation(3).

382. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Capital sentence on pregnant woman.—Where a woman, who is pregnant, is convicted of murder, capital sentence should be passed on her, notwithstanding her pregnancy, although the execution of the sentence should be deferred, and although it may be a reason for commutation of the sentence by the High Court(4).

Power of postponing the execution of a sentence of death.—The High Court is the only judicial tribunal in which the law has vested the power of postponing the execution of a sentence of death passed and confirmed on a woman found to be pregnant(5). In this case the Sessions Judge, on learning of the pregnancy of a prisoner whose sentence

(1) Cal. G. R. & C. O. Page 39; Assam Gazette, 1875, P. 355, G. R. & C. O.

(2) See G.O. dated, 23rd May 1873.

(3) Bom. Cir. O. No. 882 of 1869.

(4) *Malali v. Emperor*, 84 P. R. 1878 Cr.

(5) *Anonymous*, 2 Weir. 441.

of death was confirmed by the High Court, directed that the sentence should be suspended until forty days after her delivery, and it was held that the order was *ultra vires*, and that, in the exigencies of the situation, he should have suspended the execution of the sentence of death until such time as the order of High Court could be obtained.

383. Where the accused is sentenced to transportation or imprisonment in cases other

Execution of sentences of transportation or imprisonment in other cases.

than those provided for by section 381, the court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Sentence when to commence.—A sentence of imprisonment ought to commence from the time that the sentence is passed unless there is some lawful reason for ordering it to commence at some future period. A Magistrate has no power to postpone the execution of the sentence at the request of the accused(1). The antedating of a sentence of imprisonment is contrary to the spirit of ss. 383 and 397(2). A sentence of imprisonment for the time passed in the lock-up is illegal, but one until the rising of the court is legal(3). It is illegal to sentence an accused person to suffer imprisonment in a police lock-up(4).

Prisoner admitted to bail, pending appeal.—Where after sentencing the prisoner, the Magistrate admitted him to bail, so that he may have the means of appealing, such admission to bail did not make the sentence one to commence at a future date, and did not make it therefore illegal(5).

High Court's power to commit prisoner to mufassil jail.—The jurisdiction which the High Court exercises in hearing a case submitted to it under s. 307 is not its original criminal jurisdiction, but it bears the case as a court of reference in the exercise of the jurisdiction vested in it by cl. 28 of the Letters Patent, and it has got power to commit an accused to a jail outside its original jurisdiction, but within its jurisdiction as a court of reference(6). But it is illegal to confine a person in a jail other than that mentioned in the warrant(7).

384. Every warrant for the execution of a

Direction of warrant for execution.

sentence of imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be, confined.

Signatures on warrants.—A warrant of commitment should be signed and not stamped(8). An officer in charge of a jail would be

J. 10=7 L. B. R. 62=22 I. C. 154.

(5) *In re Okhey Kumar*, 7 C. L. R. 393.

(6) *In re Harace Lyall*, 29 C. 286.

(7) *Shamsonnessa v. Anne Lee*, 11 C. 527.

(8) *Sulramanya Aiyar v. Queen*, 8 Mad. 395.

justified in refusing to receive or detain a prisoner in jail on a warrant to which is affixed a signature by means of a stamp(1).

Definite period of imprisonment should be stated.—A definite period of imprisonment must be stated. Thus, an order directing an accused "to be imprisoned until he gives security" is bad(2).

Confinement in jail other than that mentioned in the warrant.—Where a Sheriff's Officer delivered over a judgment-debtor, who was duly committed to the Presidency Jail, Calcutta, to the officer in charge of the Alipore Jail, the Calcutta High Court held that the confinement in the Alipore Jail was illegal(3).

Warrant with
whom to be lodged.

385. When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

386. (1) Whenever an offender has been sentenced to pay a fine, the court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say it may—

- (a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender;
- (b) issue a warrant to the Collector of the district authorising him to realise the amount by execution according to civil process against the moveable or immoveable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant unless for special reasons to be recorded in writing, it considers it necessary to do so.

(2) The Local Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the court issues a warrant to the Collector under sub-section (1), clause (b), such warrant shall

(1) Rules and Orders, Lahore High Court, Vol 11, p 141.

(2) *Alaulamdi v. Taripulla*, 80 C. 644.

(3) *Shamshonnessa v. Anne Love*, 11 C. 527.

be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly :

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

Amendment.—This section has been substituted, by s. 102 of Act XVIII of 1923 for the old s. 386 which enacted as follows:—

"386. Whenever an offender is sentenced to pay a fine the court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of the payment of fine, the offender shall be imprisoned."

The important changes are :

(1) The amendment makes immoveable property as well as moveable property liable to sale as it is not thought reasonable that immoveable property should be allowed to escape.

(2) Before the amendment, liability to fine did not cease even after the full term of imprisonment in default has been undergone by the offender ; the present section ordinarily prohibits the recovery of fine in such cases, and allows it only on special reasons.

(3) Formerly there was no provision for investigating claims to attached property. Sub-section (2) provides for summary determination of such claims.

(4) Sub-section (3) provides a means for execution of a warrant of a criminal court.

Scope of the section.—The condition precedent to the issue of a distress warrant under this section is the conviction of and sentence to pay fine by the person proceeded against(1). This section does not contemplate any sort of inquiry or order. It is as a matter of fact merely same action by the court itself consequent on some previous order. The court, for instance, in the case of a conviction for hurt may impose a fine of Rs. 25 or one month's simple imprisonment and the person so sentenced may refuse to pay, the court will send the recusant person to prison and then take action under this section to levy the amount of fine from his property. The order directing a warrant to issue is merely a consequential and ancillary order and as such cannot be attacked either in appeal or revision(2). The provisions of this section should be strictly construed(3).

Statutory application of provisions as to levy of fine.—The provisions of the Code in respect of levy of fines apply to all fines

(1) *Abdul Majid v. N. L. Afukeryi*, 10 Pat. L. T. 194.

Blind 57.

(2) *Yusufally v. Emperor*, 25 Cr. L. J. 1263=83 I. C. 1007=A. I. R. 1915

(3) *Secretary of State of Sengam-mal v. Sengammal*, 18 Cr. L. J. 1=36 I. C. 833=4 L. W. 513=(1917) 21 W. N. 105.

imposed under any Act, Regulation, Rule or Bye-Law unless the Act, Regulation, Rule or Bye-Law contains an express provision to the contrary(1). Thus, the provisions of sections—386, 389 apply to the levy of penalties and fines imposed under the Police Act, V of 1861, on conviction before a Magistrate(2). The provisions of this section do not apply to fines imposed under Act XXI of 1856, such fines cannot be levied by distress and sale of the offender's property(3).

Sentence of fine.—Before a distress warrant can be issued under this section, it is necessary that the court issuing that warrant should have sentenced the offender to pay a fine. Where the Traffic Inspector of a Railway made a report to a Magistrate that damage had been caused to the Railway by a motor car and the Magistrate issued a distress warrant under this section for recovery of a certain sum of money alleged to be the amount of the damage caused. It was held that the warrant was wholly illegal(4).

Collective sentence of fine.—A sentence of fine imposed upon more than one prisoner individually and collectively is not a proper sentence. The sentence must impose a specific fine on each prisoner(5).

Immediate levy of fines.—A Magistrate cannot defer the levying of the fine imposed on the prisoner till the period of appeal shall have expired, or until the orders of the appellate court are received on appeal preferred by the accused. A criminal sentence should be forthwith carried out in its entirety as far as the law permits(6). But it is obvious that by its very nature a sentence of fine is not capable of immediate execution. The court is, therefore, authorised to suspend its execution for a time in order to enable the offender to raise the amount(7).

Compensation.—Section 547 of the Code provides that money ordered to be paid as compensation under section 250 of the Code is recoverable as if it were a fine and the methods of recovering a fine are provided for in this section of which clause (1) (a) provides for the realisation by issue of warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender. Clause (1) (a) however, does not authorise the attachment of properties belonging to a person other than the offender; therefore an undivided property belonging to the deceased offender and the other surviving members of the joint family is not liable to attachment(8).

Costs: Awarded under s. 145 case.—Where certain costs were awarded to X against A in proceedings under section 145 of the Code, and a certain property was sought to be sold under clause (1) (a), as

(1) Section 25, General Clauses Act (X of 1897).

(2) Section 37, General Police Act (V of 1861)

(3) *Queen v. Jungle*, 8 B. L. R. 47 App.

(4) *Abdul Majid v. Afukharji*, 116 I. C. 521=1919 Pat. 192=10 Pat. L. T. 124.

(5) *Abdullah v. Mahomed*, 11 B. L. R. 12, see *Lal Mahmud v. Satcourt*, 28 C. 164; *Ram Narayan v. Atul Chandra*, 18 Cr. L. J. 1014=42 I. C. 768; *Paryag v. Arju*, 22 C. 139.

belonging to A whereupon B claimed its exemption on the ground that the property was the joint family property of himself and B, it was held (i) that where the dispute arose as to whether the property was separate property or joint family property of the claimant and the defaulter, the better method would be to proceed under clause (b), and (ii) that the undivided share of A in the joint family property could be attached and sold in execution by the civil court under clause (b)(1).

Clause (a).—This clause gives power to a court passing a sentence of fine, to take steps for recovering the amount of the fine and issuing a warrant for the levy of the amount by attachment and sale of any moveable property(2). Prior to Amendment Act of 1923, the section authorised the court to issue a warrant for the levy of the fine by "distress and sale of any moveable property belonging to the offender". It was held as long ago as 1892, by the Calcutta High Court, in the case of *Queen Empress v. Sita Nath*(3), that under the section, as it then stood, a Magistrate could only order attachment of moveables of which the delinquent was the sole owner. The court, in laying this down, must be held to have meant by "attachment", "attachment by seizure" because as the section then stood, that was the only form of attachment contemplated by it. This case is still an authority for the proposition that moveable property, in which the offender has only an undivided fractional interest, is not liable to attachment by seizure and sale. This has been recognized recently by a Special Bench of the Patna High Court in the case of *Rajendra Prasad v. Emperor*(4). The same view is also taken by Pakenham Walsh J., in the case of *In re Marina Narasanna*(5). The same question was raised before Panchkrige and Patterson, JJ., in *Manmatha Nath v. Emperor*(6), but in that case it was not necessary to come to a decision on the point. This view finds ample support in the observations in *Emperor v. Pramatha Bhoddhan*(7) and *Emperor v. Shrawan*(8). It must thus be taken as settled that the authorities that lay down that moveable property in which the offender has only a fractional share is not liable to attachment by seizure or sale are correct and should be followed in preference to the case of *Shivalingappa v. Gurlingava*(9), where the contrary view was taken. Moveable property (money) belonging to the accused's brother and deposited in Court by the accused's brother as security for the

(1) S. 386.—*Queen Empress v. Sita Nath*, 1892, 18 Cal. 100.

(2) S. 386.—*Queen Empress v. Sita Nath*, 1892, 18 Cal. 100.

(3) *Queen Empress v. Sita Nath*, 1892, 18 Cal. 100.

(4) *Rajendra Prasad v. Emperor*, 13 Pat. L. T. 536=1932 Cr. C. 773=33 Cr.

L. J. 959=140 I. C. 72; *Emperor v. Pramatha Bhudan*, 60 C. 932=A. I.

R. 1933 C. 402=37 C. W. N. 567=20 A. I. Cr. R. 30=143 I. C. 97=1933 Cr. C.

580=34 Cr. L. J. 503; *Rajendra Prasad v. Emperor*, 13 Pat. L. T.

549=A. I. R. 1933 C. 292=1933 Cr. C.

764=33 Cr. L. J. 872=140 I. C. 101=12

Pat. 29.

(8) 20 C. 476; See also *Anonymous*,

2 Weir. 442 (443); *Hiralal v. Crown*, 28 P. L. R. 1915=16 Cr. L. J. 166=27

I. C. 850.

(4) 13 Pat. L. T. 549=A. I. R. 1932

Pat. 292=140 I. C. 101=33 Cr. L. J.

872=1932 Cr. C. 764.

(5) 55 M. 1041.

(6) 60 C. 851=A. I. R. 1933 C. 401=

143 I. C. 238=1933 Cr. C. 579=34 Cr.

L. J. 579.

(7) 60 C. 932=37 C. W. N. 567=143

I. C. 97=1933 Cr. C. 580=34 Cr. L. J.

503=20 A. I. R. 8, 30.

(8) 29 N. L. R. 320=A. I. R. 1935;

Nag. 248=1933 Cr. C. 932=34 Cr. L. J.

1263=146 I. C. 371.

(9) 49 B. 906=1926 B. 103=27 Bom.

L.B. 1363=27 Cr. L. J. 652=94 I. C. 644.

appearance of the accused in a criminal trial cannot be seized, as the money does not belong to the accused. Even the fact that the accused and his brother are members of a joint Hindu family will not enable court to seize the money(1). Surplus sale-proceeds in the hands of a mortgagee for payment to the mortgagor is not a debt, but any money held in trust for the mortgagor and is liable to attachment under this section and the Crown is entitled to priority over any private individual to realize the fine imposed on the mortgagor(2). Growing crops are not moveable property for the purposes of this clause(3). Moveable property of the offender in a Native State cannot be seized for the realisation of a fine adjudged by a British Court, only the property remaining in British India can be seized and sold(4).

Clause (b).—Under the unamended section immoveable property could not be attached and sold for the recovery of fine(5). It can now be attached and sold. The immoveable property of an agriculturist can be attached and sold in execution of an order passed under this section, as amended in 1923. Section 22 of the Dekkhan Agriculturist's Relief Act, 1879, is no bar to such attachment and sale, the mere fact that the warrant is executable as if it were a decree is not sufficient to make the provision of that section applicable(6). Fine imposed in a criminal case on an offender is not, however, recoverable as arrears of land revenue. Therefore, the land of a person belonging to an agricultural tribe as defined in the Punjab Alienation of Land Act cannot be sold in pursuance of a warrant issued by a Magistrate to the Collector authorising him to realise the amount of fine imposed upon such agriculturist on his conviction in a criminal case. But it is competent to the civil court to make a temporary alienation of land in a form not prohibited by the said Act with a view to realize the fine(7).

Proviso.—Before the amendment liability to fine did not cease even after the full term of imprisonment in default has been undergone by the offender(8). "The new proviso directs that after the imprisonment awarded in default of payment of fine has been served, no further steps should be taken for the recovery of the fine unless the court for special reasons to be recorded considers it necessary. The infliction of a double punishment is ordinarily uncalled for, and by the issue of warrants for the recovery of fines when there is no real reason why they should be recovered, the time of the police is frequently wasted. Convicted persons also are thus harassed for long periods after they have expiated their offences by undergoing imprisonment"(9). The reservation is intended for the case of a contumacious person who may evade the fine and suffer imprisonment and yet having the means to pay

(1) *Girdhari Lal v. Emperor*, 19 A. L. J. 887.

(2) *Pichu Vadhiar v. Secy of State*, 40 M. 767=5 L. W. 664=21 M. L. T. 71=(1917) M. W. N. 20=38 I. C. 986=18 Cr. L. J. 426.

(3) *Anonymous*, 2 Welr. 444

(4) *Ibid.*

(5) *Madari v. Mehr Din*, 22 Cr. L. J. 293=51 I. C. 527; *Reg v. Lallu*, 5 Bom. H. C. B. 63; *Queen-Empress*

v. Sitanath, 20 C. 478.

(6) *Collector of Satara v. Mahadu*, 50 B. 844=1926 B. 582=28 Bom. L. R. 1231=99 I. C. 310.

(7) *Emperor v. Malkha Singh*, 119 I. C. 227=1929 Lah. 667=80 Cr. L. J. 1006=1 Ind. Rul. (1929) Lah. 835.

(8) *Queen v. Modosoodun*, 3 W. R. Cr. 61.

(9) Statement of Objects and Reasons (1921).

the fine, does not pay the fine. In such a case, the serving of the period of imprisonment provided in default of payment of fine should absolve the person from paying the fine(1). The proviso applies, however, in terms only to the issue of a fresh warrant and does not require the withdrawal of a warrant already issued before expiration of the sentence in default of payment. But, in dealing with such existing warrants, the court should follow the policy which seems to have inspired the proviso(2).

Sub section (2).—Formerly there was no provision for investigating claims to attached property. The remedy of the aggrieved party was only by a civil suit(3). Under sub-section (2), power is given to the Local Government to make rules regarding the execution of warrants and the determination of claims(4). The use of the words "summary determination" in this sub-section makes clear the intention of the Legislature that the claim is to be determined forthwith before any further dealing with the property attached and that after the disposal of the property the matter of the attachment must be considered as concluded(5). An application of the other members of a joint Hindu family for refund of the money belonging to the joint family which has been attached in realization of a fine imposed upon an individual member of the joint family is not maintainable after the attached sum has been credited to Government(6). Where moveable or immoveable property is attached as belonging to an offender in pursuance of a warrant issued by the court under this section and a third person sets up a claim to such property, it is the duty of the Magistrate to investigate the claim by holding a proper inquiry as mentioned in O. XXI, r. 58, C. P. C.(7). But in the absence of any rules framed by the Local Government for summary determination of any claim to such property under sub-section (2) the court should stay the sale of the attached property for such time as would in the opinion of the court be sufficient to enable the claimant to establish his right thereto in a civil court(8).

Sub-section (3).—The warrant of fine of a criminal court, issued under sub-section (3), when sent to the collector is to be deemed to be a decree, and the Collector to be deemed to be the decree-holder for the

(1) See Legislative Assembly Debates, 8th February 1923, page 2061.

(2) *Digambar v. Emperor*, A. I. R. 1935 B. 160.

(3) *Empress v. Chhagan*, Rat Un. Cr. Cas 976; *Empress v. Gaspar*; 22 C. 935; *Empress v. Kandappa*, 20 M. 88; *Hiralal v. Emperor*, 28 P. L. R. 1916 = 16 Cr. L. J. 166 = 27 I. C. 850; *Anonymous*, 2 Weir 445.

(4) Statement of Objects and Reasons (1914); *Emperor v. Pandurang*, 56 B. 864 (367) = 34 Bom. L. R. 1102 = 1932 Cr. C. 604 = 139 I. C. 541 = 33 Cr. L. J. 805 = A. I. R. (1932) Bom. 476; *Suraj Narain v. Emperor*, A. I. R. 1934 Pat. 181 = 15 Pat. L. T. 57 = 13 Pat. 317 = 1934 Cr. C. 370 = 148 I. C. 321 = 35 Cr. L. J. 692.

(5) *Suraj Narain v. Emperor*, A. I. R. 1934 Pat. 181 = 15 Pat. L. T. 57 = 13 Pat. 317 = 1934 Cr. C. 370 = 148 I. C. 321 = 35 Cr. L. J. 692.

(6) *Suraj Narain v. Emperor*, A. I. R. 1934 Pat. 181 = 15 Pat. L. T. 57 = 13 Pat. 317 = 1934 Cr. C. 370 = 148 I. C. 321 = 35 Cr. L. J. 692.

(7) *Harimal v. Emperor*, A. I. R. 1933 A. 135 = 1933 A. L. J. 265 = 1933 Cr. C. 278 = 19 A. I. Cr. R. 251 = 14 L. R. A. Cr. 73 = 144 I. C. 853 = 34 Cr. L. J. 847; *Mungang v. Emperor*, 1 Bur. L. R. 332.

(8) *Emperor v. Pandurang*, 56 B. 864 = A. I. R. 1932 B. 476 = 34 B. L. R. 1102 = 1932 Cr. C. 604 = 139 I. C. 541 = 33 Cr. L. J. 803.

purpose of execution und the Code of Civil Procedure. It does not, therefore, follow that a warrant is a decree, or an order within the meaning of section 22 of the Dekkhan Agriculturists Relief Act. Sub-section (3) merely provides a means for execution of a warrant of fine through a civil court. It remains as a warrant of a Criminal Court and does not become a decree of the Civil Court to which the Dekkhan Agriculturists Relief Act in general, or section 22 in particular, would apply(1). The warrant is nevertheless valid as a decree under sub-section (3), and its validity cannot be questioned before the executing court under O. XXI, r. 58, C. P. Code(2).

Revision.—The order of a Magistrate directing a warrant to issue under this section is not a judicial order but an executive order which cannot be revised by the High Court(3).

387. A warrant issued under section 386 sub-section (1), clause (a) by any court may be executed within the local limits of the jurisdiction of such court, and it shall authorize the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

Amendment.—The opening words "a warrant issued under s. 386, sub-section (1), clause (a) by any court" have been substituted for the words "such warrant" by section 103 of the Cr. P. C. Amendment Act, XVIII of 1923. This substitution is a drafting amendment, and consequential to the amendment of section 386. The word "attachment" has been substituted for the word "distress" by the same provision. This is a necessary substitution as immoveable properties can now be sold under cl. (b) of s. 386. Section 386 does not, however, authorize the levy in a foreign state of a fine adjudged by a British Indian Court(4).

388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the court may—

Suspension of execution of sentence of imprisonment.

- (a) Order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than

(1) *Collector of State v. Mahadeo*, 1883 = 68 I. C. 1007 = A. I. R. 1926 Sind 67; *Secy of State v. Sukhdeo*, (1898) A. W. N. 178; *Empress v. Kandayya*, 20 M. 68; *Hiralal v. Emperor*, 28 P. L. R. 1916 = 16 Cr. L. J. 160 = 27 I. C. 160.
(4) 2 Weir, 444.

(1) *Collector of State v. Mahadeo*, 1883 = 68 I. C. 1007 = A. I. R. 1926 Sind 67; *Secy of State v. Sukhdeo*, (1898) A. W. N. 178; *Empress v. Kandayya*, 20 M. 68; *Hiralal v. Emperor*, 28 P. L. R. 1916 = 16 Cr. L. J. 160 = 27 I. C. 160.
(4) 2 Weir, 444.

thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

- (b) Suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond with or without sureties as the court thinks fit, conditioned for his appearance before the court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and, if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith; and if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the court may at once pass sentence of imprisonment.

Amendment.—The whole section has been redrafted by the Cr. P Code (Second Amendment) Act, XXXVII of 1923.

Sub section (1).—There is no provision except this section by which a fine can be ordered to be realized by mis-statements. But it has no application where the sentence is not a sentence of fine only(1). Where a sentence of imprisonment is a nominal sentence only the provisions of this section have no application and the court has no power to grant time to pay the fine and suspend the execution of the sentence of imprisonment in default of payment of fine(2). Sub-section (1) is likewise inapplicable where no alternative sentence of imprisonment has been passed. Where a Magistrate sentences an offender to fine and fails to pass a sentence of imprisonment in default of payment of fine, he has under this section no power to bind him over in his own recognizance to appear(3).

Sub section (2).—The provisions of sub-section (2) refer to an order made by a criminal court for the payment of money, but which is not a punishment inflicted on an offender for an offence(1). Sub-section (2) applies to all orders for payment of money by way of fine or compensation and enables the court to pass a sentence of imprisonment if the person ordered to pay fine fails to do so(2).

389. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor-in-office.

Who may issue warrant.

Who may issue warrant.—In every case in which an offender is sentenced to fine, the court which sentences the offender may issue a warrant for the levy of the amount by distress and sale. The successor-in-office of a Judge or Magistrate may levy a fine imposed by his predecessor. But the court which levies the fine must be the same as the court which imposed it(3).

390. When the accused is sentenced to whipping only, the sentence shall, subject to the provisions of section 391, be executed at such place and time as the court may direct

Time and place of execution of sentence of whipping only.

Amendment.—The words "subject to the provisions of section 391" have been added by section 21 of the Criminal Law Amendment Act, XII of 1923.

Carrying out of whipping—A sentence of whipping need not necessarily be executed on the very day that the sentence is passed. The words "at such place and time as the court may direct" in this section are very wide and give a discretion to the court. Hence, a direction that the sentence of whipping should be executed "as soon as practicable, is a proper one to pass, where the case does not fall under cls. (a), and (b) of sub-section (1) of s. 391(4). The direction contained in this section, that when the accused is sentenced to whipping only, the sentence of whipping shall be executed at such place and time as the court may direct, is intended for the case where the accused is not already under another sentence of, or is not at the same time sentenced to, imprisonment(5). When the accused is under sentence of imprisonment in another case the Magistrate should, when passing the order required by s. 390, follow the analogy of s. 391 (1) as far as may be(6). To postpone the whipping to the end of a considerable term of imprisonment is illegal(7). The sentence should be carried as soon as practicable(8).

(1) *Emperor v. Mohamed*, 11 Rang. 451—A. I. R. 1934 Rang 11.

(2) *In re Hyravalu Naidu*, 26 M. 127; see also *Empress v. Nga Myit*, (1897—1901) U. B. R. 71; *Emperor v. The My. 4 L. B. R. 151—7 Cr. L. J. 452.*

(3) *Chunder Koomar v. Modhoo Soodhun*, 9 W. R. Cr. 80.

(4) *Emperor v. Gopala Murgis*, 80

Bom. L. R. 389=109 I. O. 509—A. I. R. 1928 Bom. 138=29 Cr. L. J. 573=10 A. I. Cr. R. 306; *Ct Empress v. Abdulla, Rat. Un. Cr. Cas 906; Meyyan v. Emperor*, 26 M. 465.

(5) *Empress v. Nga Po Kye*, 1 L. B. R. 53.

(6) *Ibid.*

(7) *Ibid.*

(8) *Ibid.*

The sentence can be postponed pending an intended appeal(1). It can be postponed only if an appeal is made within 15 days from the date of the sentence. Clause (a) of section 391 further allows postponement of whipping if the accused furnishes bail.

Execution of sentence of whipping only, or of whipping in addition to imprisonment.

391. (1) When the accused—

- (a) is sentenced to whipping only, and furnishes bail to the satisfaction of the court for his appearance at such time and place as the court may direct, or
- (b) is sentenced to whipping in addition to imprisonment,

the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the appellate court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the appellate court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the Jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment, when the term of imprisonment to which he is sentenced is less than three months.

Amendment.—Clause (a) has been added by section 22 of the Criminal Law Amendment Act, XII of 1923. Formerly only sentence of whipping could not be postponed(2).

Postponement of whipping.—A sentence of whipping need not necessarily be executed on the very day that the sentence is passed(3). Whipping cannot be inflicted until after expiry of 15 days from the date of sentence and must be inflicted immediately on the expiry of 15 days(4). It is imperative to carry out a sentence of whipping in addition to imprisonment immediately on the expiry of 15 days from the date

(1) *Meyyan v. Emperor*, 26 M. 465.

(2) *Anonymous*, 2 Weir. 446;
Meyyan v. Emperor, 26 M. 465.

(3) *Emperor v. Gopala Murgis*, 30 Bom. L. R. 389=109 I. C. 509=A. I. R. 1928 B. 138=29 Cr. L. J. 873=10 A. I. Cr. R. 306.

(4) *Anonymous*, 6 M. H. C. R. App. 38; *Anonymous*, 7 M. H. C. R. App. 29; *Emperor v. Jaitant*, 4 Bom. L. R. 436; *Empress v. Habla*, Rat. Un. Cr. Cas. 803; *Empress v. Jura Ram*, (1881) A. W. N. 139; *Emperor v. Jagannath*, 4 Bom. L. R. 929; *Empress v. Sagram*, Rat. Un. Cr. Cas. 300.

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on which it was passed unless an appeal be made within that time(1). A sentence of whipping delayed beyond the period prescribed by the Code cannot legally be carried into effect(2). In passing a sentence of whipping in addition to six months' imprisonment a Deputy Magistrate ordered that at the termination of the imprisonment the prisoner should be brought before him for whipping being carried out, and it was held that the sentence of whipping had become inoperative and incapable of being carried out(3).

Sub section 3—Where an accused is sentenced to a term of imprisonment of less than three months it is illegal to further sentence him under the Whipping Act(4).

392. (1) In the case of a person of or over sixteen years of age, whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs: and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instrument, as the Local Government directs.

(2) In no case shall such punishment exceed thirty stripes, and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

Mode of inflicting whipping.—In Bengal, whipping is to be inflicted on the buttocks for persons over 16 years of age and for juveniles on the buttocks or on the hand as the court may direct(5). In Bombay, whipping is to be inflicted on the bare back across the shoulders and in the case of persons under sixteen years of age in private and with a light rattan on the bare buttocks(6). In Madras, whipping is to be inflicted on the posteriors and care is to be taken that the person undergoing the punishment is tied up to a triangle, or that his mobility be otherwise secured, in order to preclude the possibility of the rattan falling on any other part of the body(7). In the United Provinces and in the Punjab, whipping is to be inflicted on the buttocks and in Burma on the breech(8).

Limit of number of stripes.—The number of stripes cannot exceed thirty and the punishment cannot be executed by instalments(9).

(1) *Crown v. Ranja*, 31 P. R. 1878 Cr.

(2) *Anonymous*, 2 Weir. 446; *Empress v. Mau*, 34 P. R. 1880 Cr.

(3) *Hur Chandra v. Jafer Ali*, 20 W. R. 72 Cr.; *Emperor v. Rashbehari*, A. I. R. 1934 Pat 531—15 Pat. L. T. 475.

(4) *Empress v. Bhica*, 2 Bom. L. R. 54; *Crown v. Rura*, 45 P. L. R. 19.

(5) Beng Govt., Aug. 18, 1893, Cal. H. Ct. Rules, etc., pp. 62—64.

(6) Bom. Gaz. 1883, pt. 1, p. 102, Man. p. 390; Bom. Gaz. 1898, pt. 1, p. 827.

(7) Fort St. Geo. Gaz. Notification 4, 1st January 1883.

(8) All. Man. p. 277; Panj. Bk. Clr. Vol. 2, p. 269; Barmah Gaz. 1891 Pt. 1, p. 201 Man. p. 106; and see *Empress v. Din Ali*, (1884) A. W. N. 213.

(9) *Ramjus v. Sookhram*, 82 P. R. 1866 Cr.; *Emperor v. Nga Po.*, (1906) U. B. R. (Cr. P. O.), 47.

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393. No sentence of whipping shall be executed by instalments; and none of the following persons shall be punishable with whipping, namely:—

Not to be executed by instalments
Exemptions.

- (a) Females;
- (b) Males sentenced to death or to transportation or to penal servitude, or to imprisonment for more than five years;
- (c) Males whom the court considers to be more than forty-five years of age.

Clause (b).—A sentence of whipping passed on a person who is already under sentence of death, or transportation, or penal servitude, or imprisonment for more than five years, is illegal. Even if the sentence of whipping precede, instead of follow, the other sentence, the passing of the latter sentence renders the infliction of the punishment of whipping illegal(1). A sentence of whipping in addition to 7 years' rigorous imprisonment is illegal, as a sentence cannot be passed of which the execution is prohibited by law(2). Where, therefore, a person who is sentenced in two different cases to punishments, which collectively exceed the term of seven years, he cannot be punished in addition with whipping(3). But there is no justification for the taking into account the period of imprisonment to which a man has already been sentenced before the commission of the offence, for which the sentence of whipping with or without imprisonment is passed, in the computation of the maximum period of imprisonment fixed by this section(4).

394. (1) The punishment of whipping shall not

Whipping not to be inflicted if offender not in fit state of health.

be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

Fit state of convict to undergo whipping.—A man sentenced to

(1) *Anonymous*, 1 M. 56-2 Weir 448.

(2) *Akbar v. Crown*, 80 P. R. 1919 Cr.-3 Lah. L. J. 395.

(3) *Nga Ngi Gyi v. Emperor*, 7 Rang. 169-120 I. O. 697-1930 Cr. O.

305-A. I. R. 1930 Rang 128-31 Cr. L. J. 176-Ind. Rul 1930 Rang. 57.

(4) *Emperor v. Nha Ngi Nge*, A. I. R. 1934 Rang. 68-1934 Cr. C. 375-142 I. C. 1073.

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whipping is not to be whipped unless he is in a fit state to bear it. The whipping should not be commenced, but if commenced, it cannot be continued longer than the man is fit to bear it, and then the sentence is satisfied for it cannot be executed by instalment(1). A sentence of whipping is prevented from being executed wholly or partially according as the medical officer certifies either at or during the execution of whipping respectively that the offender is not in fit state of health to undergo the punishment. But the law does not authorize a medical officer to give a certificate before commencement of whipping that the accused is fit to receive only a portion of the sentence and the Magistrate in such a case cannot sentence the offender to imprisonment in lieu of so much of the sentence as was not executed(2).

395. (1) In any case in which under section 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the court which passed the sentence can revise it; and the said court may, at its discretion, either remit such sentence or sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months *or to a fine not exceeding five hundred rupees* which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorize any court to inflict imprisonment for a term *or a fine of an amount* exceeding that to which the accused is liable by law, or that which the said court is competent to inflict.

Amendment explained.—The italicised words in sub-sections (1) and (2) have been added by section 105 of the Criminal Procedure Amendment Act, XVIII of 1923. Under the unamended section it was held that in case whipping could not be inflicted the only sentence that could be passed in lieu thereof was one of imprisonment. One of fine could not be passed(3). The section as amended enables a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out(4).

Imprisonment in lieu of whipping.—The power of a Magistrate under this section to award imprisonment in lieu of whipping is confined to cases in which under section 394 a sentence of whipping is wholly or partially prevented from being executed. Such power only exists when,

(1) 9 M. H. C. R. App. 1.

(2) *The Public Prosecutor*, 31 M. B. 17 M. L. J. 535—7 Cr. L. J. 5—3 M.L. T. 31.

(3) *Crown v. Po Thit*, 1 L. B. R. 202; *Empress v. Sheodin*, 11 A. 808; *Anonymous*, 2 Weir. 449.

(4) Statement of Objects and Reasons (1914).

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under section 394(1), a Medical Officer present certifies that the offender is not in a fit state of health to undergo such punishment or when under section 394 (2) during the execution of the sentence, a Medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence. There is no provision of law, which authorises a medical officer to certify, before the infliction of whipping, that the prisoner is fit to undergo only a smaller number of stripes than that actually ordered. Where in consequence of such a certificate a smaller number of stripes is inflicted, the Magistrate has no power to award imprisonment in lieu of the whipping not inflicted(1).

Solitary confinement.—An award of solitary confinement to a person sentenced to rigorous imprisonment in lieu of whipping is not illegal(2).

Court which passed the sentence can revise it.—The only court which can act when a sentence of whipping cannot be carried out is the court which passed the sentence(3). But the words "the court which passed the sentence" in this section do not mean the same officer who inflicted the punishment of whipping originally, and in the absence of the officer who passed the original sentence, the District Magistrate can be held to be "the court which passed the sentence"(4).

Remission of sentence—It is in the discretion of a Magistrate to remit a sentence of whipping(5).

Sub-section (2).—Where a prisoner who has been sentenced to whipping is found to be unfit to undergo such sentence and such sentence is accordingly commuted to one of imprisonment, such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum which the court passing the sentence is competent to inflict(6).

Enhancement of sentence—Where an accused was sentenced to whipping on a conviction under s. 382, and application was made to the High Court for enhancement of sentence, held it could not be enhanced by awarding imprisonment, as the offence of which the accused was convicted was the first offence and it could not be enhanced by infliction of additional stripes, as, no sentence of whipping could be executed by instalments(7). The substitution, by an appellate court, of a sentence of thirty stripes for a sentence of three months' rigorous imprisonment is an enhancement of sentence within the meaning of section 423 (1) (b), and is, therefore, illegal(8).

Lower Court's power to revise sentence of whipping after appeal.—Where the sentence by a District Magistrate of imprisonment and whipping was confirmed on appeal, and the Magistrate then revised

(1) *The Public Prosecutor*, 31 M. 84—17 M. L. J. 555—3 M. L. T. 31—7 Cr. L. J. 5.

(2) *Empress v. Gaman*, 14 P. R. 1899 Cr.

(3) *Empress v. Chetu*, 10 P. R. 1889 Cr.

(4) *Chhajju v. Emperor*, 33 P. R. 1901 Cr.

(5) *Crown v. Po Thit*, 1 L. B. R. 202.

(6) *Empress v. Ram Baram*, 21 A. 35; *Crown v. Barkat Ali*, 11 P. R. 1901 Cr.

(7) *Empress v. Balu*, Rat. Un. Cr. Cas. 637.

(8) *Emperor v. Chit Pdn*, 119 I. C. 300—1 Bang. 819—1089 Rang. 117 P. B.

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the sentence of whipping by awarding instead six months' imprisonment and sent up the total sentence for confirmation, held that revision of the sentence of whipping did not render the total sentence liable to confirmation and the decision in appeal did not affect the Magistrate's power to revise the sentence of whipping(1).

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

- (a) A sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment;
- (b) A sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and
- (c) A sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

"Sentence."—The word "sentence" in section 396 or section 397 does not include an order of committal or detention under section 123 of the Code(2), though there is authority to the contrary also(3).

(1) *Empress v. Chetu*, 10 P. B. 1802 Cr.

(2) *Emperor v. Nga Po Thin*, 2 L. B. R. 71; *Empress v. Diwan Chand*, 14 P. B. 1835 Cr.; *Empress v. Tulshya*,

Rat. Un. Cr. Cas 970; *Empress v. Shice Byo*, B. J. L. B. 864.

(3) *Empress v. Pandu*, Rat. Un. Cr. Cas. 114.

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Execution of sentence on escaped convicts.—The punishment awardable under section 224 of the Penal Code being in addition to the original sentence, the courts when passing sentence must comply with the directions of this section(1). Where the accused who was a life convict under the sentence of transportation for murder, was convicted under s. 224, I. P. C., of attempting to escape from lawful custody, and sentenced to four months' imprisonment which the convicting Magistrate directed to commence immediately, it was held that such an order was contrary to the provisions of this section(2). As to date from which substantive term of imprisonment should run when accused has been released through error in warrant of commitment, see *Emperor v. Ngwe Gaing*(3).

397. When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or transportation such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced, *unless the court directs that the subsequent sentence shall run concurrently with such previous sentence* :

Provided that, if he is undergoing a sentence of imprisonment; and the sentence on such subsequent conviction is one of transportation the court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced :

Provided, further, that where a person, who has been sentenced to imprisonment by an order under section 123 in default of furnishing security, is, whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

Amendment.—The italicised words at the end of first para and the second proviso have been added by s. 106 of Act No. XVIII of 1923.

Scope.—This section specially fixes time from which the subsequent sentence shall commence, sentences of imprisonment in other cases ought to commence from the time of their being passed(4). The direction that a sentence in one case is to run from the date of the expiration of the sentence in a previous case passed on the same day

(1) 2 Weir, 450.

(3) (1897—1901) 1, U. B. R. 69.

(4) *In re Krishnanand*, 3 B. L. R. A.

C. 50; *Queen v. Sobrai*, 20 W. R. Cr. 70.

(2) *Empress v. Mahadu Nagu*, Rat. Un. Cr. Cas 965.

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Undergoing imprisonment.—An accused under custody begins to undergo a sentence of imprisonment passed on him from the moment the sentence is pronounced and if a second sentence of imprisonment is passed on him on the same day subsequently in a separate trial, he is "already undergoing sentence of imprisonment" within the meaning of this section(2). A person sentenced to imprisonment is "undergoing" that imprisonment within the meaning of this section. Sentences of imprisonment imposed on the same person in separate trials on the same day take effect, by the terms of this section, one after the other in the order in which they were passed and Magistrate need not therefore give any direction in his judgment in respect of the same(3). But in one case it has been held that an order that sentences of imprisonment passed upon an accused in two trials held on one and the same day should run concurrently is not illegal inasmuch as until an accused has actually passed into the jail he is not undergoing a sentence of imprisonment within the meaning of this section(4).

Postponement of sentence of imprisonment after period of detention in civil jail.—Detention under the order of a civil court not being a "sentence of imprisonment, penal servitude or transportation," a Magistrate cannot order that his sentence of imprisonment shall take effect at the expiry of the term of the detention in civil jail(5).

Order of sentences.—Sentences of imprisonment imposed on the same person in separate trials on the same day take effect, by the terms of this section, one after the other in the order in which they were passed and a Magistrate need not therefore give any direction in his judgment in respect of the same(6). But it is only a sentence of imprisonment that can be pronounced to take effect in succession. A sentence of whipping cannot be deferred till the expiry of the sentence of imprisonment so as to contravene the provisions of s. 391 of the Code(7).

Imprisonment in foreign territory.—It is competent to a Magistrate in British India to pass a sentence of imprisonment (for an offence committed in India), which should take effect after the expiration of the sentence which the accused is undergoing in foreign territory(8).

Concurrent sentences.—Under this section as amended sentences passed under separate trials or in the same trial on separate charges are not deemed to be concurrent unless the court directs that the subsequent sentences shall run concurrently with such previous sentence(9). Under the unamended section it was held that a sentence

(1) *Anonymous*, 2 Weir 451.

(2) *Emperor v. Nga Po Thaung*, 63 I. C. 478=3 Bur. L. J. 31=1924 R. 307=25 Cr. L. J. 1910

(6) *Muthuswami*, 2 Weir 451.

(7) *Empress v. Sagram*, Rat. Un. Cr. Cas. 300

(8) *Empress v. Venkataram*, 20 M. 444.

(9) *Nagappa v. Emperor*, 33 Cr. L. J. 77 (78)=134 I. C. 1299=1931 Cr. C. 917=33 Bom. L. R. 1163=A. I. R. 1931 B. 529=Ind. Bal. 1932 Bom. 28=(1931) Cr. Cas. 917.

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of imprisonment could not be ordered to run concurrently with another sentence not passed at the same trial(1). Even where the trials were held on the same day, the Magistrate could not make the sentences in the two trials concurrent(2). A contrary view was taken in the following circumstances. At a trial held by a Magistrate the accused was convicted of cheating and sentenced to undergo rigorous imprisonment for one year. He was immediately tried by the same Magistrate for another cheating and was convicted. The Magistrate sentenced him to suffer one year's rigorous imprisonment and ordered the two sentences to run concurrently. It was held that the order of the Magistrate was not illegal inasmuch as the trial took place on one and the same day and one after the other, it was for all practical purposes one trial(3). A court is now empowered to pass a sentence to run concurrently with any other term of imprisonment which the person convicted is already undergoing(4). The High Court has power in view of the provisions of ss. 423 and 561-A to direct separate sentences passed in separate trials to run concurrently(5).

'At the expiration of.'—It has been held in two cases by the Bombay High Court referred in *Ratanlal's Unreported Criminal Cases* at pp. 139 and 523 that the sentence must commence to run after the expiration of the first sentence whether by reversal or completion of the sentence and not before. This view is in consonance with that laid down in a recent Sind Case(6). The Madras High Court in 2 Weir's Criminal Rulings, p. 450, however, held that the imprisonment already undergone must be reckoned as imprisonment under the sentence in the conviction which was not reversed. But the ante-dating of a sentence of imprisonment is contrary to the spirit of ss. 383 and 397(7).

First proviso.—Where a person who is undergoing a term of imprisonment is sentenced by the Sessions Judge to transportation for life, the sentence of transportation passed by him will commence at the expiration of the previous sentence of imprisonment, unless he makes a further order under this section, that the sentence shall take effect immediately(8).

Second proviso.—The second proviso to the section was added by Act XVIII of 1923, section 106. Prior to the passing of this amendment divergent views were held by the High Courts in India, as to

(1) *Emperor v. San E*, 4 L. B. R. 147; *Empress v. Ishri*, 20 A. 1; *Kamal Mandal v. Emperor*, 20 C. W. N. 1300; *Rat. Un. Cr. Cas 552*=*Rat. Un. Cr. Cas.* 18, *Empress v. Bhagwandas*, 2 Bom. L. R. 111; *Empress v. Tukaram*, 4 Bom. L. R. 816; *Harak Navin v. Emperor*, 22 Cr. L. J. 520-62 L. C. 408-19

(3) *Emperor v. Mahomed*, 13 Bom. L. R. 200.

(4) Statement of Objects and Reasons (1914); See *Mahadeo v. Emperor*, 27 Cr. L. J. 807 (812)

(5) *Emperor v. ...*

(6) *Emperor v. Koural Shah*, A. I. R. 1931 S. 159-34 Cr. L. J. 24-140 L. C. 481.

(7) *Emperor v. Naga Po Min*, A. I. R. 1933 Rang 25-34 Cr. L. J. 447-143 L. C. 728

(8) *Rat. Un. Cr. Cas.* 291,

(2) *Muraffar v. Empress*, 12 P. R. 1694 Cr.

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whether an order of committal to, or detention in, prison under section 123 was a sentence of imprisonment within the meaning of section 397. The High Courts of Madras and Bombay and the late Chief Court of Lower Burma held that such an order was not a sentence of imprisonment(1). On the other hand, a Full Bench of the High Court of Allahabad held that an order of this nature was a sentence of imprisonment within the meaning of section 397(2). It is apparent from the language in which the second proviso is couched that it was the intention of the legislature that the view taken by the High Court should prevail and that an order of committal to or detention in prison, passed under section 123 should be deemed to be a sentence of imprisonment within the meaning of this section(3). Where the accused was sentenced to one year's rigorous imprisonment in default of furnishing security under s. 123 and was subsequently convicted of the offence of theft committed prior to the passing of the order under s. 123 for which he was sentenced to pay a fine or in default three months' "rigorous" imprisonment, and the fine was not paid, it was held that the sentence of imprisonment in default of payment of fine must run from the expiry of the sentence under s. 123(4). Where in default of furnishing security under s. 109 the accused was sent to jail, and subsequently the accused was convicted by another Magistrate of an offence, punishable under s. 9, Opium Act, committed prior to the order under s. 109, and that Magistrate ordered that the sentence under the Opium Act should begin after the sentence imposed under s. 109 had expired, it was held, that the order that the second sentence should run consecutively was incorrect and should be set aside, inasmuch as having regard to the second proviso the sentence imposed under the Opium Act had to commence immediately, and it had, therefore, come to an end long before the expiration of the sentence imposed in default of furnishing security under s. 109(5).

398. (1) Nothing in section 396 or section 397

Saving to sections 396 and 397. shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or

(1) 2 Weir, 452; *Emperor v. Muthukomaran*, 27 M. 525; *Joghi Kannigan v. Emperor*, 31 M. 515; *Emperor v. Arjun Ambo Kathodi*, 84 B. 326; *Emperor v. Wishun Balakrishna*, 37 B. 178; *Emperor v. Nga Po Thun*, 2 L. B. R. 72; *Empress v. Tul-hya*, Rat. Un. Cr. Cas. 970, *In re Pachari*, 16 Cr. L. J. 612; *Emperor v. Kanji*, 5 Bom. L. R. 26; *Emperor v. Durga*, 6 Bom. L. R. 1098; *In re Gandella*, (1914) M. W. N. 500; *Crown v. Sukhal*, 15 S. L. R. 205; *Crown v. Ghulam*, 7 S. L. R. 203; *Shio Thauing v. Emperor*, 10 Bur. L. T. 266;

Empress v. Diacan, 14 P. R. 1895 Cr.; *Emperor v. Lekria*, 8 N. L. R. 20; *Mar-kanda v. Emperor*, 1 Pat. L. J. 219.

(2) *Emperor v. Tula Khan*, 30 A. 331 F. B.

(3) *Emperor v. Nga Pye*, 9 Rang. 110=1931 R. 127.

(4) *Emperor v. Nan E*, 9 Rang. 612=A. I. R. 1932 Rang. 50=1931 I. O. 614=33 Cr. L. J. 174=1932 Cr. O. 210=17 A. I. Cr. R. 318.

(5) *Emperor v. Jagmohan*, 34 Cr. L. J. 1152=145 I. O. 1007=1933 Cr. O. 1098=10 O. W. N. 778=A. I. R. 1933 Oudh. 381.

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penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

Sub section (1).—Where there are two trials and two convictions, s. 397 provides that the latter sentence of imprisonment shall commence at the expiration of the imprisonment to which the convict has already been sentenced; and s. 398 (1) provides that nothing in s. 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction(1).

Sub-section (2)—In the absence of any provision such as is contained in sub-section (2) it was held that when a convict is imprisoned under two warrants, which order consecutive punishments, the first warrant should be completely executed, both in regard to the substantive sentence of imprisonment and the imprisonment in default of payment of fine, before any effect is given to the second warrant(2). This decision is no longer law.

399. (1) When any person under the age of fifteen years is sentenced by any criminal court to imprisonment for any offence, the court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897. is for the time being in force.

Definite sentence of imprisonment necessary.—A Magistrate should first pass a sentence of imprisonment and then direct that, instead of under-going the sentence the offender should be sent to a Reformatory School for such period as the Act and the rules framed

(1) *Musaffar v. Emperor*, 12 P R. 1694 Cr.

(2) *Bat Un Cr. Cas.* 182.

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thereunder direct(1). No order under the Reformatory Schools Act, 1897, can be made in respect of a youthful offender unless and until a definite sentence of imprisonment has been passed against him(2).

Period of detention should be exactly fixed in the order.—Where an accused who was convicted of theft was sentenced to two months' rigorous imprisonment but being thirteen years old was directed to be detained in a Reformatory School for five years or 'until he attains the age of eighteen years' the High Court reversed this latter direction on the ground that the period of detention in Reformatory School should be an exact or definite period(3). Where a Magistrate, who sentenced a youthful offender for six months' imprisonment, directed that, in lieu of the imprisonment, he should be detained in a Reformatory School for a period of five years unless he shall attain the age of 18 years at an earlier date, it was held that the order directing the detention was not properly made, inasmuch as it had not fixed the exact period(4).

Confinement for a longer term than imprisonment.—A Magistrate finding a juvenile offender guilty of theft in a building, sentenced him to three months' rigorous imprisonment and ordered that in place of this sentence, the offender should be confined in a Reformatory for fourteen months, and it was held that the Magistrate, having once passed a sentence of imprisonment for a particular term, could not direct that the offender should be confined in a Reformatory for a longer term(5).

Sub-section (3).—As the Reformatory Schools Act, 1897, has been extended to the Punjab, this section stands repealed(6). The introduction of Reformatory Schools Act repeals the operation of s. 399, "so far as may be practicable" under ss. 7 and 8 of the former Act. Only a first class Magistrate can send a male youthful offender to a Reformatory School. Therefore, an order by a second class Magistrate sentencing a male juvenile offender to rigorous imprisonment to be sent to Reformatory instead of being imprisoned in the criminal jail was held to be not valid inasmuch as only the first class Magistrate should pass an order for sending such person to the reformatory schools and as only reformatory

This section is a
otherwise specially
1897 are of special
character applicable only to certain defined classes of cases(8).

400. When a sentence has been fully executed, the officer executing it shall return the

Return of warrant
on execution of sen-
tence.

warrant to the court from which it issued,
with an endorsement under his hand
certifying the manner in which the sentence has been
executed.

(1) *Empress v. Kaidya*, 1 Bom. L. R. 162; 1 Weir, 879.

(2) *Crown v. Bakhtawar*, 34 P. R. 1910 Cr.

(3) *Emperor v. Ramasudama*, 15 Bom. L. R. 306=19 I. C. 512=14 Cr. L. J. 256.

(4) *Empress v. Rama*, 24 M. 13=1 Weir, 882.

(5) *Reg. v. Ganpaya*, Est. Un. Cr. Cas. 109.

(6) *Crown v. Nur Muhammad*, 17 P. R. 1918 Cr.

(7) *Empress v. Madasami*, 12 M. 94=1 Weir, 875.

(8) *Dy. Leg. Remembrancer v. Ahmad Ali*, 25 O. 333 (336)=2 O. W. N. 11.

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CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS
OF SENTENCES.

401. (1) When any person has been sentenced to punishment for an offence, the Governor-General in Council or the Local Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

Power to suspend
or remit sentences.

(2) Whenever an application is made to the Governor-General in Council or the Local Government for the suspension or remission of a sentence, the Governor-General in Council or the Local Government, as the case may be, may require the presiding Judge of the court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion, *and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.*

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor-General in Council or of the Local Government, as the case may be, not fulfilled, the Governor-General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any Police Officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section, may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) *The provisions of the above sub-sections shall also apply to any order passed by a criminal court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.*

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(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty or of the Governor-General, when such right is delegated to him, to grant pardons, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him, by the Governor-General, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent court under this Code and shall be enforceable accordingly.

(6) The Governor-General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

Amendment.—The words in italics in sub-sections (2) and (5), and sub-sections (4a) and (5a) have been added by s. 107 of Act No. XVIII of 1923. The new sub-section (4a) extends the provisions of this section to all orders of criminal courts; sub-section (5a) provides for cases where sentence is suspended or remitted by the King or the Governor-General.

Scope of section.—Primarily the power of pardon rests in the sovereign, and the provisions of this section, authorising the Governor-General in Council or a Local Government to suspend the execution, or remit the whole or part of any sentence passed upon any person sentenced to punishment, in no way interfere with the prerogative of the Crown in that respect. The special authority conferred by this section, however, relates to persons sentenced to punishment and does not touch cases under s. 337 of the Code(1).

Exercise of prerogative of mercy.—On a conviction for murder the sentence is one which is fixed by law, and to refrain from confirming a sentence, of death on account of the criminal's youth or unsoundness of mind is an act of pure mercy(2). In such cases, however, the court may report any extenuating circumstances calling for a mitigation of the punishment to the Government and the Government may thereupon take such action under this section as it thinks fit(3). Numerous cases will be found in the Law Reports in which courts have made similar recommendations in favour of persons found guilty under such circumstances(4).

(1) *Empress v. Ganga Charan*, 11 A. 79 (89).

(2) *Nga Pyan v. Crown*, 1 L. B. R. 359; *Cl. Maulu v. Crown*, 1923 Lah. 719.

(3) *Empress v. Kader Nasyar*, 23 O. 604; *Empress v. Lakshman*, 10 B. 612; See also *Nga Pan v. Crown*, 1 L. B. R. 359; *Cl. Maulu v. Crown*, 1923 Lah. 619.

(4) See the cases cited in the last note

and *Ramzan v. Emperor*, 30 P. R.; 1918 Cr.=48 I. O. 492=20 Cr. L. J. 1. *Lachhman v. Emperor*, 46 A. 243=81 I. O. 171=22 A. L. J. 116=A. I. R. 1924 A. 418=25 Cr. L. J. 683; *Tola Ram v. Emperor*, 102 I. O. 774=28 Cr. L. J. 598=A. I. R. 1927 Lah. 674; *Joga Singh v. Crown*, 11 Lah. L. J. 203; *Emperor v. Tincouri*, 1 A. I. Cr. R. 136; *Emperor v. Amirta*, 26 O. W. N. cxliv.

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Where the accused, a lad of 17 years, participates in murder under the influence of his brother and father(1); or where the offence of murder is committed by a youth of tender age who was naturally provoked by the outrageous conduct of the deceased in having sexual intercourse with a female relative of his in an open and barefaced manner some three days before the occurrence(2); or where a young girl of 18 years was married to a boy of 13 years old, and she contracted an intimacy with another man and became pregnant, and when she suddenly gave birth to an illegitimate child, she strangled it owing to her anxiety to conceal her shame(3); the case is a fit one for the Local Government to exercise its prerogative under this section. It is desirable that such like cases may be submitted to the Local Government to be dealt with under this section(4).

Sub-section (2).—The addition newly made to this sub-section empowers a Local Government to call for the record of the trial along with the presiding Judge's opinion when considering an application for the suspension or remission of a sentence. The Select Committee of 1916 said: "It is well known that in the case of proceedings in a High Court the Judges object to their notes being treated as part of the record, and we have therefore referred in our proposed amendment of section 401 (2) to a certified copy of the record of the trial, or of such record thereof as exists. We think in cases where it is necessary, in considering a petition for mercy, for Government to know, as it frequently may be, the nature of the evidence given at a trial in a High Court, we can safely trust to the courtesy of High Court Judges to furnish a copy of their notes."

Sub-sections (4-A) and (5-A).—In the Statement of Objects and Reasons (1921) the following passage occurs: "The new clause (4-A) is intended to make it clear that the power to remit sentences conferred by section 401 can be exercised in the case of orders of a penal nature, e.g., orders under section 565 of the Code. The object of the new clause (5-A) is to enable any condition, upon which a pardon has been granted by His Majesty or by the Governor-General when such power has been delegated to him to be enforced in the same way as a sentence of the court."

Use of "law" instead of "Act" explained.—The Joint Committee of 1922 said: "In sub-section (4-A), the word 'law' has been used instead of the more common word 'Act' to make it clear that this section applies to the case of persons sentenced by tribunals constituted by Regulations and Ordinances."

Sub-section (5).—The Select Committee of 1916 said "we have made a formal amendment in the sub-section in view of the special

(1) *Kartar Singh v. Crown*, 33 P. L. R. 191—A. I. R. 1892 Lah. 259—1932 Cr. O. 324—137 I. C. 293—33 Cr. L. J. 484—18 A. I. R. 215. See also *Ghulam Mohammad v. Emperor*, A. I. R. 1933 Lah. 1031—1933 Cr. C. 1558—35 P. L. R. 149—147 I. C. 578.

(2) *Nawab v. Emperor*, 33 P. L. R. 279—A. I. R. 1932 Lah. 303—1932 Cr. O.

422—138 I. C. 410—33 Cr. L. J. 580.

(3) *Ghulam Jannat v. Emperor*, A. I. R. 1926 Lah. 271—7 Lah. 70—94 I. C. 403—27 Cr. L. J. 637—27 P. L. R. 534.

(4) See *Toola Ram v. Crown*, 8 Lah. 684 and the cases cited therein; also *Chafu Mal v. Emperor*, 4 I. C. 985—16 P. W. B. 1907 Cr.—94 P. L. R. 1539.

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delegation to the present Governor-General of His Majesty's Majesty prerogative of pardon."

402. (1) The Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:—

Death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.

Amendment explained.—It was formerly considered that the power of commutation given by ss. 54 and 55 of the Indian Penal Code was restricted by the provisions of this section. This section has accordingly been renumbered by Act XVIII of 1923 and to the section as renumbered sub-section (2) has been added. This amendment is intended to clear the doubt that was experienced as to the consistency of this section with ss. 54 and 55 of the Indian Penal Code(1).

Stay of sentence.—The tribunal appointed under the Lahore Conspiracy Case Ordinance, No. III of 1930 sentenced to death certain persons and issued a warrant authorizing the Superintendent of Jail to execute the sentence by a certain date. In the meanwhile the Local Government suspended the execution of the sentence pending application to Privy Council for leave to appeal. The Privy Council refused leave. An application was made for the issue of a writ of *habeas corpus* on the ground that the custody of the prisoner was illegal as the date for execution of sentence originally fixed had expired, and as the tribunal had ceased to exist, there was no authority which could issue a fresh warrant for the execution of the death sentences. It was held, that, as the original warrant committing the prisoners to custody was issued according to law and the Government had authority to suspend the execution of the sentence as it did, the custody in which the prisoners were kept was not illegal or improper. It was further held that even if the Local Government found that there was any legal difficulty in carrying out the sentence, it would be still open to it under s. 402, Cr. P. Code, to commute the sentence into one of transportation or imprisonment(2).

(1) Statement of Objects and Reasons
(1914).
(2) *Chind Ram v. Emperor*, 82 Cr. L.

J. 126=135 I. C. 180=A. I. R. 1931 Lah.
859=33 P. L. R. 1024=1981 Cr. O. 631=
Ind. Bul. (1932) Lah. 81.

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CHAPTER XXX. OF PREVIOUS ACQUITTALS OR CONVICTIONS.

403. (1) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

Person once convicted or acquitted not to be tried for same offence.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-sec. (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of s. 26 of the General Clauses Act, 1897, or s. 188 of this Code.

Explanation.—The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 275, is not an acquittal for the purposes of this section.

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Illustrations.

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or upon the same facts with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

Principle.—It is a fundamental common law rule that no one may be punished twice for the same offence and this has long been held to mean that he may not be punished twice for the same acts or omissions irrespective of the exact terms of the charge, and that the test of similarity is whether or not the evidence to obtain a legal conviction on the first charge was in substance the same as that necessary to sustain the second charge. This common law rule together with its limitations is contained in section 403, Criminal Procedure Code(1). In other words, section 403, Criminal Procedure Code, embodies the rule as to pleas of *autrefois acquit* and *autrefois convict* subject only to the exceptions. It is a carefully drawn section, and according to it where a person has been tried and convicted or acquitted for an offence arising out of a particular set of facts, he cannot, while such conviction or acquittal remains in force, be again tried in respect of any offence based on the same facts, unless the case can be brought under one or other of the specific exceptions to the rule provided by the said section(2). There may be cases to which, though section 403 of the Code of Criminal Procedure does not strictly apply, yet on the principle underlying that

(1) *Babu Lal v. Ram Saran*, A. I. R. 1930 Pat. 26=117 I. C. 525=30 Cr. L. J. 806=1930 Cr. C. 2=9 Pat. 585=11 Pat. L. T. 722=3 Cr. Law, Pat. 21; *Empress v. Chinna*, 29 M. 125 F. B.

(2) *Mahadeopir v. Emperor*, 18 I. O. 557=9 R. L. 25=18 Cr. L. J. 185;

Res v. Plummer, (1902) 2 R. B. 339, cited in *Emperor v. Lalit Mohan*, 38 C. 559; *Fakir Muhammad v. Emperor*, 97 I. C. 417 (419)=A. I. R. 1937 B. 10=27 Cr. L. J. 1105; *Gaya Din v. Emperor*, A. I. R. 1934 O. 269 (1)=11 O. W. N. 984=1934 O. L. R. 280=147 I. C. 1144=90 Cr. L. J. 570.

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section, a second trial should not be allowed to proceed(1).

Person not placed on trial.—When A has been tried and acquitted, the expression of a desire by the trial court that further criminal proceedings should not be taken in connection with the subject-matter of the trial does not operate as a bar in law to the issue of process against B who was neither tried nor acquitted at A's trial. In such a case, the plea of *autrefois acquit* would not be available to B, the fact that another person accused upon the same facts of having been implicated in the same offence has been acquitted might properly be taken into consideration by the Magistrate in determining whether upon the materials before him there was "sufficient ground for proceeding" to issue process upon the person against whom the complaint had been preferred(2). The contrary was held in the following cases(3), but these decisions have not been generally followed, and were, in some cases expressly dissented from.

Effect of previous acquittal on an absent accused—A dismissal of the complaint under s. 247 for complainant's default and the acquittal of one of the accused, terminates also the case against the other accused, whose attendance could not be obtained and against whom the trial did not proceed, nor can the order under s. 247 be set aside under s. 437(4). But in another case in which two out of three accused were tried and convicted it has been held that the case of the absented accused, when found, should be tried and decided altogether irrespective of the fact that there had been a previous trial and conviction upheld by the High Court against the other accused(5).

"Tried."—The meaning of the word "tried" in s. 403 (1) does not necessarily import a decision of a case on merits, but only refers to the nature of the proceedings that were had; or in other words, means that the proceedings in which the acquittal was passed were in the nature of a trial. Therefore an acquittal under s. 247 would bar a further trial under section 403 (1)(6). The contrary view taken in *Kotayyo v. Venkayya*(7) must be received with caution. On a complaint of enticing away a married woman, a non-cognizable offence, and of theft, cognizable offence, being made to a Police Officer, he inquired into the offence of theft only, scarcely noticing the allegation as to the enticing away of the woman and reported to a Magistrate that no

(1) *Sidh Nath v. Emperor*, 57 C 17 = 31 Cr. L. J. 747 = 121 I. C. 824 = 1 R. 1930 Cal 472.

(2) *Subal Chandra v. Ahadulla*, 53 C 606 = 30 C. W. N. 546 = 95 I. C. 358 = 27 Cr. L. J. 788 = 1926 Cal 795 = 44 C. L. J. 114. *Kokai Sardar v. Meher Khan*, 37 C 680 = 11 Cr. L. J. 541 = 7 I. C. 931. *Manindra Chandra v. Emperor*, 41 C. 754.

(3) *Bishun Das v. Emperor*, 7 C. W. N. 493. *Kedar Nath v. Adhin*, 7 C. W. N. 711.

(4) *Panchu Singh v. Umor Muhammad*, 4 C. W. N. 346.

(5) *Emperor v. Ghure*, 36 A. 163 (171) = 12 A. L. J. 231 = 15 Cr. L. J. 200 =

22 I. C. 984.

(6) *Suku Ram v. Krishna*, Dec. 49 C. L. J. 119 = 116 I. C. 174 = 33 C. W. N. 260 = 1929 C. 18 = 30 Cr. L. J. 585 = 12 A. I. Cr. R. 463. *Shanker v. Sadashiv*, 1929 Cr. C. 436 = 53 B. 693 = 31 Bom. L. R. 795 = A. I. R. 1929 B. 468; *In re*

C 855.

(7) 40 M. 977 (n), see also *Ajodhya Nath v. Kshitish Chandra*, 35 C. W. N. 1181 = A. I. R. 1932 C. 221 = 1932 Cr. C. 200 = 1 R. 1932 Cal. 272 = 137 I. C. 161 = 33 Cr. L. J. 439.

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such offence was even *prima facie* made out. The Magistrate, thereupon, directed him to strike off the offence complained of from the list of reported offences. It was held that this was no bar to the taking up of, and proceeding with, a fresh complaint of enticing away a married woman, inasmuch as there was no dismissal of the complaint in respect of that offence(1). The maxim *nemo bis vexari* has no application to an order under s. 203, though it may be a good argument, where accused person has been discharged under s. 253, or s. 259, Criminal Procedure Code. The principle appears to be that unless the proceedings have reached such a stage of finality that an acquittal is recorded or that an order is made which the Code declares shall operate as an acquittal, there is no bar(2). "Neither an order of discharge nor of acquittal can properly be made in a case where the accused has not been directed to appear at all"(3). In this case a preliminary charge sheet under section 107, Criminal Procedure Code, was withdrawn by the police before the parties mentioned therein were ordered to appear. The Magistrate endorsed the charge-sheet to the effect that the accused were acquitted. A fresh charge under the same section was subsequently brought by the police against certain of the same persons who had been previously charge sheeted. It was held that the withdrawal of the first charge-sheet was no bar to proceedings under the second. It is hardly open to argument that a refusal by the Magistrate under s. 476, to file a complaint against an accused person, attracts the applicability of the doctrine of *autrefois acquit* enunciated by s. 403(4). Where a Magistrate to whom an application for maintenance is made knows or has reason to believe that a similar application on the same facts has previously been adjudicated upon, he ought not to act on the application without considering the previous decision, but if he does so it cannot be held that he is wrong in law and that his proceedings are void regardless of the merits(5).

Irregularity in the first trial.—Where a prisoner is released by the Court of Session, on the ground that the proceedings had in his case were illegal and irregular, there is no bar to his being subsequently tried and convicted of the same offence(6). But a court before which a second trial is held has nothing to do with the evidence given in the former trial except for the purpose of ascertaining whether the offence in the two trials is the same(7). The omission of the court to prepare in writing a charge against the accused does not invalidate his order of acquittal, and such order is a bar to the revival of the prosecution of such person for the same offence(8). But the absence of a complaint

(1) *Government v. Shidappa*, 5 B. 405=6 Ind Jur. 37.

(2) *Emperor v Chinna*, 20 M. 126 (148).

(3) *In re Muthia Moopan*, 36 M. 315=14 Cr L.J. 559=21 I C. 159

(4) *Rajabali v Emperor*, A. I R 1930 S. 315=1930 Cr C 1117=24 S. L R. 446.

(5) *Maung Hla Maung v. Ma On Kin*, 105 I. C. 240=6 Bur. L. J. 200=28 Cr. L. J. 912=5 Rang 697=A. I. R. 1927

Rang. 328 (A previous application for maintenance which was dismissed for default without an adjudication on the merits does not bar a subsequent application for the same relief.)

(6) *Queen v Wahed Ali*, 13 W. R. Cr. 42

(7) *Queen v Dwarkanath*, 7 W. R. Cr 15; *Queen v. Itwarya*, 22 W. R. Cr. 14.

(8) *Empress v. Gurdu*, 3 A. 129,

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is a fatal flaw and vitiates the trial *ab initio*. In such a case, therefore, section 403 (1) is no bar to a fresh trial of the accused(1). Where an accused person is acquitted on the ground that the prosecution has not obtained the necessary sanction for institution of the proceedings, a subsequent trial of the accused after obtaining the necessary sanction, is not barred by the provisions of s. 403 of the Cr. P. Code(2).

Conviction or acquittal—The provision contained in section 403 of the Criminal Procedure Code is imperative, and bars a second trial of a person who has once been acquitted on the same charge. The section does not make any distinction between acquittals after trial and acquittals under sections 247, 345 and 494 of the Code. So long as an order of acquittal under section 247 stands, section 403 bars a second trial on the same charge, no matter whether the order of acquittal is good or bad, legal or illegal(3). But dismissal of a complaint after a charge has been framed amounts to an acquittal(4). The dismissal of a summons-case amounts to an acquittal(5). The compounding of an offence under s. 345 operates as an acquittal and can be pleaded in defence, but it will have no effect upon other offences(6). Where there is a withdrawal of a complaint with the consent of the court, the provisions of s. 240, Criminal Procedure Code apply and the accused must be considered to have been acquitted of that charge(7). An order of acquittal under section 258 cannot be treated as an order of discharge; it is one of acquittal and bars a second trial of the same offence on the same facts(8). But the discharge or acquittal of an accused for want of a complaint under s. 476, Criminal Procedure Code, by a person

(1) *Nanakram v. Emperor*, 19 Cr. L. J. 796=46 I. C. 716

(2) *Sanitary Inspector v. Bipin Behari*, 27 Cr. L. J. 751=95 I. C. 79=30 C. W. N. 382=43 C. L. J. 110=A. I. R. 1926 C. 691

(3) *Bom. M. L. J. v. Emperor*, 51 I.

nath v. Behare, 13 C. L. R. 303, *Musa Singh v. Gorha Behary*, A. I. R. 1929 Cal. 657=1929 Cr. C. 327, (Order under S. 247 passed in ignorance of the order staying for the proceedings)

(4) *In re Jadubar*, 5 C. L. R. 359.

(5) *Saifud Din v. Crown*, 14 P. W. R. 1917 Cr.

(6) *Venkatasuami v. Narappa*, (1930) M. W. N. 692=3 M. Cr. C. 301, *Manjubhai v. Emperor*, 119 I. C. 641=31 Bom. L. R. 526=A. I. R. 1929 B. 283=53 Bom. C. 1=1929 Cr. C. 33=20 Cr. L. J. 1059.

(7) *Ghamandi Lal v. Babu Lal*, 119 I. C. 575=27 A. L. J. 1036=51 A. 977=30 C. L. J. 1089=1. R. 1929 A. 1071=A. I. R. 1929 A. 693, *In re Muthua Moopan*, 36 M. 315, *Opoorba v. Probod Kumar*, 1 C. W. N. 42; *Emperor v. Ambaji*, 30 Bom. L. R. 330=52 Bom. 257=109 I. C. 48=29 Cr. L. J. 545=10 A. I. Cr. R. 289=A. I. R. 1929 Bom. 143, *Dagai Dugdya v. Emperor*, 109 I. C. 316=30 Bom. L. R. 312=1928 Bom. 177=21 Cr. L. J. 522=10 A. I. Cr. R. 187, *Sidd Nath v. Emperor*, 49 C. L. J. 378=33 C. W. N. 454=1929 Cr. C. 91=A. I. R. 1929 Cal. 457.

(8) *Gandi Apparazu v. Emperor*, 43 M. 320.

I. C. 710=21 Cr. L. J. 815, *Venkanna v. Emperor*, 1927 M. 603=28 C. L. J. 304=103 I. C. 381, *Emperor v. Dulla*, 45 A. 53=74 I. C. 1074=1923 A. 360=21 Cr. L. J. 861, *Sukum Ram v. Krishna Deb*, 33 C. W. N. 260=49 C. L. J. 119=116 I. C. 174 (1)=30 Cr. L. J. 585=A. I. R. 1929 Cal. 189; *In re Sinnu Gounden*, 26 M. L. J. 160=(1924) M. W. N. 273=15 Cr. L. J. 236=23 I. C. 183, *Fazal Pramanik v. Emperor*, 87 C. L. J. 253=1923 Cal. 407, cf. *Emperor v. Amanat Kadar*, A. I. R. 1929 B. 134=31 Bom. L. R. 146=116 I. C. 251=30 Cr. L. J. 594=13 A. I. Cr. R. 7, *Etim Haji v. Hamid*, 24 Cr. L. J. 444=18 Cr. L. J. 105=27 I. C. 312, *Roma-*

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competent to make such a complaint, does not bar a subsequent trial of the same accused for the same offence on a complaint made by the proper person(1). But if the order of acquittal was passed in the first instance under a misapprehension that the complainant was not competent to make the complaint, it would operate as a bar to a second trial(2). An acquittal for preparation to commit dacoity is no bar to a subsequent trial on the same facts for collecting men to wage war against the King, when authority for the prosecution under Chapter VI, Indian Penal Code, has not been accorded at the time of the first trial(3). Though there is no absolute bar to an accused person being again put in peril of a fresh trial in respect of the same offence in a case where the first trial has ended in an order of discharge, it is well recognized and salutary rule of law, that a Magistrate of co-ordinate jurisdiction should not entertain a fresh complaint in respect of the same offence when it is based on facts which were known to the complainant and on evidence which was available when the first trial was held(4). A departure from this rule is in effect an assumption by the Magistrate of the powers of the appellate court, and is utterly contrary to sound principle(5). A wrong order of acquittal will not bar a subsequent trial under this section(6). A clear distinction exists between acquittal and discharge and hence, the use of the expression "acquitted" in place of "discharge" is not a mere clerical error which can be

(1) *Emperor v. Ambaji*, 109 I C 481=30 Bom. L. R. 380=A. I. R. 1928 B. 143=52 Bom. 257=29 Cr. L. J. 545=10 A. I. Cr. R. 288; *Juram v. Emperor*, 40 B. 97=17 Bom. L. R. 881=16 Cr. L. J. 761=31 I. C. 361; *Emperor v. Juran*, 27 I. C. 208=37 A. 107=13 A. L. J. 4=

Jagesh, 1 C. W. N. 57; *Dhana Reddy*

360=14 Cr. L. J. 214=19 I. C. 910; *Emperor v. Umaruddin*, 31 A. 317

(2) *Colandaswami v. Rajaratna*, 58 M. L. J. 579=127 I. C. 645=31 L. W. 755=(1930) M. W. N. 532=A. I. R. 1930 M. 785=1930 Cr. C. 896=3 M. Cr. C. 198=32 Cr. L. J. 27.

(3) *San Baw v. Crown*, 1 L. B. R. 340 The refusal of an application for sanction to prosecute a party to judicial proceeding, under ss. 162, 193 I. P. Code is not a bar under S. 403, Cr. P. C., to his prosecution for defamation: *Satish Chandra v. Ram Dayal*, 48 C. 388 (391)=24 C. W. N. 982=32 C. L. J. 91=59 I. C. 143=22 Cr. L. J. 31.

(4) *Emperor v. Alias*, 124 I. C. 384=A. I. R. 1929 S. 242=(1930) Sind 144=31 Cr. L. J. 687; *Pars Ram v. Emperor*, 115 I. C. 309=30 Cr. L. J. 414; *Empress v. Tika Singh*, 8 A. 251; *Emperor v. Amanat Kadar*, 116 I. C. 215=31 Bom. L. R. 146=A. I. R. 1929 Bom. 134=30 Cr. L. J. 594; *Nilraton v.*

Singh v. Public Prosecutor, 4 Pat 24=26 Cr. L. J. 170=83 I. C. 780=6 Pat. L. T. 225=3 Pat. L. R. Cr. 51=A. I. R. 1925

Emperor v. Alias, 29 I. C. 726; *Emperor v. Kira*, 205 P. L. R. 1911=24 P. W. R. 1911 Cr.=11 I. C. 132=12 Cr. L. J. 364.

(5) *Emperor v. Alias*, 124 I. C. 384=A. I. R. 1929 S. 242; *Pars Ram v. Emperor*, 115 I. C. 309

Emperor v. Jadu, (1886) A. W. N. 260; *Queen-Empress v. Lajja Ram*, (1888) A. W. N. 96; *Queen v. Robert*, 6 W. R. 13 Cr.

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corrected under section 369 of Cr. P. Code. The acquittal in such a case is a bar to all further proceedings on the same facts, so long as it remains in force(1). Where, however, a previous order releasing the accused was obviously not intended to operate as their acquittal but the intention of the Magistrate making the order was that the accused should ultimately be tried for the offence they were arrested in a legal manner, such order is no bar under s 403 to their being tried again(2).

Summary dismissal of complaint or discharge of accused does not invariably bar inquiry on second complaint on same facts.—The dismissal of a complaint, or discharge of the accused is not an acquittal for the purposes of this section. Therefore an inquiry on a second complaint on the same facts, where the first complaint has been summarily dismissed or the accused is discharged is not absolutely barred(3). But when a competent tribunal has dismissed a complaint, another tribunal of exactly the same powers cannot re open the same matter on a complaint made to it(4). An order that purports to be one of acquittal has to be regarded as one of discharge when, under the provision of law that was applied, only a discharge order could be passed(5).

Court of competent jurisdiction.—The acquittal or conviction in order to amount an effectual defence to the charge, must be by a court of competent jurisdiction. A previous acquittal by a court having no jurisdiction to try the offence is no bar to a subsequent trial for the offence by a court having jurisdiction(6). There can be no acquittal unless the court before which the accused is tried

(1) *Narasimha v Abdul Gafoor*, 7 Mys L J 177, *Queen Empress v Sivarama*, 12 M 35, *In re Jadubar*, 5 C L R 359, *Hesta v Crown*, 29 P R, 1914 Cr

(2) *Nafar Sardar v Emperor*, A I R 1932 C 871=38 C W N 1038=1932 Cr C, 833; see *Firangi Singh v Durga Singh*, A I R 1926 Pat 292=5 Pat. 243=7 Pat L T 449=911 C 890=27 Cr L J 678

(3) *Lallam v Emperor*, A I R 1934 A 514=31 A L J 241=3 A W R 571 *Empress v. Chotu*, 9 A. 52=(1886) A W N 281 F B. *Empress v. Puran*, 9 A. 85=(1886) A W N 307, *Empress v. Unedan*, (1895) A W N 56 *Bhagwan Din v. Dabban*, 5 A L J 137=7 Cr L J 297=(1908) A W N 67 *Emperor v. Mehrban*, 29 A 7=3 A L J 562=(1906) A W N 245=4 Cr L J, 59, *Ram Rharos v. Babban*, 36 A 53=15 Cr L J 1=22 I C 145, *Puran v. Emperor*, A I R 1916 A 293, *Empress v. Dolegobind*, 28 C, 211; *Kungs Lal v. Emperor*, A I R 1915 A, 69, (1) *Phonsia v. Emperor*, A. I. R. 1935 A 59

(4) *Empress v. Adam Khan*, 22 A, 106=(1899) A W N 211; *Rama Nand v. Sheri*, A. I. R. 1934 A. 87=1934 Cr

C 150; *Nanda v. Emperor*, A. I. R 1927 A 815.

(5) *Tolladaçu v. Rangarao*, 140 I C 322=34 Cr L J 12=5 Mad Cr C, 386=(1932) M W N 1230=6 I. W 641=A I R 1933 M 98; *Nazir Ahmad v. Emperor*, A I R 1934 A, 944, *Ram Prasad v. Ganpatrao*, A I R 1934 Nag 215, *Discharge under S 259*, *Sukhalo v. Emperor*, A I R 1934 A 141 (Order of discharge held implied), *Nafar v. Emperor*, 1932 C 871

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plainant under S. 200)

(6) *In re Shankar* 30 Bom. L. R. 1435=A I R. 1919 B 530, *Madho v. Turab*, 26 I C 174=15 Cr L J 726=18 C W N 1211, *Husain Khan v. Emperor*, 18 Cr L J 516=59 I C 60=15 A L J 176=9 A 293, *Mehendra Nath v. Emperor*, 148 I C 437=A I R 1934 lat 411, see also *Narayan Ram v. Karumbayaram* A I R 1934 M 716=(1934) M W N 1022

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competent to make such a complaint, does not bar a subsequent trial of the same accused for the same offence on a complaint made by the proper person(1). But if the order of acquittal was passed in the first instance under a misapprehension that the complainant was not competent to make the complaint, it would operate as a bar to a second trial(2). An acquittal for preparation to commit dacoity is no bar to a subsequent trial on the same facts for collecting men to wage war against the King, when authority for the prosecution under Chapter VI, Indian Penal Code, has not been accorded at the time of the first trial(3). Though there is no absolute bar to an accused person being again put in peril of a fresh trial in respect of the same offence in a case where the first trial has ended in an order of discharge, it is well recognized and salutary rule of law, that a Magistrate of co-ordinate jurisdiction should not entertain a fresh complaint in respect of the same offence when it is based on facts which were known to the complainant and on evidence which was available when the first trial was held(4). A departure from this rule is in effect an assumption by the Magistrate of the powers of the appellate court, and is utterly contrary to sound principle(5). A wrong order of acquittal will not bar a subsequent trial under this section(6). A clear distinction exists between acquittal and discharge and hence, the use of the expression "acquitted" in place of "discharge" is not a mere clerical error which can be

(1) *Emperor v. Ambaji*, 109 I. C. 481=30 Bom. L. R. 380=A. I. R. 1928 B. 143=52 Bom. 257=29 Cr. L. J. 545=10 A. I. Cr. R. 288; *Jivram v. Emperor*, 40 B. 97=17 Bom. L. R. 891=16 Cr. L. J. 761=81 I. C. 361; *Emperor v. Juwan*, 27 I. C. 208=37 A. 107=13 A. L. J. 4=16 Cr. L. J. 144; *Fakir Muhammad v. Emperor*, 97 I. C. 417=27 Cr. L. J. 1105; cf. *Ganapathi v. Emperor*, 16 M. 308=24 M. L. J. 463=13 M. L. T. 360=14 Cr. L. J. 214=19 I. C. 910; *Emperor v. Umaruddin*, 31 A. 317.

Jagesh, 1 C. W. N. 57; *Dhana Reddy v. Emperor*, 2 Bom. L. R. 911=

(3) *San Bau v. Crown*, 1 L. B. R. 340. The refusal of an application for sanction to prosecute a party to judicial proceeding, under ss. 182, 193 I. P. Code is not a bar under S. 403, Cr. P. C., to his

1005-2 D. I. P. C. 51=1 D. 1005

Muhammad Askari, 29 C. 726; *Emperor v. Kira*, 205 P. L. R. 1911=24 P. W. R. 1911 Cr.=11 I. C. 132=12 Cr. L. J. 364.

(5) *Emperor v. Alias*, 124 I. C. 384=A. I. R. 1929 S. 212; *Pars Ram v. Emperor*, 115 I. C. 309

113, *Empress v. Lika Singh*, 3 A. 251; *Emperor v. Amanat Kadar*, 116 I. C. 215=31 Bom. L. R. 146=A. I. R. 1929 Bom. 134=30 Cr. L. J. 591, *Nilratn v.*

113, *Empress v. Lika Singh*, 3 A. 251; *Queen-Empress v. Lajja Ram*, (1889) A. W. N. 26; *Queen v. Robert*, 6 W. R. 13 Cr.

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corrected under section 369 of Cr. P. Code. The acquittal in such a case is a bar to all further proceedings on the same facts, so long as it remains in force(1). Where, however, a previous order releasing the accused was obviously not intended to operate as their acquittal but the intention of the Magistrate making the order was that the accused should ultimately be tried for the offence they were arrested in a legal manner, such order is no bar under s 403 to their being tried again(2).

Summary dismissal of complaint or discharge of accused does not invariably bar inquiry on second complaint on same facts.—The dismissal of a complaint, or discharge of the accused is not an acquittal for the purposes of this section. Therefore an inquiry on a second complaint on the same facts, where the first complaint has been summarily dismissed or the accused is discharged is not absolutely barred(3). But when a competent tribunal has dismissed a complaint, another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it(4). An order that purports to be one of acquittal has to be regarded as one of discharge when, under the provision of law that was applied, only a discharge order could be passed(5).

Court of competent jurisdiction.—The acquittal or conviction in order to amount an effectual defence to the charge, must be by a court of competent jurisdiction. A previous acquittal by a court having no jurisdiction to try the offence is no bar to a subsequent trial for the offence by a court having jurisdiction(6). There can be no acquittal unless the court before which the accused is tried

(1) *Narasimha v. Abdul Gafoor*, 7 Mys L J 177; *Queen Empress v. Sivarama*, 12 M 35; *In re Jadubar*, 5 C L R 359; *Hesta v Crown*, 29 P. R. 1914 Cr.

(2) *Nafar Sardar v. Emperor*, A. I. R. 1932 C 871=36 O W. N 1038=1932 Cr. C. 893; see *Firangi Singh v. Durga Singh*, A. I. R. 1926 Pat 292=5 Pat. 213=7 Pat. L. T. 449=94 I. O. 890=27 Cr. L. J. 698.

(3) *Emperor v. ...*, A. I. R. 1924

(4) *...*

(5) *...*

(6) *Empress v. Adam Khan*, 22 A. 106=(1899) A. W. N. 211; *Rama Nand v. Sheri*, A. I. R. 1934 A. 87=1934 Cr.

C. 150; *Nanda v. Emperor*, A. I. R. 1927 A. 815.

(5) *Tolladagu v. Rangarao*, 140 I. C. 322=34 Cr. L. J. 12=5 Mad. Cr. C. 386=(1932) M. W. N. 1220=16 I. W. 641=A. I. R. 1933 M. 98; *Nazir Ahmad v. Emperor*, A. I. R. 1934 A. 914; *Ram Prasad v. Ganpatrao*, A. I. R. 1934 Nag. 215, (Discharge under S. 259); *Sukhala v. Emperor*, A. I. R. 1934 A. 141 (Order of discharge held implied); *Nafar v. Emperor*, 1932 C. 871. (Release of accused in a summons case); *Uma Singh v. Emperor*, A. I. R. 1933 Pat. 212=14 Pat. L. T. 162=12 Pat. 231 (striking off case reported under S. 179); *Ali Bux v. Emperor*, A. I. R. 1934 A. 877=32 A. L. J. 648=150 I. C. 1006 (Dismissal for failure to examine complainant under S. 200).

(6) *In re Shankar*, 30 Bom. L. R. 1435=A. I. R. 1928 B. 530; *Madho v. Turab*, 26 I. C. 174=15 Cr. L. J. 722=18 O. W. N. 1211; *Husain Khan v. Emperor*, 18 Cr. L. J. 510=39 I. O. 690=...

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has jurisdiction(1). When the conviction and sentence passed upon an accused are set aside on the ground that the trying Magistrate had no jurisdiction, the order of the appellate court setting aside the conviction is no obstacle to the accused being retried on the same charge(2). Where an offence is tried without jurisdiction, the proceedings are void under s. 530, *post*, and the offender, if acquitted is liable to be re-tried under this section. It is not necessary for the High Court to upset the acquittal before the re-trial can be had(3). If the court had jurisdiction there can be no re-trial unless the acquittal has been set aside by the High Court on appeal by the Local Government(4). 'Competent Court' in sub-sections (1) and (4) has given rise to conflict of opinion; the question is whether in considering competency all these considerations are to be taken into account (i) authority as regards subject-matter, that is, the class of offence, (ii) authority as regards the person, or the class of offender (iii) local jurisdiction, (iv) whether some preliminary condition (e.g. sanction) has to be fulfilled before the exercise of jurisdiction (v) whether Judge labours under some personal disqualification(5). The Council of Elders established under the Punjab Regulation (IV of 1887) is a court of competent jurisdiction, for the purposes of this section, and a person convicted by such Council cannot be re-tried on the same facts(6). A conviction by a village headman in Burma of an offence under section 294 of the Indian Penal Code bars a further trial for the same offence(7). But an acquittal by a village Munsiff in Madras does not bar the trial of the accused by a Magistrate(8). A trial in Native State bars further trial for the same offence on the same facts in British India(9). All offences against the Abkari law in Bombay being cognizable by a Magistrate of the second class, a person tried for any such offence by any such Magistrate, and acquitted, is not

(1) *Rami Reddi v. Seshu Reddi*, 3 M. 48=2 Weir. 756; *Samsuddin, In re*, 22 B. 711.

(2) *Narayanawami v. Karumbayiram*, 58 M. 256.

(3) *Empress v. Hussain Garbu*, 8 B. 307.

(4) *Emperor v. Gustadji*, 10 B. 181.

(5) *Katju & Das Cr. P. C.* p. 384; *Chuhar v. Emperor*, A. I. R. 1930 Lab. 1055=129 I. C. 224=1930 Cr. C. 1231=32 Cr. L. J. 253 (want of complaint has also

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Pat. 302=7 Pat. L. T. 383=95 I. C. 929=27 Cr. L. J. 849 (Jurisdiction does not refer merely to character or status of court but refers also to want of jurisdiction on other grounds such as want of sanction under S. 193); see also *In re Shankar*, 113 I. C. 70=30 Bom. L. R. 1435=A. I. R. 1928 B. 520; *Darbari Mal v. Emperor*, 12 I. C. 839=8 A. L.

J. 1129=12 Cr. L. J. 575 (Acquittal by Magistrate disqualified under S. 556); *Ram Piyari v. Emperor*, A. I. R. 1931 Lab. 199=1931 Cr. C. 319=191 I. C. 373=32 Cr. L. J. 731=16 A. I. Cr. R. 352 (Illegal conviction is not conviction by incompetent court); *In re Ganapathi*, 36 M. 308 (Sanction is not a condition of competency); *Ct. Khetra v. Emperor*, 23 Cr. L. J. 310=66 I. C. 662=48 C. 867, F. B.; *Emperor v. Menghraj*, 23 Cr. L. J. 304=66 I. C. 657; *Uthnavel v. K. S. Iyer*, A. I. R. 1933 M. 765 (Acquittal by Court wanting in territorial jurisdiction)

(6) *Sarwar v. Empress*, 30 P. R. 1884 Cr.

(7) *Ngae v. Empress*, 1 Rang. 449=2 Bur. L. J. 149=76 I. C. 697=25 Cr. L. J. 233=1924 Rang. 23

(8) *Rama Naidu v. Venkataswami*, 1927 M. 695=53 M. L. J. 102=28 Cr. L. J. 507=101 I. C. 891=8 A. I. Cr. B. 178

(9) *Teja Singh v. Emperor*, 73 I. C. 939=24 Cr. L. J. 715.

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liable to be tried again for the same offence(1).

For the same offence.—To render a former acquittal or conviction a defence on a second trial, the offence must be the same(2). If the offence be different and based on different facts, though based on the same evidence, the previous trial will not bar a second trial(3). A practical test is whether the act or omission comes under the same penal section and on the facts a reference may be made to the time and place of the offence, the intention with which it was done and the like differentiating characteristics. Each case must, therefore, be considered on its own facts(4). "Same offence also includes an offence which is involved in the offence with which the accused was previously charged"(5). Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to form a part, his acquittal is conclusive(6).

Same facts.—A person convicted under the Forest Act for felling timber in excess of his license cannot, while that conviction remains in force, be tried again for felling the same timber merely because the evidence of the measurement of the timber given at the first trial was incorrect(7). The acquittal of an accused person of an offence under s. 427, I. P. C., bars a subsequent trial on the same facts for an offence of rioting(8). The acquittal of an accused person of an offence under s. 302, I. P. C., bars a subsequent trial on the same facts for an offence under s. 201, I. P. C.(9). The acquittal of a person of offences of forgery and abetment thereof under the Penal Code bars his trial for an offence under section 82 (c) of the Registration Act, on the same facts(10). A person, who has already been convicted of an offence under section 121-A, Penal Code, for a conspiracy to overawe the Government of India by means of criminal force, to wit, by causing bombs to be thrown at British Officers, cannot, on the same facts, be subsequently convicted under section 120-B, for a conspiracy to kill Europeans(11). The previous acquittal of an accused on a charge

(1) *Empress v. Gustadji*, 10 B. 181.

(2) *Queen v. Dwarka Nath*, 7 W. R. 15.

(3) *Ganesh Sahu v. Emperor*, 50 C. 594=37 C. L. J. 326=27 C. W. N. 554= (1923) Cal. 557=24 Cr. L. J. 707=73 I. C. 731; *Emperor v. Bishan Singh*, 3

1010. C. L. J. 412=27 C. W. N. 554= (1923) Cal. 557=24 Cr. L. J. 707=73 I. C. 731.

(6) *Emperor v. Lalit Mohan*, 28 C. 559.

(7) *San Mya v. Emperor*, 8 L. B. R. 253=5 Cr. L. J. 412.

(8) *Chinnappa Naidu In re*, (1921) M. W. N. 153=9 L. W. 31=25 Cr. L. J. 211=76 I. C. 708.

(9) *Crown v. Manghnidas*, 4 S. L. R. 174.

(10) *Maunga Saing v. Emperor*, 1 Rang. 299=25 Cr. L. J. 191=76 I. C. 431=A. I. R. (1921) Rang. 213.

(11) *Hussain v. Emperor*, 82 I. C. 169=25 Cr. L. J. 1241.

(4) Woodhouse v. C. P. C., p. 44b, citing *Dwarkanath*, 7 W. R. 15; *Anon*, 6 M. H. C. App. 27; *Subedar*, 1 Bom. L. R. 15; *Prasanna*, 31 C. 1007; *Jhabbar*, 21 Cr. L. J. 509; *Goolzar*, 9 W. R. 30; *Ishan*, 15 C. 511; *Malkhan*, 15 A. 317, foll. in *Bishun*, 3 Patna 503; S. C. 25 Cr. L. J. 733; *Mian*, 28 A. 313; *Griffiths*, 21 C. 262; *Mun. of Bombay*, 4 Bom. L. R. 575; *Thakar*, 20 P. R.

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has jurisdiction(1). When the conviction and sentence passed upon an accused are set aside on the ground that the trying Magistrate had no jurisdiction, the order of the appellate court setting aside the conviction is no obstacle to the accused being retried on the same charge(2). Where an offence is tried without jurisdiction, the proceedings are void under s. 530, *post*, and the offender, if acquitted is liable to be re-tried under this section. It is not necessary for the High Court to upset the acquittal before the re-trial can be had(3). If the court had jurisdiction there can be no re-trial unless the acquittal has been set aside by the High Court on appeal by the Local Government(4). 'Competent Court' in sub-sections (1) and (4) has given rise to conflict of opinion; the question is whether in considering competency all these considerations are to be taken into account (i) authority as regards subject-matter, that is, the class of offence, (ii) authority as regards the person, or the class of offender (iii) local jurisdiction, (iv) whether some preliminary condition (e.g. sanction) has to be fulfilled before the exercise of jurisdiction (v) whether Judge labours under some personal disqualification(5). The Council of Elders established under the Punjab Regulation (IV of 1887) is a court of competent jurisdiction, for the purposes of this section, and a person convicted by such Council cannot be re-tried on the same facts(6). A conviction by a village headman in Burma of an offence under section 294 of the Indian Penal Code bars a further trial for the same offence(7). But an acquittal by a village Munsiff in Madras does not bar the trial of the accused by a Magistrate(8). A trial in Native State bars further trial for the same offence on the same facts in British India(9). All offences against the Abkari law in Bombay being cognizable by a Magistrate of the second class, a person tried for any such offence by any such Magistrate, and acquitted, is not

(1) *Rami Reddi v. Seshu Reddi*, 3 M. 48=2 Weir. 756; *Samsuddin, In re*, 22 B. 711.

(2) *Narayanawami v. Karumbayiram*, 58 M. 256.

(3) *Empress v. Hussain Garbu*, 8 B. 307.

(4) *Emperor v. Gustadji*, 10 B. 181.

(5) *Katju & Das Cr. P. C.* p. 384; *Chuhra v. Emperor*, A. I. R. 1900 L. L.

J. 1129=12 Cr. L. J. 575 (Acquittal by Magistrate disqualified under S. 556); *Ram Piyari v. Emperor*, A. I. R. 1931 Lah. 199=1931 Cr. C. 319=131 I. C. 373=32 Cr. L. J. 731=16 A. I. Cr. R. 352 (Illegal conviction is not conviction by incompetent court); *In re Ganapathi*, 36 M. 308 (Sanction is not a condition of competency); *Ct. Khetra v. Emperor*, 23 Cr. L. J. 310=66 I. C. 662=48 O. 867, F. B.; *Emperor v. Menghroj*, 23 Cr. L. J. 304=66 I. C. 657; *Bathnavelu v. K. S. Iyer*, A. I. R. 1933 M. 765 (Acquittal by Court wanting in territorial jurisdiction).

(6) *Sarwar v. Empress*, 30 P. R. 1884 Cr.

(7) *Ngae v. Empress*, 1 Rang. 449=2 Bur. L. J. 149=76 I. C. 697=25 Cr. L. J. 233=1924 Rang. 23.

(8) *Rama Naidu v. Venkataswami*, 1927 M. 695=53 M. L. J. 102=28 Cr. L. J. 507=101 I. C. 891=8 A. I. Cr. R. 178.

(9) *Teja Singh v. Emperor*, 73 I. C. 939=24 Cr. L. J. 715.

not refer merely to character or status of court but refers also to want of jurisdiction on other grounds such as want of sanction under S. 195; see also *In re Shankar*, 118 I. C. 70=30 Bom. L. R. 1435=A. I. R. 1928 B. 530; *Darbari Mal v. Emperor*, 12 I. C. 839=8 A. L.

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liable to be tried again for the same offence(1).

For the same offence—To render a former acquittal or conviction a defence on a second trial, the offence must be the same(2). If the offence be different and based on different facts, though based on the same evidence, the previous trial will not bar a second trial(3). A practical test is whether the act or omission comes under the same penal section and on the facts a reference may be made to the time and place of the offence, the intention with which it was done and the like differentiating characteristics. Each case must, therefore, be considered on its own facts(4). "Same offence also includes an offence which is involved in the offence with which the accused was previously charged"(5). Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to form a part, his acquittal is conclusive(6).

Same facts.—A person convicted under the Forest Act for felling timber in excess of his license cannot, while that conviction remains in force, be tried again for felling the same timber merely because the evidence of the measurement of the timber given at the first trial was incorrect(7). The acquittal of an accused person of an offence under s. 427, I. P. C., bars a subsequent trial on the same facts for an offence of rioting(8). The acquittal of an accused person of an offence under s. 302, I. P. C., bars a subsequent trial on the same facts for an offence under s. 201, I. P. C.(9). The acquittal of a person of offences of forgery and abetment thereof under the Penal Code bars his trial for an offence under section 82 (c) of the Registration Act, on the same facts(10). A person, who has already been convicted of an offence under section 121-A, Penal Code, for a conspiracy to overawe the Government of India by means of criminal force, to wit, by causing bombs to be thrown at British Officers, cannot, on the same facts, be subsequently convicted under section 120-B, for a conspiracy to kill Europeans(11). The previous acquittal of an accused on a charge

(1) *Empress v. Gustadji*, 10 B. 181.

(2) *Queen v. Dicarika Nath*, 7 W. B. Cr. 15.

(3) *Ganesh Sahu v. Emperor*, 50 C. 594=37 C. L. J. 326=27 C. W. N. 554= (1923) Cal. 557=24 Cr. L. J. 707=73 I. C. 931; *Emperor v. Bishan Singh*, 3 Pat. 503 (519)=5 Pat. L. T. 319=15 Cr. L. J. 738=81 I. C. 226=(1924) Pat. 126=2 Pat. L. R. 131 Cr.=A. I. R. 1923 Pat. 20; *Ishan v. Empress*, 15 C. 511; *Empress v. Mahan*, 15 A. 317.

(4) Woodroffe's Cr. P. C. p. 446, citing *Dicarikanath*, 7 W. R. 15; *Anon.*, 6 M. H. C. App. 27; *Subedar*, 1 Bom. L. R. 15; *Prasanna*, 31 C. 1007; *Jhabbar*, 21 Cr. L. J. 509; *Goolzar*, 9 W. R. 30; *Ishan*, 15 C. 511; *Mahan*, 15 A. 317.

(5) *Emperor v. Lalit Mohan*, 29 C. 559.

(6) *Emperor v. Lalit Mohan*, 29 C. 559.

(7) *Emperor v. Lalit Mohan*, 29 C. 559.

(8) *Emperor v. Lalit Mohan*, 29 C. 559.

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(13) *Emperor v. Lalit Mohan*, 29 C. 559.

(14) *Emperor v. Lalit Mohan*, 29 C. 559.

(15) *Emperor v. Lalit Mohan*, 29 C. 559.

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Page 1335, footnote 3, line 4, after '569'; Desai v. Emperor, 1935 S 193

Page 1340, footnote (7) line 2 after '703', Moti Lal v. Emperor, 1935 A 652=1935 Cr C 652.

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Page 1263, footnote (6) after '949'; Chhotey Lal v. Tinke Lal, 1935 A. 815=156 I. C. 163.

Page 1364, after (5) The order of transfer cannot be regarded as an order in the nature of judgment and hence can be altered after it is once passed and signed, Chhotey Lal v. Tinke Lal, 1935 A 815=156 I. C. 163.

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Page 1375, after the provision of section This section is not meant to enable a court to remedy an important error in procedure which might have been calculated to prejudice the accused in the trial and which, in fact, causes the trial to be vitiated, Emperor v. Hari, 1935 S 145.

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Page 1387, footnote (2) line 2 after '160'=59 B. 350

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Page 1411, after (4). Similarly where a summons has been issued to the accused and the complainant does not appear on the day appointed for the appearance of the accused and the Court acquits the accused, then he must be deemed to have been tried within the meaning of this section, though the summons may not have been served and the accused may not have appeared. Hence a fresh complaint is barred by this section, Bhupati v. Amro, 1935 C 491=39 C W N. 919=157 I. C. 670

Page 1413, footnote (6) line 10 after '1022'=58 M. 256

Page 1416, footnote (4) line 2 after '56 (2)'=58 M. 518.

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Page 1458 footnote (3) line 4 after '56', Pem Mahlon v. Emperor, 1935 P. 425=14 P. 392=159 I. C. 211.

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Page 1461, footnote (2) line 9 after '453', Pem Mahlon v. Emperor, 1935 P. 425=14 P. 392=159 I. C. 211

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Page 1463, footnote (3) line 2 after '69'=62 C 983

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Page 1474, after (6) Where the judgment of the appellate court shows examination of evidence without appellants' counsel, it was held that there was hearing within this section, Kewal Ram v. Emperor, 1935 P 515=16 P. L. T. 693=158 I. C. 321=36 Cr. L. J. 1354

Page 1481, footnote (2) line 2 after '304'; Potram v. Emperor 1935 Nag 175=155 I. C. 258=31 N. L. R. 246=36 Cr. L. J. 740.

Page 1482, after (8) Where on appeal from a conviction passed in the High Court Session, the appellate Judge sets aside the conviction and orders a retrial, but further orders that the trial should be held not by the High Court but by some other court of competent jurisdiction subordinate to the appellate court, the order passed is one under S 423 (b), Hari v. Emperor, 1935 P. C. 122=156 I. C. 3=39 C. W. N. 922.

Page 1482, footnote (11) after '580'; Shahdeo Ram v. Emperor, 1935 A. 679=1935 A. L. J. 618.

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Page 1503, after (9) Where an order of imprisonment is passed against a person under S 120 and the appellate Court releases him on bail, the period during which he was on bail must be excluded from period of detention, Darsu v. Emperor 1934 A. 815=57 A. 264

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Page 1507, after (8). But no such power is vested in the Court of Session when the Court of Session hears an appeal from the Additional Sessions Judge which has decided the case with the aid of Jurors or Assessors, Hari v. Emperor, 1935 O. 402=155 I. C. 753=1935 O. L. R. 358=1935 O. W. N. 592

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Page 1533 after (2) The Sessions Judge has no authority to revise order of a District Magistrate passed under the provisions of S. 528, Mohamed Isahuck v. Emperor, 1935 R. 446

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Page 1545, footnote (4) line 4, after '1176', Abdullah Jan v. Taji Gul, 1935 Pesh. 141.

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Page 1553, footnote (4) line 2 after '190'; *Shambhooram v. Emperor*, 1935 S. 221=159 I. C. 271

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Page 1567, footnote (9) line 8, after '905'; *Shivaprasad v. Pahlad*, 1935 A. 696.

Page 1570, footnote (4) line 16 after '448'; *Mathura v. Chkra*, 10 Luck. 192.

Page 1579, footnote (5) line 2 after '61'; *Ignatious v. A'agamma*, 1935 R. 192.

Page 1589 footnote (1) line 8, after '241'; *Emperor v. Jafir Khan*, 1935 A. 814=156 I. C. 101 (revisional application is not to be regarded as in some sort a second appeal on a question of law).

Page 1614 footnote (4) line 2, after '6'; *Alef v. Emperor*, 62 C. 952.

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Page 1639, line 20 after *supra*. New Heading. *Scope*.—Under Sub. S 1, of this section there does not appear to be any injunction upon the Magistrate or court to take evidence as to the capacity of the accused to make his defence. The view of the Magistrate or court is made the criterion of whether action is required under Sub. S (2), *Emperor v. Ahmad Ali*, 1935 P. 501=16 P. L. T. 828

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Page 648, after (3) If an accused deaf and dumb is charged under S. 411 I. P. C. but the knowledge regarding stolen nature of property is not proved, the case does not come under this section, *Emperor v. A deaf and dumb person*, 1933 P. 451=16 P. L. T. 568.

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Page 1650, footnote (12) after '680'; *Mahalinga v. Emperor*, 1935 M. 1044=158 I. C. 1040.

Page 1651, footnote (1) line 2, after 'opala-
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Page 1652 footnote (5) line 2, after '310'; cf. *Narsappa v. Emperor*, 59 B. 845=1935 B. 158

Page 1652, footnote (6) line 2, after '630'; *Harcharan Singh v. Kirpa*, 1935 L. 677.

Page 1658 footnote (9) line 6, after '238'; *Mahalinga v. Emperor*, 1935 M. 1044=158 I. C. 1040.

Page 1659 after (5). Witness making different statements in Sessions Court and committing Magistrate's Court is not exempt from prosecution in all cases

true, *Emperor v. Jitsing*, 1935 N. 145=156 I. C. 257.

Page 1661, footnote (4) line 2, after '863'; followed in *Bal Gobind v. Jambabai*, 1935 Nag. 199.

Page 1661, footnote (5) line 16 after '201'; *Ibn Ali v. Emperor*, 1935 A. 603=1935 A. L. J. 393=155 I. C. 490.

Page 1662, footnote (6) line 5, after '928'=57 A. 351

Page 1670, footnote (4) line 3, after '474'; *Kewal Ram v. Emperor*, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354

Page 1671, after (4) Where no objection on the ground of omission to hold a preliminary enquiry is raised by the accused until after he has been convicted, the objection must fail, *Kewal Ram v. Emperor*, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354.

Page 1681, footnote (1) last line after 59'=10 Luck 335.

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Page 1686, after (7) New Para. *Power of Attorney*.—An appeal from an order on a petition under S 476-A does not require a power of attorney, *Harcharan Singh v. Kirpa*, 1935 L. 677=37 P. L. R. 762.

Page 1686 footnote (3) line 7, after '440'; *Shivaprasad v. Pahlad Singh*, 1935 A. 696.

Page 1686 footnote 6 line 3 after '683'; *Abdul Ghani v. Ram Mohan*, 1935 A. 573=1935 A. L. J. 671.

Page 1687 footnote (3) line 20 '157'=59 B. 340

Page 1690 footnote (6) line 3 after '435'; *Bal Govind v. Jambabai*, 1935 Nag. 199=31 N. L. R. 370.

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Page 1711 after (9). So also an order of discharge shall not release the insolvent from any liability under an order for maintenance made under this section; *Emperor v. Sardar Muhammad*, 1935 Lah. 758=36 P. L. R. 161.

Page 1717 footnote (18) line 4 after '525'; *Hemanta Kumar v. Monorma*, 1935 C. 488=39 C. W. N. 432=61 O. L. J. 141=62 C 639.

Page 1722 footnote (3) line 2 after 'Cr.'; *Emperor v. Kuppini Naik*, 1935 M. 572=1934 M. W. N. 922=1934 M. Cr. C 342=67 M. L. J. 493=41 I. W. 697=155 I. C. 694=36 Cr. L. J. 830.

Page 1722 footnote (11) line 10 after '623'; see also *Pal Singh v. Nihal Kaur*, 37 P. L. R. 609.

Page 1723 footnote (3) line 5 after "488"; *Bhagwati v. Gajadhar*, 158 I. C. 1123.

Page 1728 after (3). But where husband was ordered to pay maintenance

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Page 1235, footnote 3, line 4, after '363'; *Deraji Mal v Emperor*, 1935 S 193.

Page 1340, footnote (7) line 2 after '703'; *Moti Lal v Emperor*, 1935 A 652=1935 Cr C. 652.

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Page 1363, footnote (6) after '919'. *Chhotey Lal v Tinku Lal*, 1935 A. 815=156 L. C. 163

Page 1364, after (5) The order of transfer cannot be regarded as an order in the nature of judgment and hence can be altered after it is once passed and signed, *Chhotey Lal v Tinku Lal*, 1935 A 815=156 L. C. 163.

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Page 1375, after the provision of section This section is not meant to enable a court to remedy an important error in procedure which might have been calculated to prejudice the accused in the trial and which, in fact, causes the trial to be vitiated, *Emperor v. Hari*, 1935 S. 145.

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Page 1387, footnote (2) line 2 after '160'=59 B 350.

S. 403.

Page 1411, after (4). Similarly where a summons has been issued to the accused and the complainant does not appear on the day appointed for the appearance of the accused and the Court acquits the accused, then he must be deemed to have been tried within the meaning

Bhupati v Amio, 1935 C. 491=39 C. W. N. 919=157 I C 670

Page 1413, footnote (6) line 10 after '1022'=58 M. 256

Page 1416, footnote (4) line 2 after '56 (2) '=58 M. 513.

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Page 1458 footnote (5) line 4 after '453'; *Pem Mahtom v Emperor*, 1935 P. 428=14 P. 392=159 I. C 211.

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Page 1461, footnote (2) line 9 after '453'; *Pem Mahtom v Emperor*, 1935 P. 426=14 P. 392=159 I. C. 211.

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Page 1463, footnote (3) line 2 after '59'=62 C 993

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Page 1474, after (6). Where the judgment of the appellate court shows examination of evidence without appellants' counsel, it was held that there was hearing within this section, *Kewal Ram v Emperor*, 1935 P 515=16 P. L. T 693=158 I C 321=36 Cr L J 1351

Page 1481, footnote (2) line 2 after '301'. *Potram v Emperor* 1935 Nag 175=155 I C 258=31 N L R 246=36 Cr L J. 740

Page 1482, after (8) Where on appeal from a conviction passed in the High Court Session, the appellate Judge sets aside the conviction and orders a retrial, but further orders that the trial should be held not by the High Court but by some other court of competent jurisdiction subordinate to the appellate court, the order passed is one under S 423 (6), *Hari v Emperor*, 1935 P. C. 122=156 I. C. 8=39 C. W. N 929.

Page 1482, footnote (11) after '580'; *Shahdeo Ram v. Emperor*, 1935 A 579=1935 A. L. J 618.

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Page 1503, after (9). Where an order of imprisonment is passed against a person under S. 120 and the appellate Court releases him on bail, the period during which he was on bail must be excluded from period of detention, *Darsu v Emperor* 1934 A. 845=57 A. 264.

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Page 1507, after (8). But no such power is vested in the Court of Session when the Court of Session hears an

S 435.

Page 1533 after (2) The Sessions Judge has no authority to revise order of a District Magistrate passed under the provisions of S. 528, *Mohamed Israhuck v. Emperor*, 1935 R. 446.

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Page 1545, footnote (4) line 4, after '1176'; *Abdullah Jan v. Teti Gul*, 1935 Pesh. 141.

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Page 1938 footnote (3); *Mosafir Singh v Emperor*, 1935 P. 356=156 I. C. 310=16 P. L. T. 440=36 Cr. L. J. 901 (compliance with S. 195 (1) (a) is necessary condition to jurisdiction).

Page 1942 after (6) When Magistrate has ample ground for apprehending a breach of the peace and he issues an order under S. 145, sub-S. (1) the mere omission to frame his order in accordance with law is cured by S. 537 as no failure of justice is caused, *Bibi Asghari v. Emperor*, 1935 O. 316=1935 O. W. N. 454=155 I. C. 169=1935 O. L. R. 257=36 Cr. L. J. 656.

Page 1946 footnote (7) line 4 after '171'; *Deep Chand v. Emperor*, 1935 A. 627=1935 A. L. J. 606=1535 Cr. C. 641=157 I. C. 915=36 Cr. L. J. 1260.

Page 1946 footnote (12) line 4 after '199' approved in *Bishnath v Emperor*, 1935 O. 488=157 I. C. 378=1935 O. W. N. 922=1935 O. L. R. 471=36 Cr. L. J. 1198.

Page 1948 footnote (6) line 22 after 713; *Piarey Lal v Emperor*, 1935 O. 273=154 I. C. 320=1935 O. W. N. 185=1935 O. L. R. 157.

Page 1948 footnote (6); *Munoo Lal v Emperor*, 1935 O. 241=1935 O. W. N. 126=1935 O. L. R. 141=154 I. C. 258. 1935 Cr. C. 442=36 Cr. L. J. 447.

Page 1949 footnote (3) line 2 after '101'; *Bhaggan v. Emperor*, 1936 O. 327=1935 O. W. N. 408=1935 O. L. R. 210=154 I. C. 901=36 Cr. L. J. 602.

Page 1950 footnote (2) line 2 after '75'; see also *Ganga Singh v Emperor*, 1935 A. 547=1935 A. L. J. 423=155 I. C. 541=1935 Cr. C. 650=36 Cr. L. J. 762

(where no prejudice caused, irregularity is cured by S. 537).

Page 1958 footnote (2) line 3 after '137'=57 A. 412

Page 1354 footnote (4) line 7 after 547, referred in *Marudamuthu v. Raghava*, 58 M. 427=1935 M. 22

S. 545.

Page 1984 after (9). The same view is taken by the Judicial Commissioner, Peshawar, in a recent case, *Mst. Nur Sahibi v. Emperor*, 1935 Pesh. 102=157 I. C. 531=36 Cr. L. J. 1208.

Page 1985 after (6). So also an order of compensation out of fine made by the Magistrate in a prosecution of the mid-wife under S. 304-A, I. P. C. is illegal and without jurisdiction, *Maung Sain v Emperor*, 1935 R. 471.

Page 1985 footnote (2) after 'Cr'; see also *Ram Prasad v Emperor*, 1935 R. 199=156 I. C. 957=36 Cr. L. J. 1030.

S. 546-A

Page 1987 after (3) Complainant not having paid process fees or fee on petition of complaint is not entitled to receive such sum under S. 546-A (1), *Emperor v. Maung Po Hla*, 1935 R. 209=156 I. C. 980=36 Cr. L. J. 1048

S. 552

Page 1992 footnote (2) after '487'; *Ma Ngwe v. Maung Ye*, 1935 R. 494 (application of S. 552 depends on the question of girl's age).

S. 562

Page 2021 footnote (6) line 4 after '566' overruled in *Vaijappa v. Emperor*, 1935 Bom. 402=37 Bom. L. R. 739=1935 Cr. C. 1110; *Emperor v. Manchershaw*, 59=B. 352=1935 B. 156.

Page 2022 footnote (4) line 2 after '182'=59 B. 514.

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the wife applied for maintenance in the 4th month but husband not being traced her application was dismissed and she

Page 1764 footnote (9) line 4 after '65', Abdul Majid v. Emperor 1935 Cal 473=39 C. W. N. 1081.

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Page 1787 after (4) New Para. *Peshawar Case* The mere fact that a committal order has been passed, does not in itself afford reasonable grounds to the Sessions Judge for believing that the person so committed is guilty of the offence with which he is charged. Hence it is no bar to a Sessions Judge's granting bail to the accused, Nisar Ali v. Abdul Hamid, 1935 Pesh 101

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Page 1807 footnote (2) lines 3 after '665'=57 A. 256.

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Page 1846 footnote (2) line 4 after '664'; Shahbapat v. Ram Kishan, 62 C 861.

Page 1846 footnote (5) line 3 after '345', Shahbapat v. Ram Kishan, 62 C 861.

S. 522

Page 1852 footnote (9) line 7 after '341'; Suba v. Ali Gauhar, 1933 Lah. 477=37 P. L. R. 176

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Page 1886 footnote (2) line 4 after '795', Bhagomal v. Noor Nabi Khan, 1935 Cal 473=39 C. W. N. 1081.

Magistrate, but she does not apply to the High Court for revision of the order and subsequently after the birth of a child applies again for the maintenance of herself and her child, only the maintenance of the child can be considered, Ma Saw May v. U Aung, 1935 R. 277

Page 1745 after (9). They are not really criminal precedents, Ma Saw May v. U. Aung 1935 R. 277.

S. 491

Page 1757 after (8) But where the person is detained in custody under Extradition Act, 8 10 over two months and no extension has been granted by the Local Government, the detention is illegal, Surjan Narayan v. Emperor, 1935 P 419=16 P. L. T. 651

Page 1757 footnote (1) line 3 after '1052'=10 Luck. 87.

Page 1759 footnote (2) after '72', D. C. v. Muhammad Shikoh, 10 Luck 141.

S. 494

Page 1763 after (6). Provisions in this section are meant to avoid possible injustice to applicant whose application

and the trial for an offence which would in the ordinary course be by Jury in a particular district, may be transferred to another district where it would be held with the aid of Assessors only, Emperor v. Hari, 1935 S 145=28 S. L. R. 397=157 I. C. 697=36 Cr. L. J. 1161

Page 1893 footnote (9) line 2 after '122'; Hari v. Emperor, 1935 P. C. 122=156 I. C. 3=39 C. W. N. 929=37 B. L. R. 631=37 P. L. R. 542=59 B. 496 36 Cr. L. J. 978=16 P. L. T. 613=69 M. L. J. 122=42 L. W. 168

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Page 1910 footnote (11) line 23 after '97', Chhotey Lal v. Tinkle Lal, 1935 A 815=156 I. C. 163=36 Cr. L. J. 918=1935 A. L. J. 1053

Page 1914 after (7) The Sessions Judge has no authority to revise order of a District Magistrate passed under the provisions of this section any more than the High Court has any such authority, Mohammad Isabuck v. Emperor, 1935 R. 446.

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Page 1938 footnote (3); *Mosafir Singh v Emperor*, 1935 P. 356=156 I. C. 310-16 P. L. T. 440=36 Cr. L. J. 901 (compliance with S. 195 (1) (a) is necessary condition to jurisdiction).

Page 1942 after (6) When Magistrate has ample ground for apprehending a breach of the peace and he issues an order under S 145, sub-S (1) the mere omission to frame his order in accordance with law is cured by S 537 as no failure of justice is caused, *Bibi Asghari v. Emperor*, 1935 O. 816=1935 O. W. N. 454=155 I. C. 169=1935 O. L. R. 257=36 Cr. L. J. 656.

Page 1946 footnote (7) line 4 after '171'; *Deep Chand v. Emperor*, 1935 A. 627=1935 A. L. J. 666=1635 Cr. O. 641=157 I. C. 915=36 Cr. L. J. 1260

Page 1946 footnote (12) line 4 after '199' approved in *Bishnath v Emperor*, 1935 O. 488=157 I. C. 378=1935 O. W. N. 922=1935 O. L. R. 471=36 Cr. L. J. 1198

Page 1948 footnote (6) line 22 after 713; *Piavey Lal v. Emperor*, 1935 O. 273=154 I. C. 320=1935 O. W. N. 185=1935 O. L. R. 157.

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Page 1949 footnote (3) line 2 after '101'; *Bhaggan v. Emperor*, 1936 O. 327=1935 O. W. N. 408=1935 O. L. R. 210=154 I. C. 901=36 Cr. L. J. 602.

Page 1950 footnote (3) line 2 after '75'; 1935 I. C. 1762

(where no prejudice caused, irregularity is cured by S. 537).

Page 1958 footnote (2) line 3 after '137'=57 A. 412.

Page 1954 footnote (4) line 7 after 547, referred in *Marudamuthu v Raghava*, 58 M. 427=1935 M. 22.

S. 545.

Page 1984 after (9). The same view is taken by the Judicial Commissioner, Peshawar, in a recent case, *Mst. Nur Sahibi v. Emperor*, 1935 Pesh. 102=157 I. C. 531=36 Cr. L. J. 1203.

Page 1985 after (6). So also an order of compensation out of fine made by the Magistrate in a prosecution of the mid-wife under S. 354-A, I. P. C. is illegal and without jurisdiction, *Maung Sain v Emperor*, 1935 R. 471.

Page 1985 footnote (2) after 'Cr.'; see also *Ram Prasad v Emperor*, 1935 R. 199=156 I. C. 957=36 Cr. L. J. 1030.

S. 546-A

Page 1987 after (3) Complainant not having paid process fees or fee on petition of complaint is not entitled to receive such sum under S. 546-A (1). *Emperor v Maung Po Hla*, 1935 R. 209=156 I. C. 980=36 Cr. L. J. 1048

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Page 1992 footnote (2) after '467'; *Ma Ngwe v. Maung Ye*, 1935 R. 494 (application of S 552 depends on the question of girl's age).

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Page 2021 footnote (6) line 4 after '566' overruled in *Vaijappa v Emperor*, 1935 Bom. 402=37 Bom. L. R. 739=1935 Cr. C. 1110; *Emperor v. Manchershaw*, 59=B. 352=1935 B. 156.

Page 2022 footnote (4) line 2 after '182'=59 B. 514.

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under section 498, Penal Code, is not a bar to subsequent proceedings under the same section on a charge of subsequent detention(1). It would not be right to put the accused man on his trial for the second time in respect of the same matters upon which he has already been tried and acquitted although the charges not before the court are framed in a different manner and under a different section of the I.P.C.(2). An accused person who has been acquitted of an offence under s. 397, Penal Code, cannot be tried again for an offence under s. 307, Penal Code, on the same facts(3). When the court has once decided that there has been no failure to remove an encroachment and acquitted the accused, he is not liable to be tried again and again for failure to remove the same encroachment, simply because the same authority hopes to get a different decision later on by issuing one notice after another relating to the same encroachment(4).

Subsequent prosecution on different facts.—Where the prosecution of an accused rests of facts wholly and completely different from those on which he was previously prosecuted, the principle of *autrefois acquit* cannot be invoked(5).

Continuing offence—A person who has been once tried for building a house without the sanction of a Municipal Committee and acquitted, cannot be retried for the same offence simply on the ground that the house continues to stand and thus constitutes a continuous offence(6).

Trial for different offence upon the same facts.—An accused once acquitted cannot be convicted for another offence in respect of the same facts(7). An acquittal of an offence arising out of certain facts under a wrong section will prevent a further inquiry into any offence based on the same facts until that acquittal is set aside(8). But the protection offered by this section extends to different offences only when they are based on the same facts and fall within the provisions of section 236 or Section 237(9). A previous conviction under sec. 91-B of the Companies Act does not debar a subsequent trial and conviction for criminal breach of trust on the same set of facts on the principle of *autrefois convict* as no alternative charge could be framed in the proceedings under the Companies Act(10). The acquittal of an accused person on a charge under section 401 does not debar a subsequent trial and conviction for an offence under section 413, I. P. C.(11). But the

(1) *Waryam Singh v. Emperor*, 29 Cr. L. J. 3=29 P. L. R. 52=106 I. C. 330=9 A. I. Cr. R. 215; see also *Mahdub Ali Khan v. Crown*, 4 Lah. L. J. 483.

(2) *Emperor v. Jubbar Mull*, 72 I. C. 973=49 Cal. 921=24 Cr. L. J. 503=1923 Cal. 179.

(3) *In re Penumatcha*, 148 I. C. 844=A. I. R. 1934 M. W. N. 41=39 L. W. 433.

(4) *Itangachariar v. Venkata-srami* A. I. R. 1935 M. 56 (2).

(5) *Waryam Singh v. Emperor*, 106 I. C. 339=9 A. I. Cr. R. 315=29 Cr. L. J. 3=29 P. L. R. 52. But a complainant cannot institute a series of trials each based upon different evidence, *Maoka Pillai In re*, 28 Cr. L. J. 235=99 I. C.

1035=1927 M. 444=7 A. I. Cr. R. 390=25 L. W. 220.

(6) *Saifuddin v. Emperor*, 18 Cr. L. J. 324=39 I. C. 436=14 P. W. R. 1917 Cr.

(7) *Sobha Mal v. Emperor*, A. I. R. 1928 Lah. 332=29 Cr. L. J. 232=107 I. C. 766.

(8) *Ram Nidh v. Ram Saran*, 26 O. C. 282=1924 O. 64=25 Cr. L. J. 791=81 I. C. 314.

(9) *Empress v. Subedar*, 1 Bom. L. R. 15.

(10) *Mangal Sen v. Emperor*, 119 I. C. 650=A. I. R. (1929) Lah. 810=30 Cr. L. J. 254=A. I. R. 1930 Lah. 57.

(11) *Chafju v. Emperor*, 5 A. I. Cr. R. 8

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Page 1335, footnote 3, line 4, after '369'; *Deviji Mal v. Emperor*, 1935 S. 193

Page 1340, footnote (7) line 2 after '703'; *Moti Lal v. Emperor*, 1935 A 652=1935 Cr C 152.

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Page 1263, footnote (6) after '919'; *Chhotey Lal v. Tinko Lal*, 1935 A. 815=156 L. C. 163

Page 1364, after (5) The order of transfer cannot be regarded as an order in the nature of judgment and hence can be altered after it is once passed and signed, *Chhotey Lal v. Tinko Lal*, 1935 A. 815=156 L. C. 163.

S. 375

Page 1375, after the provision of section This section is not meant to enable a court to remedy an important error in procedure which might have been calculated to prejudice the accused in the trial and which, in fact, causes the trial to be vitiated, *Emperor v. Hari*, 1935 S. 145.

S. 386.

Page 1397, footnote (2) line 2 after '160'=59 D. 350

S. 403.

Page 1411, after (4). Similarly where a summons has been issued to the accused and the complainant does not appear on the day appointed for the appearance of the accused and the Court acquits the accused, then he must be deemed to have been tried within the meaning of this section, though the summons may not have been served and the accused may not have appeared. Hence a fresh complaint is barred by this section, *Bhupati v. Amio*, 1935 C. 491=39 C. W. N. 919=157 I. C. 670

Page 1413, footnote (6) line 10 after '1022'=58 M. 256

Page 1416, footnote (4) line 2 after '56 (2)'=58 M. 513.

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Page 1458 footnote (5) line 4 after '56'. *Pem Mahtom v. Emperor*, 1935 P. 425=14 P. 392=159 I. C. 211

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Page 1461, footnote (2) line 9 after '453'; *Pem Mahtom v. Emperor*, 1935 P. 426=14 P. 392=159 I. C. 211

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Page 1463, footnote (3) line 2 after '59'=62 C. 983

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Page 1474, after (6) Where the judgment of the appellate court shows examination of evidence without appellants' counsel, it was held that there was hearing within this section, *Kewal Ram v. Emperor*, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354

Page 1481, footnote (2) line 2 after '304'; *Potram v. Emperor*, 1935 Nag. 175=155 I. C. 258=31 N. L. R. 246=36 Cr. L. J. 740.

Page 1482, after (8) Where on appeal from a conviction passed in the High Court Session, the appellate Judge sets aside the conviction and orders a retrial, but further orders that the trial should be held not by the High Court but by some other court of competent jurisdiction subordinate to the appellate court, the order passed is one under S. 423 (b), *Hari v. Emperor*, 1935 P. C. 122=156 I. C. 3=39 C. W. N. 922.

Page 1482, footnote (11) after '580'; *Shahdeo Ram v. Emperor*, 1935 A. 579=1935 A. L. J. 618.

S. 426

Page 1503, after (9) Where an order of imprisonment is passed against a person under S. 120 and the appellate Court releases him on bail, the period during which he was on bail must be excluded from period of detention, *Darsu v. Emperor*, 1934 A. 845=57 A. 264

S. 429

Page 1507, after (8) But no such power is vested in the Court of Session when the Court of Session hears an

S. 435

Page 1533 after (2) The Sessions Judge has no authority to revise order of a District Magistrate passed under the provisions of S. 528, *Mohamed Isahuck v. Emperor*, 1935 R. 416.

S. 436.

Page 1545, footnote (4) line 4, after '1176'. *Abdullah Jan v. Taji Gul*, 1935 Pesh. 141.

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Page 1553, footnote (4) line 2 after '190'; Shambhooram v. Emperor, 1935 S. 221=159 I. C. 271.

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Page 1567, footnote (9) line 8, after '905'; Shivaprasad v. Pahlad, 1935 A. 696.

Page 1570, footnote (4) line 16 after '448'; Mathura v Chkra, 10 Luck. 192.

Page 1579, footnote (5) line 2 after '61'; Ignatious v A'agamma, 1935 B. 192.

Page 1589 footnote (1) line 8, after '441'; Emperor v Jafar Khan, 1935 A. 814=156 I. C. 101 (revisional application is not to be regarded as in some sort a second appeal on a question of law).

Page 1614 footnote (4) line 2, after '6'; Alef v Emperor, 62 C. 952.

S 463

Page 1639, line 20 after *supra*. New Heading. *Scope*.—Under Sub S. 1, of this section there does not appear to be any injunction upon the Magistrate or court to take evidence as to the capacity of the accused to make his defence. The view of the Magistrate or court is made the criterion of whether action is required under Sub. S. (2), Emperor v. Ahmad Ali, 1935 P. 501=16 P. L. T. 828.

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Page 643, after (3). If an accused deaf and dumb is charged under S. 411 I. P. C. but the knowledge regarding stolen nature of property is not proved, the case does not come under this section, Emperor v. A deaf and dumb person, 1933 P. 451=16 P. L. T. 668.

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Page 1650, footnote (12) after '860'; Mahalinga v. Emperor, 1935 M. 1044=158 I. C. 1040.

Page 1651, footnote (1) line 2, after '630'; Mahabaleswarappa v Gopala-swami, 1935 M. 673=1935 M. W. N. 152=41 L. W. 503=1935 M. Cr. C. 119=156 I. C. 311=36 Cr. L. J. 895.

Page 1652 footnote (5) line 2, after '310'; cf. Narasappa v. Emperor, 59 B. 345=1935 B. 158

Page 1653, footnote (6) line 2, after '530'; Harcharan Singh v Kirpa, 1935 L. 677.

Page 1658 footnote (9) line 6, after '238'; Mahalinga v. Emperor, 1935 M. 1044=158 I. C. 1040.

Page 1659 footnote (4) line 2, after '190'; Shambhooram v. Emperor, 1935 S. 221=159 I. C. 271.

Page 1660 footnote (5) line 2, after '61'; Ignatious v A'agamma, 1935 B. 192.

Page 1661 footnote (4) line 2, after '190'; Shambhooram v. Emperor, 1935 S. 221=159 I. C. 271.

Page 1662 footnote (6) line 5, after '928'=57 A. 351

Page 1670, footnote (4) line 8, after '474'; Kewal Ram v Emperor, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354

Page 1671, after (4) Where no objection on the ground of omission to hold a preliminary enquiry is raised by the accused until after he has been convicted, the objection must fail, Kewal Ram v. Emperor, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354.

Page 1681, footnote (1) last line after 59'=10 Luck 335.

Page 1686, after (7) New Para. *Power of Attorney*—An appeal from an order on a petition under S. 476-A does not require a power of attorney, Harcharan Singh v. Kirpa, 1935 L. 677=37 P. L. R. 762.

Page 1686 footnote (3) line 7, after '440'; Shivaprasad v. Pahlad Singh, 1935 A. 696.

Page 1686 footnote 6 line 3 after '683'; Abdul Ghami v Ram Mohan, 1935 A. 573=1935 A. L. J. 671.

Page 1687 footnote (3) line 20 '157'=59 B. 340

Page 1689 footnote (6) line 9 after '435'; Bal Govind v. Jamnabai, 1935 Nag 199=31 N. L. R. 870

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Page 1711 after (9). So also an order of discharge shall not release the insolvent from any liability under an order for maintenance made under this section; Emperor v. Sardar Muhammad, 1935 Lah 758=36 P. L. R. 161.

Page 1717 footnote (13) line 4 after '525'; Hemanta Kumar v Monorma, 1935 C. 488=39 C. W. N. 432=61 C. L. J. 141=62 C 639.

Page 1722 footnote (3) line 2 after 'Cr.'; Emperor v Kuppini Naicken 1935 M. 572=1934 M. W. N. 922=1934 M. Cr. C. 342=67 M. L. J. 493=41 L. W. 697=155 I. C. 694=36 Cr. L. J. 830.

Page 1722 footnote (11) line 10 after '623'; see also Pal Singh v. Nihal Kaur, 37 P. L. R. 809.

Page 1723 footnote (3) line 5 after "488"; Bhagwati v. Gajadhar, 158 I.C. 1123

Page 1728 after (3). But where husband was ordered to pay maintenance

true, Emperor v. Jitsing, 1935 N. 145=156 I.C. 257.

Page 1661, footnote (4) line 2, after '862'; followed in Bal Gobind v Jamnabai, 1935 Nag 199.

Page 1661, footnote (5) line 16 after '201'; Ibn Ali v Emperor, 1935 A. 603=1935 A. L. J. 995=155 I. C. 490.

Page 1662, footnote (6) line 5, after '928'=57 A. 351

Page 1670, footnote (4) line 8, after '474'; Kewal Ram v Emperor, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354

Page 1671, after (4) Where no objection on the ground of omission to hold a preliminary enquiry is raised by the accused until after he has been convicted, the objection must fail, Kewal Ram v. Emperor, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354.

Page 1681, footnote (1) last line after 59'=10 Luck 335.

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Page 1686, after (7) New Para. *Power of Attorney*—An appeal from an order on a petition under S. 476-A does not require a power of attorney, Harcharan Singh v. Kirpa, 1935 L. 677=37 P. L. R. 762.

Page 1686 footnote (3) line 7, after '440'; Shivaprasad v. Pahlad Singh, 1935 A. 696.

Page 1686 footnote 6 line 3 after '683'; Abdul Ghami v Ram Mohan, 1935 A. 573=1935 A. L. J. 671.

Page 1687 footnote (3) line 20 '157'=59 B. 340

Page 1689 footnote (6) line 9 after '435'; Bal Govind v. Jamnabai, 1935 Nag 199=31 N. L. R. 870

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Page 1717 footnote (13) line 4 after '525'; Hemanta Kumar v Monorma, 1935 C. 488=39 C. W. N. 432=61 C. L. J. 141=62 C 639.

Page 1722 footnote (3) line 2 after 'Cr.'; Emperor v Kuppini Naicken 1935 M. 572=1934 M. W. N. 922=1934 M. Cr. C. 342=67 M. L. J. 493=41 L. W. 697=155 I. C. 694=36 Cr. L. J. 830.

Page 1722 footnote (11) line 10 after '623'; see also Pal Singh v. Nihal Kaur, 37 P. L. R. 809.

Page 1723 footnote (3) line 5 after "488"; Bhagwati v. Gajadhar, 158 I.C. 1123

Page 1728 after (3). But where husband was ordered to pay maintenance

merely because subsequent statement is true one. Complaint for giving false evidence should be made generally where it is doubtful as to which statement is

period, U. Hpay Latt v Ma Po, 1935 R. 407=13 R. 289=159 I. C. 282.

Page 1729 footnote (9) after '210'; Emperor v Sirdar Muhammad, 1935 Lahore 758=36 P. L. R. 161 (person committed to jail is not civil debtor but ordinary prisoner. Such person's maintenance expenses in jail cannot be ordered against opposite party).

Page 1729 footnote (8) line 2 after '291', followed in Emperor v Sirdar Muhammad, 1935 L. 758=36 P. L. R. 161.

Page 1732 footnote (9) line (2) after '391'; Ignatious v. Alagamma, 1935 R. 192 (she need not prove habitual ill-treatment)

Page 1734 footnote (8) line 2 after 'Cr.'; Muhammad Arizullah v. Abdul Halim, 1935 O. 235=1935 O. W. N. 222=1935 O. L. R. 171=154 I. C. 561=36 Cr. L. J. 524.

Page 1732 just after the heading 'Cancellation of Order'—This sub-section provides for the cancellation of the order. The reasons given therein for cancellation are not exhaustive. Pearey Lal v. Naraini, 1935 A. 977=159 I. C. 308.

Page 1736 footnote (8) line 2 after '113'; see also Chan Toon v Ma Ti, 1935 R. 359=159 I. C. 81.

Page 1745 after (4). Where an application for maintenance by a mistress under this section is dismissed by the Magistrate, but she does not apply to the High Court for revision of the order and subsequently after the birth of a child applies again for the maintenance of herself and her child, only the maintenance of the child can be considered, Ma Saw May v U Aung, 1935 R. 277.

Page 1745 after (9). They are not really criminal proceedings, Ma Saw May v U. Aung 1935 R. 277.

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Page 1757 after (8). But where the person is detained in custody under Extradition Act, S. 10 over two months and no extension has been granted by the Local Government, the detention is illegal, Surjan Narayan v Emperor, 1935 P. 419=16 P. L. T. 551.

Page 1767 footnote (1) line 3 after '1052'=10 Luck, 87.

Page 1769 footnote (2) after '72'; D. C. v Muhammad Shikoh, 10 Luck 141.

S. 494

Page 1763 after (6). Provisions in this section are meant to avoid possible injustice to applicant whose application

for quashing of commitment on ground of insufficient evidence may be dismissed on merits, Maroti v Emperor, 1935 Nag 202=16 N. L. J. 227.

Page 1764 footnote (9) line 4 after '66'; Abdul Majid v Emperor 1935 Cal 473=39 O. W. N. 1081.

S. 498

Page 1787 after (4) New Para *Peshawar Case* The mere fact that a committal order has been passed, does not in itself afford reasonable grounds to the Sessions Judge for believing that the person so committed is guilty of the offence with which he is charged. Hence it is no bar to a Sessions Judge's granting bail to the accused, Nisar Ali v. Abdul Hamid, 1935 Pesh 101.

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Page 1807 footnote (2) lines 3 after '663'=57 A. 256.

S. 520

Page 1816 footnote (2) line 4 after '664'; Shahbapati v. Ram Kishan, 62 C. 861.

Page 1816 footnote (5) line 3 after '315'; Shahbapati v. Ram Kishan, 62 C. 861.

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Page 1852 footnote (9) line 7 after '341'; Suba v Ali Gauhar, 1933 Lah. 477=37 P. L. R. 176.

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Page 1886 footnote (2) line 4 after '795'; Bhagomal v Noor Nabi Khan, 1935 S. 195=1935 Cr. C. 1060.

and the trial of all offences which would in the ordinary course be by Jury in a particular district, may be transferred to another district where it would be held with the aid of Assessors only, Emperor v Hari, 1935 S. 145=28 S. L. R. 397=157 I. C. 697=36 Cr. L. J. 1161.

Page 1893 footnote (9) line 2 after '122'; Hari v Emperor, 1935 P. C. 122=156 I. C. 3=39 O. W. N. 929=37 B. L. R. 634=37 P. L. R. 542=59 B. 496 36 Cr. L. J. 978=16 P. L. T. 513=69 M. L. J. 122=42 L. W. 168.

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Page 1910 footnote (11) line 23 after '97'; Chhotey Lal v. Tinka Lal, 1935 A. 815=156 I. C. 163=36 Cr. L. J. 918=1935 A. L. J. 1063.

Page 1914 after (7). The Sessions Judge has no authority to revise order of a District Magistrate passed under the provisions of this section any more than the High Court has any such authority, Mohammad Isahuck v. Emperor, 1935 R. 446.

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Page 1938 footnote (3); Mosafir Singh v Emperor, 1935 P 356=156 I. C. 310=16 P. L. T. 440=36 Cr. L. J. 901 (compliance with S. 195 (1) (a) is necessary condition to jurisdiction)

Page 1942 after (6) When Magistrate has ample ground for apprehending a breach of the peace and he issues an order under S 145, sub-S. (1) the mere omission to frame his order in accordance with law is cured by S 537 as no failure of justice is caused, Bibi Asghari v. Emperor, 1935 O. 316=1935 O. W. N. 454=155 I. C. 169=1935 O. L. R. 257=36 Cr. L. J. 656.

Page 1946 footnote (7) line 4 after '171'; Deep Chand v. Emperor, 1935 A. 627=1935 A. L. J. 666=1635 Cr. C. 641=157 I. C. 915=36 Cr. L. J. 1260.

Page 1946 footnote (12) line 4 after '199' approved in Bishnath v Emperor, 1935 O. 488=157 I. C. 378=1935 O. W. N. 922=1935 O. L. R. 471=36 Cr. L. J. 1198

Page 1948 footnote (6) line 22 after 718, Piarey Lal v. Emperor, 1935 O. 273=154 I. C. 320=1935 O. W. N. 185=1935 O. L. R. 157.

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Page 1949 footnote (3) line 2 after '101'; Bhaggan v Emperor, 1936 O. 327=1935 O. W. N. 408=1935 O. L. R. 210=154 I. C. 901=36 Cr. L. J. 602.

Page 1950 footnote (2) line 2 after '75'; see also Ganga Singh v Emperor, 1935 A. 547=1935 A. L. J. 423=155 I. C. 541=1935 Cr. C. 650=36 Cr. L. J. 762

(where no prejudice caused, irregularity is cured by S. 537).

Page 1958 footnote (2) line 3 after '187'=57 A. 412.

Page 1954 footnote (4) line 7 after 547, referred in Marudamathu v. Ragbava, 58 M. 427=1935 M. 22.

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Page 1984 after (9). The same view is taken by the Judicial Commissioner, Peshawar, in a recent case, Mst. Nur Sahibi v. Emperor, 1935 Pesh. 102=157 I. C. 531=36 Cr. L. J. 1208.

Page 1985 after (6). So also an order of compensation out of fine made by the Magistrate in a prosecution of the mid-wife under S. 354-A, I. P. C. is illegal and without jurisdiction, Maung Sain v Emperor, 1935 R. 471.

Page 1985 footnote (2) after 'Cr.'; see also Ram Prasad v Emperor, 1935 R. 199=156 I. C. 957=36 Cr. L. J. 1030.

S. 546-A

Page 1987 after (3) Complainant not having paid process fees or fee on petition of complaint is not entitled to receive such sum under S. 546-A (1), Emperor v. Maung Po Hla, 1935 R. 209=156 I. C. 980=36 Cr. L. J. 1048

S. 552

Page 1992 footnote (2) after '487'; Ma Ngwe v Maung Ye, 1935 R. 494 (application of S 552 depends on the question of girl's age).

S. 562

Page 2021 footnote (6) line 4 after '566' overruled in Vijappa v. Emperor, 1935 Bom. 402=37 Bom. L. R. 739=1935 Cr. C. 1110; Emperor v. Manchershaw, 59=B. 352=1935 B. 156.

Page 2022 footnote (4) line 2 after '182'=59B. 514.

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The References are to pages, lines and footnotes.

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Page 1835, footnote 3, line 4, after '303'; *Desai Mal v Emperor*, 1935 S. 193.

Page 1840, footnote (7) line 2 after '703'; *Moti Lal v Emperor*, 1935 A 652=1935 Cr C 62.

S. 309

Page 1863, footnote (6) after '919'; *Chhotey Lal v Tinkle Lal*, 1935 A. 615=186 I. C. 163.

Page 1864, after (5) The order of transfer cannot be regarded as an order in the nature of judgment and hence can be altered after it is once passed and signed, *Chhotey Lal v Tinkle Lal*, 1935 A 615=186 I. C. 163.

S. 315

Page 1875, after the provision of section This section is not meant to enable a court to remedy an important error in procedure which might have been calculated to prejudice the accused in the trial and which, in fact, causes the trial to be vitiated, *Emperor v Hari*, 1935 S. 145.

S. 360

Page 1857, footnote (2) line 2 after '100'=59 B 350

S. 403.

Page 1411, after (4). Similarly where a summons has been issued to the accused and the complainant does not appear on the day appointed for the appearance of the accused and the Court acquits the accused, then he must be deemed to have been tried within the meaning of this section, though the summons may not have been served and the accused may not have appeared. Hence a fresh complaint is barred by this section, *Bhupati v Amro* 1935 C. 49=29 C. W. N. 919=157 I. C. 670

Page 1413, footnote (6) line 10 after '1022'=58 M 256

Page 1416, footnote (4) line 2 after '56 (2)'=58 M 53

S. 419.

Page 1458 footnote (5) line 4 after '56'; *Pem Makton v Emperor*, 1935 P. 423=14 P. 292=159 I. C. 211.

S. 420

Page 1461, footnote (2) line 4 after '453'; *Pem Makton v Emperor*, 1935 P. 423=14 P. 292=159 I. C. 211

S. 421

Page 1463, footnote (3) line 2 after '59'=61 C 283

S. 423

Page 1474, after (C) Where the judgment of the appellate court shows examination of evidence without appellants' counsel, it was held that there was nothing within this section, *Kewal Ram v Emperor*, 1935 P. 515=16 P. L. T. 693=159 I. C. 324=36 Cr L. J. 434

Page 1481, footnote (2) line 2 after '304'; *Potram v Emperor* 1935 Nag. 175=155 I. C. 258=31 N. L. N. 216=36 Cr L. J. 710

Page 1482, after (5) Where on appeal from a conviction passed in the High Court Session, the appellate Judge sets aside the conviction and orders a retrial, but further orders that the trial should be held not by the High Court but by some other court of competent jurisdiction subordinate to the appellate court, the order passed is one under S. 421 (b), *Hari v Emperor* 1935 P. C. 121=156 I. C. 3=39 C. W. N. 923.

Page 1492, footnote (11) after '250'; *Shahdeo Ram v Emperor*, 1935 A. 479=1935 A. L. J. 618.

S. 426

Page 1503, after (9) Where an order of imprisonment is passed against a person under S. 120 and the appellate Court releases him on bail, the period during which he was on bail must be excluded from period of detention, *Dattu v Emperor* 1934 A 615=57 A 264

S. 428

Page 1507, after (6) But no such power is vested in the Court of Session when the Court of Session hears an appeal from the Additional Sessions Judge which has decided the case with the aid of Juries or Assessors, *Hari v Emperor* 1935 C. 492=155 I. C. 255=155 Cr L. J. 255=1935 Cr. W. N. 922

S. 429

Page 1522 after (4) The Sessions Judge has no authority to remand a case to a District Magistrate for trial after the prosecution has been found to be insufficient, *Emperor v Rajgopal*, 1935 P. 445.

S. 430

Page 1525, footnote (4), line 4 after '1175'; *Emperor v Hari* 1935 Nag. 175.

the wife applied for maintenance in the 4th month but husband not being traced her application was dismissed and she

for quashing of commitment on ground of insufficient evidence may be dismissed on merits, *Maroti v Emperor*, 1935 Nag 201=18 N L J. 227

Page 1764 footnote (9) line 4 after '66'; *Abdul Majid v Emperor* 1935 Cal 473=39 C. W N 1081.

S. 498

Page 1787 after (4) New Para *Pesha-war Case* The mere fact that a committal order has been passed, does not in itself afford reasonable grounds to the Sessions Judge for believing that the person so committed is guilty of the offence with which he is charged Hence it is no bar to a Sessions Judge's granting bail to the accused, *Nisar Ali v. Abdul Hamid*, 1935 Pesh 101

S. 510

Page 1807 footnote (2) lines 3 after '865'=57 A 256.

S. 520

Page 1846 footnote (2) line 4 after '664'; *Shahapati v. Ram Kishan*, 62 C. 861

Page 1846 footnote (5) line 3 after '315', *Shahapati v Ram Kishan*, 62 C 861.

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Page 1852 footnote (9) line 7 after '341'; *Suba v Ali Gauhar*, 1933 Lah, 477=37 P L R 176.

S. 526

Page 1886 footnote (2) line 4 after '795', *Bhagomal v. Noor Nabi Khan*, 1935 S. 195=1935 Cr C. 1060

R 359=103 A. C. 30.

Page 1745 after (4). Where an application for maintenance by a mistress under this section is dismissed by the Magistrate, but she does not apply to the High Court for revision of the order and subsequently after the birth of a child applies again for the maintenance of herself and her child, only the maintenance of the child can be considered, *Ma Saw May v. U Aung*, 1935 R. 277

Page 1745 after (9). They are not really criminal proceedings, *Ma Saw May v U. Aung* 1935 R. 277.

S. 491

Page 1757 after (8) But where the person is detained in custody under Extradition Act, S. 40 months and no extension is granted by the Local C. is illegal, *Sor*, 1935 P. 419

Page 1052= 3 after

; D.

v.

Page 1910 footnote (11) line 23 after *hotel Lal v. Tinks Lal*, 1935 A. J. C. 163=36 Cr. L. J 918= J. 1053.

S. 528

4 after (7). The Sessions authority to revise order of Magistrate passed under of this section any High Court has any *Isahuck v.*

S 437.

Page 1553, footnote (4) line 2 after '190'; Shambhooram v. Emperor, 1935 S. 221=159 I. C. 271.

S. 439

Page 1567, footnote (9) line 8, after '905'; Shivaprasad v. Pahlad, 1935 A. 696.

Page 1570, footnote (4) line 16 after '448'; Mathura v. Chkra, 10 Luck. 192.

Page 1579, footnote (5) line 2 after '61'; Ignatious v. A'agamma, 1935 R. 192.

Page 1589 footnote (1) line 8, after '241'; Emperor v. Jafir Khan, 1935 A. 814=156 I. C. 101 (revisional application is not to be regarded as in some sort a second appeal on a question of law).

Page 1614 footnote (4) line 2, after '6'; Alef v. Emperor, 62 C. 952.

S 463.

Page 1639, line 20 after *supra*. New Heading. *Scope*.—Under Sub S 1, of this section there does not appear to be any injunction upon the Magistrate or court to take evidence as to the capacity of the accused to make his defence. The view of the Magistrate or court is made the criterion of whether action is required under Sub S (2), Emperor v. Ahmad Ali, 1935 P. 501=16 P. L. T. 828

S 471.

Page 643, after (3) If an accused deaf and dumb is charged under S. 411 I. P. C. but the knowledge regarding stolen nature of property is not proved, the case does not come under this section, Emperor v. A deaf and dumb person, 1933 P. 451=16 P. L. T. 568.

S 476

Page 1650, footnote (19) after '880'; Mahalinga v. Emperor, 1935 M. 1044=158 I. C. 1040.

Page 1651, footnote (1) line 2, after '630'; Mahabaleswarappa v. Gopalaswami, 1935 M. 673=1935 M. W. N. 159=41 L. W. 503=1935 M. Cr. C. 119=156 I. C. 311=36 Cr. L. J. 895

Page 1652 footnote (5) line 2, after '310'; cf. Narsappa v. Emperor, 59 B. 345=1935 B. 158

Page 1652, footnote (6) line 2, after '530'; Harcharan Singh v. Kirpa, 1935 L. 677.

Page 1658 footnote (9) line 6, after '238'; Mahalinga v. Emperor, 1935 M. 1044=158 I. C. 1040.

Page 1659 after (5). Witness making different statements in Sessions Court and committing Magistrate's Court is not exempt from prosecution in all cases merely because subsequent statement is true one. Complaint for giving false evidence should be made generally where it is doubtful as to which statement is

true, Emperor v. Jitsing, 1935 N. 145=156 I. C. 257.

Page 1661, footnote (4) line 2, after '862'; followed in Bal Gobind v. Jamnabai, 1935 Nag 199.

Page 1661, footnote (5) line 16 after '201'; Ibn Ali v. Emperor, 1935 A. 603=1935 A. L. J. 395=155 I. C. 490.

Page 1662, footnote (6) line 5, after '928'=57 A. 351.

Page 1670, footnote (4) line 3, after '474'; Kewai Ram v. Emperor, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354

Page 1671, after (2) Where no objection on the ground of omission to hold a preliminary enquiry is raised by the accused until after he has been convicted, the objection must fail, Kewai Ram v. Emperor, 1935 P. 515=16 P. L. T. 693=158 I. C. 324=36 Cr. L. J. 1354.

Page 1681, footnote (1) last line after '59'=10 Luck 335.

S. 476 B

Page 1686, after (7) New Para. *Power of Attorney*.—An appeal from an order on a petition under S 476-A does not require a power of attorney, Harcharan Singh v. Kirpa, 1935 L. 677=37 P. L. R. 762.

Page 1686 footnote (3) line 7, after '440'; Shivaprasad v. Pahlad Singh, 1935 A. 696.

Page 1686 footnote 6 line 3 after '683'; Abdul Ghani v. Ram Mohan, 1935 A. 573=1935 A. L. J. 671.

Page 1687 footnote (3) line 20 '157'=59 B. 340

Page 1659 footnote (6) line 9 after '435'; Bal Govind v. Jamnabai, 1935 Nag 199=31 N. L. R. 370.

S 488

Page 1711 after (9). So also an order of discharge shall not release the insolvent from any liability under an order for maintenance made under this section; Emperor v. Sardar Muhammad, 1935 Lah. 758=36 P. L. R. 161.

Page 1717 footnote (13) line 4 after '525'; Hemanta Kumar v. Monorma, 1935 C. 488=39 C. W. N. 432=61 C. L. J. 141=62 C. 639.

Page 1722 footnote (3) line 2 after 'Cr.'; Emperor v. Kuppini Naicken 1935 M. 572=1934 M. W. N. 923=1934 M. Cr. C. 342=67 M. L. J. 493=41 L. W. 627=155 I. C. 694=36 Cr. L. J. 830.

Page 1722 footnote (11) line 10 after '623'; see also Pal Singh v. Nihal Kaur, 37 P. L. R. 809.

Page 1723 footnote (3) line 5 after "488"; Bhagwati v. Gajadhar, 158 I. C. 1123.

Page 1728 after (3). But where husband was ordered to pay maintenance

acquittal of an accused on a charge under section 400 is a bar to his being prosecuted again on a charge under Section 395 of the Indian Penal Code(1). Similarly the acquittal of an accused on a charge under section 408 is a bar to his being prosecuted again on a charge under s. 477-A in respect of the same items(2). The conviction of the accused of an offence under section 68 of the Calcutta Police Act for assaulting the Captain of the ship is a bar to his being prosecuted under section 103 (iv) of the Indian Merchants Shipping Act(3). An acquittal on a charge of a murder is a bar to a second trial on a charge of causing disappearance of evidence of the murder(4). An acquittal on a charge under section 193 is a bar to a second trial on a charge under ss 467 and 471 read with s. 120 B of the Penal Code(5). An acquittal on a charge under s. 297, I. P. C., for having hurt the religious feeling by cutting down a tree in a grave-yard is a bar to a second trial for theft(6). An acquittal of offences under s. 380 and s. 411 of the Penal Code, charged in the alternative, bars a subsequent trial for an offence under s. 54-A of the Calcutta Police Act(7). An acquittal on a charge under section 426, I. P. C., is a bar to the accused being put on his trial again under section 379 I. P. C.(8). An acquittal on a charge under section 160 of the Penal Code is a bar to the accused being put on his trial under section 16 (o) of the Bombay District Police Act(9). Where an accused has been tried and acquitted under sections of the Indian Penal Code of offences of forgery and abetment thereof, his subsequent trial for offences under the Registration Act on the same facts is barred under section 403, Cr. P. Code(10). If in a previous trial for offence under a different Act a person is convicted and the sentence is enhanced in view of another offence under the Penal Code for which no charge was framed, there cannot be subsequent trial for that offence inasmuch as the court has taken account of the same previously though indirectly(11).

Stolen property.—Where property is stolen at different dates, the presumption is that the property passed from the hands of thief to the receiver of the stolen property at different dates and the burden is shifted from the Crown to the accused to prove that it passed to him at one and the same time. In the absence of such proof, a subsequent trial in respect of different items of property stolen on a different date is not barred by the provisions of s. 403, Cr. P. C., by reason of a prior

(1) *Emress v Subedar*, 1 Bom L. R 15.

(2) *Emperor v Jhabbar Mull*, 49 C. 924

(3) *Alfred Laird v. Emperor*, 99 I. C. 1043=31 C W N 195=1927 C 224=28 Cr. L. J 293

(7) *Manhari v Emperor*, 45 C. 727=43 I C 614=21 C. W. N. 199=1917 L J 199=27 C. L J. 474.

(8) *Fazar Pramank v Emperor*, 37 C. L J 253=76 I. C 293=A 1 R 1924 Cal 407=25 Cr. L J. 149

(9) *Kallasani v Emperor* 9 A. I. Cr R 187=40 I L R Bom 3=126 I C. 216=29 Cr L J. 1032

(10) *Maung Sain v Emperor*, 1 Rang 299=25 Cr L J 191=76 I C 431=1924 Rang 219

(11) *Kailashpati v Goppi Koeri*, 1930 C 60

S. 537.

Page 1938 footnote (3); Mosafir Singh v Emperor, 1935 P. 356=156 I. C. 310-16 P. I. T. 440=36 Cr. L. J. 901 (compliance with S. 195 (1) (a) is necessary condition to jurisdiction)

Page 1942 after (6) When Magistrate has ample ground for apprehending a breach of the peace and he issues an order under S 145, sub-S (1) the mere omission to frame his order in accordance with law is cured by S 537 as no failure of justice is caused, Bibi Asghari v. Emperor, 1935 O. 316=1935 O. W. N. 454=155 I. C. 169=1935 O. L. R. 257=36 Cr. L. J. 656.

Page 1946 footnote (7) line 4 after '171'; Deep Chand v Emperor, 1935 A. 627=1935 A. L. J. 666=1935 Cr. C. 641=157 I. C. 915=36 Cr. L. J. 1260.

Page 1946 footnote (12) line 4 after '199' approved in Bishnath v Emperor, 1935 O. 488=157 I. C. 378=1935 O. W. N. 922=1935 O. L. R. 471=36 Cr. L. J. 1198

Page 1948 footnote (6) line 22 after 713; Piarey Lal v Emperor, 1935 O. 273=154 I. C. 320=1935 O. W. N. 185=1935 O. L. R. 157.

Page 1948 footnote (6); Munnoo Lal v. Emperor, 1935 O. 241=1935 O. W. N. 126=1935 O. L. R. 141=154 I. C. 258. 1935 Cr. C. 442=36 Cr. L. J. 447.

Page 1949 footnote (3) line 2 after '101'; Bhaggan v. Emperor, 1936 O. 327=1935 O. W. N. 408=1935 O. L. R. 210=154 I. C. 901=36 Cr. L. J. 602.

Page 1950 footnote (2) line 2 after '75'; see also Ganga Singh v Emperor, 1935 A. 547=1935 A. L. J. 423=155 I. C. 541=1935 Cr. C. 650=36 Cr. L. J. 762

(where no prejudice caused, irregularity is cured by S. 537).

Page 1958 footnote (2) line 3 after '187'=57 A. 412.

Page 1954 footnote (4) line 7 after 547, referred in Marudamuthu v Raghava, 58 M. 427=1935 M. 22.

S. 545.

Page 1984 after (9). The same view is taken by the Judicial Commissioner, Peshawar, in a recent case, Mst. Nur Sabibi v. Emperor, 1935 Pesh. 102=157 I. C. 631=36 Cr. L. J. 1208.

Page 1985 after (6). So also an order of compensation out of fine made by the Magistrate in a prosecution of the mid-wife under S. 354-A, I. P. O. is illegal and without jurisdiction, Maung Sain v Emperor, 1935 R. 471.

Page 1985 footnote (4) after 'Cr.'; see

Page 1987 after (3) Complainant not

S. 552

Page 1992 footnote (2) after '487'; Ma Ngwe v Maung Ye, 1935 R. 494 (application of S 552 depends on the question of girl's age).

S. 562

Page 2021 footnote (6) line 4 after '566' overruled in Vaijappa v Emperor, 1935 Bom. 402=37 Bom. L. R. 739=1935 Cr. C. 1110; Emperor v. Mauchershaw, 59=B. 352=1935 B. 156.

Page 2022 footnote (4) line 2 after '182'=59B. 514.

the wife applied for maintenance in the 4th month but husband not being traced her application was dismissed and she again applied for maintenance for fifteen months after the order, it was held that a warrant could be issued for the whole period, *U. Hpay Latt v. Ma Po*, 1935 R. 407=13 R. 289=159 I. C. 289.

Page 1729 footnote (3) after '240'; *Emperor v. Sardar Muhammad*, 1935 Lahore 728=36 P. L. R. 161 (person committed to jail is not civil debtor but ordinary prisoner. Such person's maintenance expenses in jail cannot be ordered against opposite party).

Page 1729 footnote (8) line 2 after '291', followed in *Emperor v. Sardar Muhammad*, 1935 L. 758=36 P. L. R. 161.

Page 1731 footnote (2) line (2) after '391'; *Ignatious v. Alagamma*, 1935 R. 192 (she need not prove habitual ill-treatment).

Page 1731 footnote (8) line 2 after 'Cr.'; *Muhammad Azizullah v. Abdul Halim*, 1935 O. 235=1935 O. W. N. 292=1935 O. L. R. 172=154 I. C. 561=36 Cr. L. J. 521.

Page 1732 just after the heading 'Cancellation of Order'—This sub-section provides for the cancellation of the order. The reasons given therein for cancellation are not exhaustive, *Pearey Lal v. Naraini*, 1935 A. 977=159 I. C. 308.

Page 1736 footnote (8) line 2 after '113'; see also *Chan Toon v. Ma Ti*, 1935 R. 359=159 I. C. 81.

Page 1745 after (4) Where an application for maintenance by a mistress under this section is dismissed by the Magistrate, but she does not apply to the High Court for revision of the order and subsequently after the birth of a child applies again for the maintenance of herself and her child, only the maintenance of the child can be considered, *Ma Saw May v. U Aung*, 1935 R. 277.

Page 1745 after (9). They are not really criminal proceedings, *Ma Saw May v. U. Aung* 1935 R. 277.

S. 491

Page 1757 after (8) But where the person is detained in custody under Extradition Act, S. 10 over two months and no extension has been granted by the Local Government, the detention is illegal, *Surjan Narayan v. Emperor*, 1935 P. 419=16 P. L. T. 551.

Page 1757 footnote (1) line 3 after '1052'=10 Luck, 87.

Page 1759 footnote (2) after '72', *D. G. v. Muhammad Eshkoh*, 10 Luck 141.

S. 494

Page 1763 after (6). Provisions in this section are meant to avoid possible injustice to applicant whose application

for execution of commitment is refused.

Page 1764 footnote (9) line 4 after '65'; *Abdul Majid v. Emperor* 1935 Cal. 473=39 C. W. N. 1081.

S. 498

Page 1767 after (4) New Para. *Peshawar Case* The mere fact that a committal order has been passed, does not in itself afford reasonable grounds to the Sessions Judge for believing that the person so committed is guilty of the offence with which he is charged. Hence it is no bar to a Sessions Judge's granting bail to the accused, *Nisar Ali v. Abdul Hamid*, 1935 Pesh. 101.

S. 510

Page 1807 footnote (2) lines 3 after '665'=57 A. 256.

S. 520

Page 1846 footnote (2) line 4 after '661'; *Shahbapati v. Ram Kishan*, 62 C. 661.

Page 1846 footnote (5) line 8 after '315', *Shahbapati v. Ram Kishan*, 62 C. 661.

S. 523

Page 1852 footnote (9) line 7 after '311', *Suba v. Ali Gauhar*, 1933 Lah. 477=37 P. L. R. 176.

S. 526

Page 1886 footnote (2) line 4 after '795', *Bhagomal v. Noor Nabi Khan*, 1935 S. 195=1935 Cr. C. 1060.

particular district, may be transferred to another district where it would be held with the aid of Assessors only, *Emperor v. Hari*, 1935 S. 145=28 S. L. R. 397=157 I. C. 697=36 Cr. L. J. 1161.

Page 1893 footnote (9) line 2 after '122'; *Hari v. Emperor*, 1935 P. O. 122=156 I. C. 3=39 C. W. N. 929=37 B. L. R. 631=37 P. L. R. 542=59 B. 496 36 Cr. L. J. 978=16 P. L. T. 513=69 M. L. J. 122=42 L. W. 168.

S. 528

Page 1910 footnote (11) line 23 after '97'; *Chhotay Lal v. Tinku Lal*, 1935 A. 815=156 I. C. 163=36 Cr. L. J. 918=1935 A. L. J. 1063.

Page 1914 after (7). The Sessions Judge has no authority to revise order of a District Magistrate passed under the provisions of this section any more than the High Court has any such authority, *Mohammad Isabuck v. Emperor*, 1935 R. 446.

acquittal with regard to another item of property(1). The contrary was, however, held in the following cases(2).

Sub-section (2).—Under sub-section (2) a person can be tried for any distinct offence for which a separate charge might have been made against him under s. 235, notwithstanding that he may have been convicted or acquitted of another offence committed in the same transaction(3). A person can therefore be convicted under s. 323, I. P. C., and also under s. 3 (12), Madras Town Nuisances Act 1889, when although the act or series of acts constituting the two offences may be the same, they are capable of being viewed from entirely two different points of view, the former being an offence against an individual and the latter against the public(4). A conviction of theft under section 379 of the Indian Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the convict under section 9 of the Indian Opium Act, 1878(5). An acquittal on a charge for preparation to commit dacoity is no bar to a subsequent trial on the same facts for collecting men to wage war against the King(6). An acquittal on a charge under s. 155 of the U. P. Municipality Act for evasion of octroi duty is no bar to a subsequent trial for obstructing and assaulting the peons under ss. 186 and 353, I. P. C.(7). The acquittal of an accused person in a case under section 147 of the Penal Code, is no bar to his trial for an offence under section 186 of the Code(8). The acquittal of an accused person in a case under section 182 of the Penal Code, is no bar to his trial for an offence under section 211 of the Code(9). The offence of affray and of causing hurt being distinct from each other, the conviction of the accused for affray does not bar their subsequent conviction for causing hurt(10). The conviction of the accused for an offence under the Excise Act does not prevent the accused from being subsequently tried for an offence under the Merchandise Marks Act(11). A previous conviction for being in possession of counterfeit coins, under section 243, I. P. C. does not bar a subsequent trial under section 240, I. P. C. for passing other coins, knowing

(1) *Dadmal v Emperor*, 98 I. C. 104=27 Cr. L. J. 1246=A. I. R. 1927 Sind 53, *Ghulam v Emperor*, 96 I. C. 120=27 Cr. L. J. 872.

(2) *Ganesh Sahu v Emperor*, 73 I. C. 931=37 C. L. J. 326=27 C. W. N. 554=1923 Cal. 557=50 C. 594=24 Cr. L. J. 707; *Munwa v Emperor*, A. I. R. 1925 Oudh. 298=26 Cr. L. J. 1=83 I. C. 481; *Ishan v Emperor*, 15 O. 511; *Sheo Charan v Emperor*, 73 I. C. 520=21 A. L. J. 389=45 All. 485=24 Cr. L. J. 632=A. I. R. 1923 All. 547; *Emperor v. Bishan Singh*, 81 I. C. 226=(1924) Pat. 126=5 P. L. T. 319=2 P. L. R. 131 Cr.=3 Pat. 503=25 Cr. L. J. 738=A. I. R. 1925 Pat. 20.

(3) *Sabbiah v. Kandaswami*, (1932) M. W. N. 105=62 M. I. J. 197=A. I. R. 1932 M. 362=5 M. Cr. C. 19=35 L. W. 265=1932 Cr. C. 295.

(4) *Ibid.*

(5) *Emperor v Deoki*, 48 A. 486=24 A. L. J. 559=95 I. C. 287=L. R. 7 A. 95 Cr.=1926 A. 405=27 Cr. L. J. 767.

(6) *San Baw v. Emperor*, 1 L. B. R. 340 F. B.

(7) *Abdul Roshid v. Harish Chandra*, 12 I. C. 121=A. I. R. 1929 A. 940=80 Cr. L. J. 1153=Ind. Rul. (1930) All. 9=1930 A. L. J. 218.

(8) *Tanuk Lal v Emperor*, 22 Cr. L. J. 222=60 I. C. 334=1 Pat. L. T. 654.

(9) *Thakar Singh v. Chatter Pal*, 140 P. L. R. 1910=20 P. R. 1910 Cr.=80 P. W. R. 1910 Cr.=11 Cr. L. J. 420.

(10) *Ram Sukh v. Emperor*, L. R. 6 A. Cr. 41=47 All. 284=2 A. L. J. 8=86 I. C. 64=26 Cr. L. J. 658=A. I. R. 1925 All. 299.

(11) *Empress v. Croft*, 23 O. 174.

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exempts the dismissal of a complaint under section 249, the discharge of the accused or any entry made upon a charge under section 273 from the category of orders headed "Acquittal". The omission of acquittal under section 247 or 345 or 494 is significant, inasmuch as the Legislature regarded the orders under those sections as having the same force and effect as an acquittal after a regular and full trial(1). See notes above under the head "Conviction or Acquittal".

Appeal.—Where an accused is acquitted of a certain charge in an appeal, the Judge cannot come to an adverse conclusion against him in respect of the same matter when deciding a subsequent appeal(2).

Revision.—Where subsequent proceedings are *prima facie* barred under sub-section (1) by acquittal of accused in prior proceedings but this ground is not taken by the accused in the revision petition filed against the conviction in the subsequent proceedings, the High Court is entitled to take notice of the fact *suo motu*(3).

The English Law.—The same principle is applied to English criminal decisions, where, in order to establish a plea of *autrefois acquit* which, as has been explained in an earlier chapter of the work (4), is in substance, neither more nor less than a plea of estoppel *per rem judicatam* under another name, based on the same theory, and subject to the same rules, it must appear that the offence of which the accused was acquitted is, in substance, identical with the offence charged in the second proceedings. Whenever this substantial identity is established, the plea prevails(5).

(1) *Ram Mahto v. Emperor*, 61 I. C. 59 (60).

(2) *Emperor v. Munnoo*, A. I. R. 1933 O. 470.

(3) *Ramkrishna v. Shanker*, A. I. R. 1935 Nag. 25.

(4) Spencer Bower on *Res judicata*, 1924 Ed p. 121 and S. 51 thereof.

(5) Spencer Bower on *Res judicata*, 1924 Ed p. 121. (As in *R. v. Vandercomb*, (1796), 2 Leach 708, Exch. Ch. (acquittal of burglary is no bar to subsequent indictment for attempt to commit burglary per Cur., at pp. 716—711); *Att. Gen. v. King*, (1817) 5 Price 195 (condemnation of goods under a certain revenue statute no estoppel against party resisting on information under a different revenue statute though in respect of the same goods (per Richards C. B. at p. 214); *R. v. Bird*, (1851), 2 Den 94 (where it was held that, in the peculiar circumstances of that case a man acquitted on an indictment for murder could not have been convicted of an assault, notwithstanding, 7 W. 4 & 1 Vict. C. 35 S. 11, and that, accordingly, such acquittal was no bar to a subsequent indictment for assault); *R. v. Green*, (1856) 1 Dears and B. 113 (acquittal on indictment for stealing goods

dictment for murder, a plea of *autrefois acquit* alleging an acquittal on a former indictment for wounding with intent to murder the same person, was held bad, on demurrer, for not averring the identity of the two offences: per Pollock C. B., at pp. 482, 483; *Martin B.* at p. 483 ("Is the crime here one and the same? Now the offence for which the prisoner has been tried was one of intent, and was, therefore, complete the moment the stab was given, whereas the offence for which he is now indicted could only be consummated by the death of the party") and Willes J., at p. 483 ("It could not be assumed that the Jury negatived the wounding, therefore, if the wounding, coupled with circumstances not showing an intention to kill, might constitute murder, the prisoner ought now to be tried for that offence") *R. v. Dungey*, (1864) 4 F. & F. 99, acquittal on indictment for rape, and assault with intent to commit a rape, held no bar to an indictment for a common assault (per Willes, J. at p. 103), because at common law the prisoner could not have been convicted of

them to be counterfeited(1). But a person who has been acquitted of an offence under sec. 63 of the Mysore Excise Regulation for non-payment of compensation fee levied for cutting and removing some toddy trees cannot be tried again for an offence under section 427 of the Indian Penal Code(2). Similarly a person who has been tried and acquitted of offences under sections 201 and 202, I. P. C. cannot be tried again for an offence under s. 176, I. P. C.(3). A trial in respect of a gross sum for which a breach of trust was alleged to have been committed between two specified dates does not bar a second trial in respect of an offence alleged to have been committed on intermediate days but not included in the gross sum(4). A trial in respect of criminal conspiracy does not bar a second trial in respect of the separate offences of cheating in pursuance of that conspiracy(5). Conversely an accused person let off at a former trial in respect of an offence committed in furtherance of the object of a criminal conspiracy can subsequently be charged for the offence of conspiracy(6). Where the facts which can be proved clearly disclose two distinct offences and only two, viz., the offence of theft and the offence of forgery the case is one to which s. 235 (1) applies and hence the acquittal of the accused for the theft of the blank Railway ticket is no bar to a subsequent trial of his for forgery by making certain entries thereon(7). Where two indictments are essentially different and relate to independent transactions, acquittal under one does not bar complaints with reference to other(8). Where the members of an unlawful assembly trespass upon the land of several persons and cause damage to their crops in the course of a riot, a separate offence of trespass and mischief can be charged against the members of the assembly in respect of each separate holding which is damaged, and acquittal or conviction in respect of damage caused to the holdings of some of the owners is no bar to their trial for offences in connection with the properties of the other owners(9). Conviction of an accused person for an offence under s. 160, Penal Code, on prosecution initiated by the police against both the accused and the complainant in which both were sentenced to varying fines, does not bar the subsequent prosecution of the accused for offences under ss. 323 and 147, Penal Code, on complaint laid by the complainant. For in the previous prosecution the charges under ss. 323 and 147, could have been joined against the present accused under s. 235 (1)(10). Where the charges

(1) *Emperor v. Prāsanna*, 31 C. 1007

(2) *Ankalappa v. Govt. of Mysore*, 7 Mys. L. J. 443.

(3) *Sharbekhan v. Emperor*, 10 C. W. N. 518

(4) *Briguan Das v. Emperor*, 53 A. 411—A. I. R. 1931 A. 209—15 A. I. Cr. R. 473—12 L. R. A. Cr. 69—92 Cr. L. J. 376—12 L. R. A. Cr. 48—1931 Cr. C. 224—29 A. L. J. 98—129 I. C. 559; *Nagendra Nath v. Emperor*, 50 C. 632

(5) *Ochhavilal v. Emperor*, 58 B. 23—A. I. R. 1933 B. 447—35 Bom. L. R. 985; or for a different conspiracy; *Abdul*

Rehman v. Emperor, A. I. R. 1935 C. 316

(6) *Ram Das v. Emperor*, A. I. R. 1924 A. 61.

(7) *Sriyanga Chariar v. Emperor*, A. I. R. 1934 M. 678—(1934) M. W. N. 994—1934 M. Cr. C. 261—40 L. W. 596—152 I. C. 154

(8) *Hukam Singh v. Emperor*, 29 A. L. J. 85—A. I. R. 1930 A. 91—1930 Cr. C. 81; *Balchand v. Emperor*, A. I. R. 1933 Pat. 670

(9) *Ghana v. Emperor*, 123 I. C. 78—A. I. R. 1923 Pat. 710

(10) *In re Dodhu Kalu*, 119 I. C. 693—31 Bom. L. R. 921—30 Cr. L. J.

grounds exist for its interference(1). Where the High Court has heard an application for revision and passed orders thereon, after going into facts of the case and exercising its powers as an appellate court under ss. 423-439, it cannot afterwards hear an appeal in the same case(2). An appeal from an order of conviction previously revised by the High Court under revisional powers is inadmissible(3). No appeal lies from an order granting sanction (now abolished) under s. 195, *supra*(4). Nor from an order restoring possession of immoveable property under s. 522, *post*(5). Nor from an order dismissing a complaint for non-appearance of a complainant(6). Nor from an order passed under s. 22 of the Cattle Trespass Act, awarding compensation for illegal seizure of cattle(7).

Privy Council appeal in criminal matters.—The King in Council is not a court of criminal appeal and the power in the Sovereign to entertain appeals of this character is only to be exercised when there has been such a gross denial of the principles of natural justice as has been defined in numerous cases(8). If the Judicial Committee comes to the conclusion that, by some disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done, then whatever doubt it may have of the appellant's innocence, or whatever suspicions it may entertain of his guilt, or however great may be its reluctance to interfere with, or overrule, the decisions of the Indian courts in criminal matters, it is bound to advise His Majesty that the conviction should not be allowed to stand(9). The reception of wholly inadmissible evidence and the use of that evidence, when admitted, to the prejudice of the accused coupled with the absence of all reliable evidence of the accused's guilt, constitute substantial and grave injustice and a conviction based thereupon cannot stand(10). However strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice its use may lead to, nor by itself supply the want of all reliable evidence direct or circumstantial of the commission

(1) *Keshab Chunder v. Alhil Meley*, 21 C. 998; *Empress v. Badruddin*, 6 B. 197; *Empress v. Chagon Dayaram*, 14 B 331.

(2) *Empress v. Kanhia*, (1890) A. W. N. 225.

(3) *Empress v. Ramdas*, (1883) A. W. N. 1.

(4) *Mehdi Hassan v. Tota*, 15 A. C. 1. *Badruddin v. Empress*, 15 C. 330. *Chagon Dayaram v. Empress*, 14 B. 331. *Alhil Meley v. Keshab Chunder*, 21 C. 998. *Alhil Meley v. Keshab Chunder*, 21 C. 998.

(5) *Itam Chandra v. Nobin*, 25 C. 630.

(6) *Narayansami*, 2 Weir, 308.

(7) *Empress v. Raya Lakshmi*, 10 B. 230.

(8) *Muruqa Goundan v. Emperor*, 26 C. W. N. 67 P. C.; *Taba Singh v.*

Emperor, A. I. R. 1925 P. C. 59; *Begu v. Emperor*, A. I. R. 1925 P. C. 180; *Taba Singh v. Emperor*, A. I. R. 1925 P. C. 180.

(9) *Alhil Meley v. Keshab Chunder*, 21 C. 998.

(10) *Dal Singh v. Emperor*, 44 C. 876=15 A. L. J. 475=19 Bom. L. R. 510=21 C. W. N. 818=23 M. L. J. 555=18 Cr. L. J. 471 P. C.; *Aldul Rahman v. Emperor*, 5 Rang. 53=6 Bur. L. J. 65=29 Bom. L. R. 813=31 C. W. N. 271=52 M. L. J. 585=25 A. L. J. 117=28 Cr. L. J. 259=1927 P. C. 44; *Channing Arnold v. Emperor*, 41 C. 1023=18 C. W. N. 785=15 Cr. L. J. 309; *In re Dillet*, (1987) 12 A. C. 459; *Atta Mohammad v. Emperor*, 3 Cr. Law. P. C. 1.

(11) *Ibid.*

(12) *Ibid.*

(13) *Ibid.*

(14) *Ibid.*

(15) *Ibid.*

(16) *Ibid.*

(17) *Ibid.*

(18) *Ibid.*

Whenever it is not, the plea is defeated(1). The criterion of this identity is stated in two different ways by the different authorities. It is sometimes said that the proper test is to inquire whether the

a common assault on the former indictment, though, since the passing of the Criminal Law Amendment Act 1885 (48 & 49 Vict C 69), S 9, which empowered a Jury to acquit of the felony, and convict of the lesser offence, such a plea would now be sustained. *R. v O'Brien*, (1882), 15 Cox Cr Cas 29 (acquitted of larceny of goods, on the ground that the alleged goods were fixtures, is no bar to an indictment for stealing the fixtures, described as such, under S 31 of the Larceny Act, 1851; per Lord Coleridge C J at p 31); *R. v Gilmore*, (1882), 15 Cox Cr. Cas 85 (acquitted on indictment for the felonious act of throwing things on to a railway with intent to endanger safety of passengers, under a certain enactment, held no bar to indictment for an unlawful act of this description made a misdemeanour by another enactment, though without intent; per Huddleston B., at pp 87, 88); *Bollard v. Spring*, (1887), 51 J. P. 501, Div. Ct. (acquitted of assault on a woman under another section); *R. v. Ollis*, (1900) 2 Q. B. 758, Div. Ct. (acquittal on indictment for obtaining a cheque by false pretences from a credit—

under another section); *R. v. Ollis*, (1900) 2 Q. B. 758, Div. Ct. (acquittal on indictment for obtaining a cheque by false pretences from a credit—

per Lord Russell C. J. at p. 764, and Wright J. at pp. 769, 770). *R. v. Barron*, (1914) 2 K. B. 570, Ct. of Crim. App. (acquittal on indictment for sodomy is no bar to subsequent indictment for gross indecency (per Cur. at pp. 574—576); *R. v. Kupperberg*, (1918), 13 Cr. App. Cas. 106 (acquittal on indictment for conspiring with another to commit an offence against the Defence of the Realm

598, Div. Ct. (an acquittal on an information for using premises occupied by the defendant for the purposes of betting, contrary to ss 1, 3 of the Betting Act, 1853, is no bar to a summons charging the defendant that he, being the holder of a justices' licence to sell intoxicating liquors by retail, suffered his licensed premises to be used in contravention of s. 79 of the Licensing Consolidation

Act, 1910 per Lord Reading C J at. pp. 603—605) Cp the cases under S 6 of the Habeas Corpus Act, 1679 (31 Car. 2, c 2) in which it was held that a writ of Habeas Corpus, or similar order discharging a man from custody, and pronouncing his arrest or detention to be illegal on the ground that no such offence as is alleged to have justified it is disclosed, or that the warrant on which he was detained shows no valid cause for his detention is no bar to a second arrest for a different offence, or under a regular warrant or procedure *Att Gen for Hong Kong v. Kuok a. Si. a. l.* (1972) 1 F. R. D. 170 (1st Inst.)

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(1) Spencer Bower on *Res judicata* 1934. Ed. p. 121. As in *R. v. Clark*, 1820 1 Brod & B 473 (where, to an indictment for pouring vitriol down a child's throat, and making him hold the vitriol in his mouth, whereby the child's mouth and throat were injured, and death was caused, a plea of *autrefois acquit*, setting up a previous acquittal on a charge of causing the child's death by pouring vitriol down his throat, was allowed); *R. v. Sheen*, (1827), 2 C. & P. 631 (per Burrough J., at p 639); *R. v. Alfrington*, 1861). 1 B. & S 638 (dismissal of former complaint of assault and battery is a bar to indictment for assault and battery, and malicious cutting and wounding, etc.; per Cockburn, C. J at pp 636, 637, and Blackburn C. J at p 637, 638, holding that the addition of circumstances of aggravation in the later charge did not destroy the substantial identity of the two offences); *R. v. Brackenridge*, (1881), 58 J. P. 293, Div. Ct. (per Lord Reading (1880) 62 J.

committed the offence on any one of the eleven days; per Lord Esher, 31 B. at p. 455) Cp. the foreign criminal case of *R.*

of the crime with which an accused person may be charged(1). When there has been evidence before the court below and the court below has come to a conclusion upon that evidence their Lordships of the Privy Council will not disturb that conclusion, they will only interfere, where there has been a gross miscarriage of justice or gross abuse of the forms of legal process(2). The power of the Privy Council to entertain appeals arises not from the relation of the Board to the court below, as a court of criminal appeal, but as the Privy Council advising the Sovereign with regard to the exercise of the prerogative. The prerogative is that remnant of the power of the Crown which remains to the Crown to interfere with tribunals of justice. With Indian's march to self-government, this prerogative has been diminishing. Therefore, unless it can be proved that there was no proper trial at all, that the forms of all judicial procedure were disregarded, not merely according to local ordinances, but according to the unvarying character, which is common to all, the Privy Council cannot interfere. If there is anything very very gross, it might come under the same category, but even then, the Crown has to be extraordinarily cautious in asserting the survivor even of that very restricted prerogative which existed fifty years ago, but which may not exist now. The Privy Council cannot take cognizance of a mere mistake which the court in India has made in the exercise of its jurisdiction. Where justice has not been set at naught, the Privy Council has no jurisdiction(3). The Judicial Committee of the Privy Council does not lightly interfere in criminal cases; but where justice had been gravely and injuriously miscarried, and the sentence pronounced against the appellant formed an invasion of his liberty and denial of his just rights as a citizen, their Lordships felt called upon to interfere(4). It would, however, be contrary to the practice of the Board and very mischievous if any countenance were given to the view that an appeal would be allowed in every case in which it would be shown that the learned Judge misdirected the jury(5).

Certificate of fitness.—The Code does not provide for an application for leave to appeal to Privy Council from sentence of death being entertained by any High Court; such application can only be entertained by chartered High Courts under cl. 41 of the Letters Patent(6). Before granting the certificate that the case is a fit one for appeal to the Privy Council, the High Court must be satisfied that there is a reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice(7).

(1) *Ibid.*

(2) *Hegu v. Emperor*, A. I. R. (1925) P. O. 190-6 L. 226-7 L. J. 824-88 I. O. 3-26 Cr. I. J. 1059-26 P. L. R. 284; *Abdul Rehman v. Emperor*, 5 Rang 53-6 Bar. L. J. 65-29 Bom. L. R. 813-31 C. W. N. 271-52 M. L. J. 685-25 A. I. J. 117-1927 P. C. 41-28 Cr. L. J. 259; *Channing Arnold v. Emperor*, 41 C. 1023-18 C. W. N. 765-15 Cr. L. J. 809-23 I. O. 661.

(3) *Hanmant Rao v. Emperor*, A. I.

R. (1925) P. C. 180-26 Cr. L. J. 1419-48 I. O. 813-49 B. 455.

(4) *Louis Eduard Lamier v. King*, 18 O. W. N. 98-15 Cr. L. J. 305-23 I. O. 657-26 M. L. J. 1 P. C.

(5) *In re Maccree*, 15 A. 310

(6) *Zhapraya v. Emperor*, A. I. R. 1933 Nag 216-145 I. O. 246-34 Cr. L. J. 934-29 N. L. R. 810.

(7) *In re Bal Gangadhar Tilak*, 33 B. 221-10 Bom. L. R. 973-9 Cr. L. J. 226,

become seized of the case. There was some conflict of authority on this point before 1923(1) but the amendment to s. 406 made in that year has put the matter beyond all possible doubt. It is now specifically provided that no appeal lies to the Sessions Judge or to the District Magistrate on behalf of the persons proceeding against whom have been laid before the Sessions Judge in accordance with the provisions of sub-s. (2) of s. 123(2).

Revision.—The High Court will not ordinarily interfere on merits with proceedings under s. 118 of the Code provided that the court hearing the appeal under section 406, shows in its judgment that it has really and not merely nominally considered the evidence on the record(3). But where the judgment of the Sessions Judge does not fulfil these requirements and there is clear misconception of the evidence, the High Court will interfere(4). An order of discharge passed by a Sessions Judge under this section is neither an original nor an appellate order of acquittal within the meaning of s. 417, so that no appeal lies to the High Court against that order; but the Local Government has a right to file a revision against it(5).

406-A. Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order—

Appeal from order refusing to accept or rejecting a surety.

- (a) if made by a Presidency Magistrate, to the High Court;
- (b) if made by the District Magistrate, to the Court of Session; or
- (c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

This section has been added by section 110 of Act XVIII of 1923. The advisability of inserting this section is thus explained by the Select Committee of 1916 "We think that there should be a general right of appeal against the rejection of a surety, and we have provided for it in section 406-A." An order under s. 118 as to the class of sureties to be furnished had been held to be appealable even before the insertion of the section(6).

407. Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349, or in respect of whom an order has been made or a sentence has been passed

Appeal from sentence of Magistrate of the second or third class

(1) Compare *Qamar Din v. Emperor*, 67 I. C. 716=23 Cr. L. J. 454=66 P. I. R. 1922; *Emperor v. Amir Bala*, 13 Bom. L. R. 203=12 Cr. L. J. 257=10 I. C. 801; *Crown v. Ida*, 12 P. R. 1900 Cr.; *In re Hari Das*, (1891) A. W. N. 219 with *Pattu v. Emperor*, 13 I. C. 351=11 Cr. L. J. 725=8 I. C. 879.
(2) *Mangal Singh v. Emperor*, 103 I. C. 193 (195)=28 I. L. J. 657.
(3) *Babu Pershad v. Emperor*, 18 I.

C 102=13 Cr. L. J. 9; *Kashiram v. Asaram*, 120 I. C. 215=A. I. R. 1929 Nag. 328=31 Cr. L. J. 20.

(4) *Kashiram v. Asaram*, 120 I. C. 215=A. I. R. 1929 Nag. 328=31 Cr. L. J. 20.

(5) *Emperor v. Samai Din*, 1 Luck. 231=18 O. L. J. 276=3 O. W. N. 390.

(6) *Jumo v. Emperor*, 28 I. C. 103=8 S. L. E. 229=16 Cr. L. J. 252.

no right of appeal against such an order but may move the High Court in revision(1). An order under s. 118 as to the class of sureties to be furnished has been held to be appealable under this section(2). And section 439 (5) of the Code precludes the High Court from entertaining an application for revision of an order under s. 118 where the right of appeal has not been exercised(3).

Appeal.—Formerly an appeal only lay against an order for security for good behaviour and not an order to give security to keep the peace(4). Under the amended section an appeal is allowed from such order in demanding security with reference to section 17 of the Gambling Act, the Magistrate must be held to act under s. 118 and consequently an appeal lies under this section(5).

Powers of appellate court.—In an appeal under this section the appellate court has power under section 423 (c) and (d) of the Code to alter or reverse the order under appeal and to make any consequential or incidental order that may be just and proper(6). It is competent to a court hearing an appeal in a case under s. 107 to direct that the case before him be re-tried(7).

Clause (h).—Under the Old law such appeal as was allowed lay to the District Magistrate(8). Under the present law the appeal will lie to the Sessions Court subject to special notification.

First proviso.—As the Local Government has made use of the proviso to s. 406, and in its notification No. 28348, dated 3rd December 1923 included the district of Gujranwala, an appeal from an order made by the Additional District Magistrate of Gujranwala under section 118 lies to the District Magistrate and not to Court of Session(9). It was held that in *Mahendra Bhumij v. Emperor*(10) that an appeal under section 406 from the order of an Additional District Magistrate lies to the District Magistrate. This decision was made in 1921, before the Amending Act, but its principle is obviously applicable to cases decided after the amending Act. An appeal from an order by a Magistrate sentencing a person proceeded under s. 110 for a period of three years does not lie to the District Magistrate(11).

Second proviso.—It is obvious that no appeal would be competent to the Sessions Judge or to the District Magistrate against the original order of the Magistrate after the record had been submitted to the Sessions Judge under s. 123 (2) and after the Sessions Judge had

(1) *Emperor v. Samai Din*, 2 Luck. 231=3 O. W. N. 390=13 O. L. J. 276=91 I. C. 402=27 Cr. L. J. 626=1926 O. 320.

(2) *Jumo v. Emperor*, 28 I. C. 108.

(3) *Ibid.*

(4) *In re Chet Ram*, 27 A. 623; *Har Datt v. Emperor*, 14 A. L. J. 268=17 Cr. L. J. 165; *Baranasi v. Partab*, 11 A. L. J. 16=35 A. 103; *Emperor v. Suleman*, 11 Bom. L. R. 740; *Sham-rao v. Emperor*, 19 N. L. R. 160=75 I. C. 979=25 Cr. L. J. 67.

(6) *Empress v. Nga Kyauk Maic*, (1897—1901) 1 U. B. R. 227.

(6) *Nga San Du v. Emperor*, 3 U. B. R. (1917—1920) 270.

(7) *Emperor v. Bhagwat Singh*, 48 A. 501=A. I. R. 1926 A. 403=21 A. L. J. 666=7 L. R. A. Cr. 121=26 I. C. 497=27 Cr. L. J. 945.

(8) *Mahendru v. Emperor*, 48 C. 874=25 O. W. N. 853=23 Cr. L. J. 229; 18 L. R. 98.

(9) *Crown v. Jahangir Chand*, 13 Lab. 254.

(10) 48 C. 874.

(11) *Fazal Mahmud v. Emperor*, A. I. R. 1935 Pesh. 55.

become seized of the case. There was some conflict of authority on this point before 1923(1) but the amendment to s. 406 made in that year has put the matter beyond all possible doubt. It is now specifically provided that no appeal lies to the Sessions Judge or to the District Magistrate on behalf of the persons proceeding against whom have been laid before the Sessions Judge in accordance with the provisions of sub-s. (2) of s. 123(2).

Revision.—The High Court will not ordinarily interfere on merits with proceedings under s. 118 of the Code provided that the court hearing the appeal under section 406, shows in its judgment that it has really and not merely nominally considered the evidence on the record(3). But where the judgment of the Sessions Judge does not fulfil these requirements and there is clear misconception of the evidence, the High Court will interfere(4). An order of discharge passed by a Sessions Judge under this section is neither an original nor an appellate order of acquittal within the meaning of s. 417, so that no appeal lies to the High Court against that order; but the Local Government has a right to file a revision against it(5).

406-A. Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order—

Appeal from order refusing to accept or rejecting a surety.

- (a) if made by a Presidency Magistrate, to the High Court;
- (b) if made by the District Magistrate, to the Court of Session; or
- (c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

This section has been added by section 110 of Act XVIII of 1923. The advisability of inserting this section is thus explained by the Select Committee of 1916 "We think that there should be a general right of appeal against the rejection of a surety, and we have provided for it in section 406-A." An order under s. 118 as to the class of sureties to be furnished had been held to be appealable even before the insertion of the section(6).

407. Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349, or in respect of whom an order has been made or a sentence has been passed

Appeal from sentence of Magistrate of the second or third class.

O 102=13 Cr. L. J. 9; *Kashiram v. Asaram*, 120 I. O. 215=A. I. R. 1929 Nag. 328=31 Cr. L. J. 20.

(4) *Kashiram v. Asaram*, 120 I. O. 215=A. I. R. 1929 Nag. 328=31 Cr. L. J. 20.

(5) *Emperor v. Samai Din*, 1 Luck. 231=13 O. L. J. 276=3 O. W. N. 390.

(6) *Jumo v. Emperor*, 28 I. O. 108=8 B. L. R. 229=16 Cr. L. J. 252.

under section 380, by a Sub-Divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Transfer of appeals
to first class Magistrate.

Amendment.—This section has been amended by section 111 of Act XVIII of 1923.

"Convicted on a trial".—By section 4 (o) of the Code, the word "offence" includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, and a person against whom an order under section 22 of the Cattle Trespass Act is made is a "person convicted on a trial" within the meaning of this section(1).

Second or third class Magistrate.—When a Magistrate with second class powers hears the evidence and the arguments as such, but before a subsequent date on which he delivers a judgment of conviction he is vested with first class powers, an appeal would lie to the District Magistrate under this section(2). This view was accepted in the case of *Emperor v. Nga Pow*(3) which was cited and not dissented from in the case of *Sheobhajan Singh v. Emperor*(4). In this case, as also in the case of *Emperor v. Mangalal*(5), it was held that an appeal lay to the Court of Sessions and not to the District Magistrate. But in both these cases the decision was based on the ground that a greater part of the trial took place after the Magistrate had been vested with first class powers. It is also reasonably plain from the two decisions of the Lahore High Court in the case of *Babu Ram v. Emperor*(6) and *Durga Das v. Emperor*(7), that an appeal from an order of conviction passed by a Magistrate, who commenced the trial as second class Magistrate, but who was invested

(1) *In re Ponnusami*, 29 M. 517=5 Cr. L. J. 66; *Emperor v. M. Hari Ma.*, 4 L. B. R. 10=6 Cr. L. J. 131; *Rodriks v. Papa Dada*, 46 B 58; *Em-*

(1925) Pat. 120=26 Cr. L. J. 914=Ind. Rul. (1925) Pat. 120=A. I. R. 1925 Pat. 472

(5) 29 Bom. L. R. 481=8 A. I. Cr. B. 70=101 I. C. 602=1927 B. 366=23 Cr. L. J. 474.

(6) 8 Lah. 203=101 I. C. 100=8 Lah. L. J. 803=1927 Lah. 393=29 P. L. R. 480=23 Cr. L. J. 781.

(7) 99 I. C. 69=28 Cr. L. J. 50=1927 Lah. 139.

with first class powers before the conclusion of the trial, lies to the Sessions Judge and not to the District Magistrate.

Bench of Magistrates with second or third class powers.—An appeal lies under this section from a conviction by a Bench of Magistrates invested with second or third class powers(1). An appeal against an order granting sanction to prosecute passed by a Bench of Honorary Magistrates exercising the powers of a Magistrate of Second Class lies to the District Magistrate to whom the Bench of Honorary Magistrates is subordinate(2). But no such appeal will lie, if under special orders of Government a Bench of Magistrates, each of whom exercises such powers, is empowered to exercise conjointly, as a bench, powers of the first class(3).

Sub-section (2): Magistrate specially empowered to hear appeal.—A Magistrate of the First Class upon whom special powers of appeal have been conferred by the provisions of sub-section (2) of the Code is not a court to which an appeal "ordinarily" lies under s. 195 (7) of the Code from the orders of a Magistrate exercising second class powers(4). The omission of the word 'only' in sub-s. 7 of s. 195 as it stood in 1898 has not changed the law; *vide* sub s. (3) of s. 195 as it stands at present(5). A Deputy Magistrate empowered under sub-sec. (2) to hear appeals from the sentences of subordinate Magistrates is not competent to hear appeals under section 476-B from the orders of such Magistrates, not being a court to which appeals from such Magistrates ordinarily lie(6).

Transfer by District Magistrate.—A District Magistrate directed that the Assistant Collector under him should perform the "routine work of the Collector's office, including the criminal, appellate and revisional work", and it was held that the order was *ultra vires* as regards the revisional work, but was good so far as the appellate work was concerned(7). The Court to which an appeal is transferred for disposal, and in which the responsibility for its correct disposal rests, is not bound by any opinion as to the necessity for taking further evidence, formed by the Court from which the appeal was transferred, and which is no longer responsible for the due decision of the appeal(8). An appeal from an order directing a complainant to pay compensation to the accused under section 250 is an appeal under Chap. XXXI of the Code within the meaning of s. 428 of the Code and in an appeal from such an order the appellate court has power to take additional evidence(9).

(1) *Empress v. Narayanasami*, 9 M. 36=2 Weir. 460.

(2) *Ahmad Hussain v. Rahiman*, 85 I. O. 39=26 O. C. 358=(1924) A. I. R. (O) 239=26 Cr. L. J. 423.

(3) *Havaladar v. Jagu Mian*, 9 C. 96.

(4) *Jiwani v. Emperor*, 68 I. O. 412=2 Lah. L. J. 660=23 Cr. L. J. 372; *Sadhu Lal v. Ram Churn*, 30 C. 394; *Eroma Variar v. Emperor*, 26 M. 656; *Cl. Empress v. Subbaraya Pillai*, 18 M. 487; and *Ramdayal v. Ramprasad*, 3 N. L. R. 50=5 Cr. L. J. 431.

(5) *Mahim Chandra v. Emperor*, 56

C. 824 (829)=116 I. O. 638=1929 Cal. 172=33 C. W. N. 285=49 O. L. J. 342.

(6) *Mahim Chandra v. Emperor*, 56 C. 824=116 I. O. 638=1929 O. L. 172=33 C. W. N. 285=49 O. L. J. 342.

(7) *Bai Harka v. Sitaram*, 2 Bom. L. R. 636.

(8) *In re Alaga Ambalam*, 31 M. 277 (279-280)=18 M. L. J. 89=7 Cr. L. J. 329.

(9) *Seemiah Naidu v. Abdul*

under section 380, by a Sub-Divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Transfer of appeals to first class Magistrate.

Amendment.—This section has been amended by section 111 of Act XVIII of 1923.

"Convicted on a trial".—By section 4 (o) of the Code, the word "offence" includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, and a person against whom an order under section 22 of the Cattle Trespass Act is made is a "person convicted on a trial" within the meaning of this section(1).

Second or third class Magistrate.—When a Magistrate with second class powers hears the evidence and the arguments as such, but before a subsequent date on which he delivers a judgment of conviction he is vested with first class powers, an appeal would lie to the District Magistrate under this section(2). This view was accepted in the case of *Emperor v. Nga Pow*(3) which was cited and not dissented from in the case of *Sheobhajan Singh v. Emperor*(4). In this case, as also in the case of *Emperor v. Mangalal*(5), it was held that an appeal lay to the Court of Sessions and not to the District Magistrate. But in both these cases the decision was based on the ground that a greater part of the trial took place after the Magistrate had been vested with first class powers. It is also reasonably plain from the two decisions of the Lahore High Court in the case of *Babu Ram v. Emperor*(6) and *Durga Das v. Emperor*(7), that an appeal from an order of conviction passed by a Magistrate, who commenced the trial as second class Magistrate, but who was invested

(1) *In re Ponnusami*, 29 M. 517=5 Cr. L. J. 86; *Emperor v. Mi Hari Ma*, 4 L. B. R. 10=6 Cr. L. J. 121; *Rodriks v. Papa Dada*, 46 B 58; *Empress v. Rayalakhma*, 10 B 230

(2) *Baramaddi v. Magarali*, 36 O. W N 302=A. I. R. 1932 C. 460=1932 Cr. C. 450=127 I. O. 834=33 Cr. L. J. 516=18 A. I. Cr. R. 278.

(3) 4 L. B. R. 239=8 Cr. L. J. 48.

(4) 6 Pat. L. T. 534=86 I. C. 978=

(1925) Pat. 120=26 Cr. L. J. 914=Ind. Rul. (1925) Pat. 120=A. I. R. 1925 Pat. 472.

(5) 29 Bom. G. R. 482=8 A. I. Cr. R. 70=101 I. C. 602=1927 B 366=23 Cr. L. J. 474.

(6) 8 Lah. 203=101 I. C. 103=8 Lah. L. J. 203=1927 Lah. 399=29 P. L. R. 489=23 Cr. L. J. 781.

(7) 99 I. C. 52=28 Cr. L. J. 50=1927 Lah. 138.

with first class powers before the conclusion of the trial, lies to the Sessions Judge and not to the District Magistrate.

Bench of Magistrates with second or third class powers.—An appeal lies under this section from a conviction by a Bench of Magistrates invested with second or third class powers(1). An appeal against an order granting sanction to prosecute passed by a Bench of Honorary Magistrates exercising the powers of a Magistrate of Second Class lies to the District Magistrate to whom the Bench of Honorary Magistrates is subordinate(2). But no such appeal will lie, if under special orders of Government a Bench of Magistrates, each of whom exercises such powers, is empowered to exercise conjointly, as a bench, powers of the first class(3).

Sub-section (2): Magistrate specially empowered to hear appeal.—A Magistrate of the First Class upon whom special powers of appeal have been conferred by the provisions of sub-section (2) of the Code is not a court to which an appeal "ordinarily" lies under s. 195 (7) of the Code from the orders of a Magistrate exercising second class powers(4). The omission of the word 'only' in sub-s. 7 of s. 195 as it stood in 1898 has not changed the law; *vide* sub s. (3) of s. 195 as it stands at present(5). A Deputy Magistrate empowered under sub-sec. (2) to hear appeals from the sentences of subordinate Magistrates is not competent to hear appeals under section 476-B from the orders of such Magistrates, not being a court to which appeals from such Magistrates ordinarily lie(6).

Transfer by District Magistrate.—A District Magistrate directed that the Assistant Collector under him should perform the "routine work of the Collector's office, including the criminal, appellate and revisional work", and it was held that the order was *ultra vires* as regards the revisional work, but was good so far as the appellate work was concerned(7). The Court to which an appeal is transferred for disposal, and in which the responsibility for its correct disposal rests, is not bound by any opinion as to the necessity for taking further evidence, formed by the Court from which the appeal was transferred, and which is no longer responsible for the due decision of the appeal(8). An appeal from an order directing a complainant to pay compensation to the accused under section 250 is an appeal under Chap. XXXI of the Code within the meaning of s. 428 of the Code and in an appeal from such an order the appellate court has power to take additional evidence(9).

(1) *Empress v. Narayanasami*, 9 M. 86=2 Weir. 460.

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(3) *Havaldar v. Jagu Mian*, 9 C. 96.

(4) *Jiwani v. Emperor*, 68 I. C. 412=2 Lah. L. J. 660=23 Cr. L. J. 372; *Sadhu Lal v. Ram Churn*, 30 C. 394; *Eroma Varior v. Emperor*, 26 M. 656; *Cf. Empress v. Subbaraya Pillai*, 18 M. 487; and *Ramdayal v. Ram-prasad*, 3 N. L. R. 50=5 Cr. L. J. 431.

(5) *Mahim Chandra v. Emperor*, 56

C. 824 (829)=116 I. C. 638=1929 Cal. 172=33 C. W. N. 285=49 C. L. J. 342.

(6) *Mahim Chandra v. Emperor*, 56 C. 824=116 I. C. 638=1929 C. 172=33 C. W. N. 285=49 C. L. J. 342.

(7) *Bai Harka v. Sitaram*, 2 Bom. L. R. 536.

(8) *In re Alaga Ambalam*, 21 M. 277 (279-280)=18 M. L. J. 89=7 Cr. L. J. 829.

(9) *Seemiah Nadiu v. Abdul Wahab*, 123 I. C. 809=58 M. L. J. 416=8 Mad. Cr. Cas. 160=53 M. 688=31 L. W. 524=Ind. Rul. (1930) Mad. 553=81 Cr. L. J. 602=A. I. R. (1930) Mad. 488.

Notice to officer appointed by Local Government.—Where an appeal under this section is heard by a Magistrate specially empowered to hear such appeals, it is incumbent on the Magistrate to give notice of such hearing under section 422 of the Code, to the officer appointed by the Local Government in that behalf and an omission to give such notice before hearing the appeal cannot be treated as an irregularity. The disposal of such an appeal without notice to the officer is not a legal disposal of the appeal(1).

Order as to disposal of property.—A Sub-Divisional Magistrate hearing a criminal appeal under sub-section (2) has power to pass orders under section 520, regarding the disposal of property in respect of which an offence has been committed, either at the time of disposing of the appeal or so soon thereafter that the order may be treated as part of the appeal proceedings(2).

Withdrawal.—It is competent to a District Magistrate to withdraw part-heard appeals from the file of a first class Magistrate subordinate to him under this section(3).

Revision.—Where an appeal from an order of a second or third class Magistrate is heard by a first class Magistrate an application in revision against the order of the appellate court ought to be made to the Sessions Judge asking him to make a reference to the High Court and should not be made direct to the High Court(4).

408. Any person convicted on a trial held by an Assistant Sessions Judge, District Magistrate or other Magistrate of the first class, or any person sentenced under section 349, or in respect of whom an order has been made or a sentence has been passed under section 380, by a Magistrate of the first class, may appeal to the Court of Session :

provided as follows :—

(a) (Repealed by Act XII of 1923, s. 23.)

(b) When in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, *the appeal of all or any of the accused convicted at such trial, shall lie to the High Court;*

(c) When any person is convicted by a Magistrate of an offence under section 124-A of the Indian Penal Code, the appeal shall lie to the High Court.

(1) *Emperor v. Shirlingappa*, 73 I. O. 812=24 Bom. L. R. 1150=1923 B. 74=24 Cr. L. J. 700.

(2) *In re Arunachula Theron*, 46 M. 162=71 I. C. 514=44 M. L. J. 56=17 L. W. 462=32 M. L. T. 104=24 Cr. L. J.

162=1923 M. 324

(3) *In re Alaga Ambalam*, 31 M. 277=18 M. L. J. 89=7 Cr. L. J. 329.

(4) *Abdul Matiali v. Nandalal*, 77 I. C. 990=50 C. 423=1923 C. 674=23 Cr. L. J. 526.

Amendment—The words in *italics* have been newly added by s. 112 of Act No. XVIII of 1923, proviso (a) which enabled European British subjects to appeal at their option either to the High Court or the Court of Session has now been repealed by Act No XII of 1923. Under the Code as amended in 1923 the mere fact that an accused person is an European British subject does not *ipso facto* entitle him to a right of any special procedure. Therefore, a Court of Sessions in British Baluchistan can hear such appeals as the Code prescribes(1).

Convicted.—A convicted person has a right of appeal on order passed against him under section 562 (1) of the Code, releasing him on probation of good conduct, though no provision as to appeal has been expressly made in respect of an order under section 562(2). An appeal will lie to the Sessions Judge from an order of a Magistrate under section 562 passed on a summary trial(3).

Sentence on reference by subordinate Magistrate under s. 349.—A District Magistrate to whom a case had been submitted by a second class Magistrate under s. 349 passed a sentence of five years' imprisonment on one of the accused, and it was held that in view of the last clause of s. 349 a District Magistrate acting under that section must be regarded as a Magistrate not empowered under section 30, and that therefore, in spite of the sentence of five years' imprisonment, which was *ultra vires*, appeal lay not to the Chief Court, but to the Court of Session(4).

Sentence under s. 380.—Where proceedings are submitted to a first class Magistrate under section 562 and he passes sentence in the case under section 380, the conviction must, for the purposes of appeal, be considered to be within the meaning of section 408 and the order is appealable to the Sessions Court(5).

Order of compensation.—An order awarding compensation and repayment of fines, *i.e.*, under section 22 of the Cattle Trespass Act, 1871, is appealable under this section(6).

Magistrate of the first class.—The moment a second class Magistrate is invested with the powers of a first class Magistrate he becomes a first class Magistrate and any conviction by him in cases which were taken up by him as a second class Magistrate, are appealable to the Court of Session and not to the District Magistrate(7). But in some cases it has been held that when a Magistrate with second class powers hears the evidence and the arguments as such, but before a

(1) *Bombardier v. Emperor*, 118 I. C. 438=1929 Lah 187=30 Cr. L. J. 918

(2) *Bahadur v. Ismail*, 52 C. 463=29 C. W.N. 151; *Emperor v. Manohar*, 24 P. R. 1904 Cr.=1 Cr. L. J. 1098, *Hayat v. Crown*, 20 P. R. 1917 Cr.=18 P. W. R. 1917 Cr.=18 Cr. L. J. 401=38 I. C. 961; *Emperor v. Madhav*, 28 Bom. L. R. 671=1926 B. 382=96 I. C. 121=27 Cr. L. J. 873; *Afa Chit Su v. Emperor*, 4 I. C. 1027=5 L. B. R. 129=11 Cr. L. J. 152.

(3) *Emperor v. Hira Lal*, 46 A. 828=22 A. L. J. 751=25 Cr. L. J. 1244=82 I. C. 172.

(4) *Naga Pya v. Emperor*, 4 L. B. R. 83=6 Cr. L. J. 269.

(5) *Emperor v. Bhimappa*, 16 Cr.

L. J. 738=31 I. C. 338=17 Bom. L. R. 895.

(6) *Rodricks v. Popa Dada*, 46 B. 58=23 Bom. L. R. 836=63 I. C. 160=22 Cr. L. J. 624=A. I. R. 1922 (Bom.) 191.

(7) *Triumala Venkatarreddy v. Sikatapu Ramayya*, 106 I. C. 583=51 M. 257=(1927) M. W. N. 669=26 L. W. 685=39 M. L. T. 497=53 M. L. J. 733=A. I. R. 1928 M. 55=29 Cr. L. J. 71; *Sheobhajan v. Emperor*, 86 I. C. 978=26 Cr. L. J. 714=A. I. R. 1925 Pat. 472=Ind. Rul. (1925) Pat. 120=3 Pat. L. R. 100 Cr.=6 Pat. L. T. 554; *Magnalal v. Emperor*, 29 Bom. L. R. 483, *Durga Das v. Emperor*, 28 Cr. L. J. 50=99 I. C. 82=A. I. R. (1927) Lah. 198.

Notice to officer appointed by Local Government.—Where an appeal under this section is heard by a Magistrate specially empowered to hear such appeals, it is incumbent on the Magistrate to give notice of such hearing under section 422 of the Code, to the officer appointed by the Local Government in that behalf and an omission to give such notice before hearing the appeal cannot be treated as an irregularity. The disposal of such an appeal without notice to the officer is not a legal disposal of the appeal(1).

Order as to disposal of property.—A Sub-Divisional Magistrate hearing a criminal appeal under sub-section (2) has power to pass orders under section 520, regarding the disposal of property in respect of which an offence has been committed, either at the time of disposing of the appeal or so soon thereafter that the order may be treated as part of the appeal proceedings(2).

Withdrawal.—It is competent to a District Magistrate to withdraw part-heard appeals from the file of a first class Magistrate subordinate to him under this section(3).

Revision.—Where an appeal from an order of a second or third class Magistrate is heard by a first class Magistrate an application in revision against the order of the appellate court ought to be made to the Sessions Judge asking him to make a reference to the High Court and should not be made direct to the High Court(4).

408. Any person convicted on a trial held by an Assistant Sessions Judge, District Magistrate or other Magistrate of the first class, or any person sentenced under section 349, or in respect of whom an order has been made or a sentence has been passed under section 380, by a Magistrate of the first class, may appeal to the Court of Session :

Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class.

provided as follows :—

(a) (Repealed by Act XII of 1923, s. 23)

(b) When in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal of all or any of the accused convicted at such trial, shall lie to the High Court;

(c) When any person is convicted by a Magistrate of an offence under section 124-A of the Indian Penal Code, the appeal shall lie to the High Court.

(1) *Emperor v. Shirdingappa*, 73 I. C. 812=24 Bom. L. R. 1150=1913 B. 74 =24 Cr. L. J. 700.

(2) *In re Arunachula Thevan*, 46 M. 162=71 I. C. 514=44 M. L. J. 56=17 L. W. 462=32 M. L. T. 104=24 Cr. L. J.

162=1923 M. 321

(3) *In re Alaga Ambalam*, 31 M. 277=18 M. L. J. 63=7 Cr. L. J. 329.

(4) *Abdul Matiali v. Nandalal*, 77 I. C. 990=50 C. 423=1923 C. 674=23 Cr. L. J. 526.

Aggregate of consecutive sentences passed for several offences at one trial exceeding four years.—Under sec. 35, sub-sec. (3), of the Code the aggregate of consecutive sentences passed for several offences at one trial is to be deemed a single sentence and where the sentence for each offence is of less than four years but the aggregate exceeds that term, an appeal lies to the High Court under proviso (b)(1). Concurrent sentences cannot, however, be calculated as aggregate sentences for the purpose of raising the status of the forum of appeal(2). Therefore, where an Assistant Session Judge passes sentences upon an accused each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Session Court and not to the High Court(3).

Magistrate acting under section 30.—An appeal by any person convicted in a case in which a Magistrate of the first class exercising enhanced powers under s. 30, has passed a sentence of imprisonment exceeding four years on any one of the accused, whether he be the appellant or any other person tried with him in the same case, shall lie only to the High Court(4). Where the appellant was sentenced by a Magistrate specially empowered under section 30 to a term of imprisonment exceeding four years : and his petition of appeal sent from the jail to the Sessions Judge was summarily dismissed by him on the merits it was held that under the provisions of section 530(r) of the Code the proceedings in the Sessions Court were void and the accused still had a right of appeal to the High Court(5).

'All or any of the accused'.—The advisability of inserting the words under comment is thus stated in the statement of objects and Reasons : "This amendment provides that in trial in which more than one person are accused, and in which by reason of the sentences passed an appeal lies in the case of some of the persons to the Sessions Judge and of others to the High Court, the appeal of all shall lie to the latter tribunal. This is in accordance with the decision in the undernoted(6) cases. The decision in *re Venkatakrishnayya*(7) is no longer good law. Under this proviso when one accused has been sentenced to more than four years, all the other accused convicted at the same trial have to appeal to the High Court even though they themselves have received smaller sentences, and this is so even if the accused, who has got more

(1) *Emperor v. Hamid*, 28 A. L. J. 1206=11 L. R. 172; *Emperor v. Tulsi Ram*, 35 A. 154=18 I. C. 679=11 A. L. J. 111=14 Cr. L. J. 119.

(2) *Emperor v. Tulsi Ram*, 35 A. 154=18 I. C. 679=11 A. L. J. 111=14 Cr. L. J. 119; *Gursahay v. Emperor*, 3 Pat. L. J. 133; *Sher Mohammad v. Emperor*, 25 P. R. 1901; *Emperor v. Tulsidas*, 11 Bom. L. R. 544; *Reg. v. Gulam Abbas* 12 Bom. H. C. R. 147; *Cf. Abdul Khalak v. Emperor* 17 O. W. N. 72.

(3) *Lakhmi v. Emperor*, 23 C. T. J. 695; *Emperor v. Tulsi Das*, 11 Bom. L. R. 544; *Sher Mohammad v. Empe-*

ror, 25 P. R. 1901 Cr.; *Jagdish v. Emperor*, 10 N. L. J. 135=28 Cr. L. J. 672=103 I. C. 208=1927 Nag. 255; (4) *Ahmad Khan v. Crown*, 5 P. R. 1916 Cr.=17 Cr. L. J. 299=95 I. C. 171=56 P. W. R. 1915 Cr.

(5) *In re Abdulla*, 2 Rang. 386=26 Cr. L. J. 293=84 I. C. 437=A. I. R. (1925) R. 98.

(6) *Palani v. Emperor*, 17 M. L. J. 248; *Richhe v. Emperor*, 13 A. L. J. 272=16 Cr. L. J. 353=28 I. C. 737; *Empress v. Jai Singh*, 12 P. R. 1900 Cr.; *Debi Din v. Emperor*, 24 A. L. J. 151=27 Cr. L. J. 175=91 I. C. 959.

(7) 40 M. 591=43 M. L. J. 561.

subsequent date on which he delivers a judgment of conviction, he is vested with first class powers, an appeal would lie to the District Magistrate under s. 407(1). If a bench when sitting together is invested with first class powers, though consisting of second or third class Magistrates, an appeal from such bench will not lie to the District Magistrate but to the Sessions Judge(2).

Court of Session.—Where a Magistrate against whose decisions appeals are preferred, has his headquarters in a place, which is within the local limits of one of the two Sessions Divisions in a district, though he is authorised to try offences throughout the whole district including cases arising within the other Sessions Division, the appeal lies to the Sessions Division within whose jurisdiction the Headquarters of the Magistrate are situate, irrespective of the place where the offence was committed(3).

Acquittal in appeal by court without jurisdiction.—An accused person acquitted and discharged by a Sessions Judge in an appeal which he had no jurisdiction to hear, may be re-arrested even after the period to which he was originally sentenced to be imprisoned, and made to undergo the rest of his term(4).

Proviso (b).—The intention of proviso (b) is that in a case in which a sentence of transportation or of imprisonment for more than four years is passed, an appeal or appeals in the case shall lie to the High Court(5). The reason is that when a long term of imprisonment has to be undergone the question whether the offence is proved should be tried in appeal by a court of higher grade than it would be tried by if the sentence were less(6).

Sentence of imprisonment exceeding four years.—The word "sentence of imprisonment exceeding four years" in proviso (b) must be taken to mean the substantive sentence of imprisonment apart from any sentence of fine or imprisonment in default of payment of the fine(7). The appeal from an order of a Magistrate with special powers sentencing accused to four years' rigorous imprisonment lies to the Court of Session and not to the High Court(8). Where the total terms of imprisonment to which an appellant has been sentenced either by an Assistant Sessions Judge or by Magistrate empowered under section 30 does not exceed four years in the aggregate, the appeal lies to the court of the Sessions Judge(9). The fact that the Magistrate in determining the length of sentence took into account the length of time the appellant had been under trial does not affect the question of what court of appeal has jurisdiction(10).

(1) *Baramaddi v. Magarali*, 36 C. W. N. 301; *Emperor v. Naga Patu*, 4 L. B. R. 239.

(2) *Havaldar v. Jagu Mean*, 9 C. 98.

(3) *Valia Ambu v. Emperor*, 30 M. 136; *Hiralal v. Crown*, 7 P. R. 1918 Cr.=19 Cr. L. J. 310=44 I. C. 326.

(4) *Reg. v. Gopala Shiru*, Rat. Un. Cr. Cas. 17.

(5) *Empress v. Naga Tun Hau*, (1897 O.) 1 U. B. R. 94.

(6) *Nga Pya v. Emperor*, 4 L. B. R. 53 (54).

(7) *Nga Tun Tha v. Empress*, 1 L. B. R. 57; *Khuda Bakhsh v. Crown*, 19 P. B. 1918 Cr.=19 Cr. L. J. 742=46 I. C.

518; *Karjan v. Emperor*, A. I. R. 1934 O. 433 (1)=1934 O. L. R. 717=11 O. W. N. 1193=151 I. C. 289=35 Cr. L. J. 1283 (or of whipping).

(8) *Khuda Bakhsh v. Crown*, 19 P. B. 1918 Cr.=19 Cr. L. J. 742=46 I. C. 518.

(9) *Jagdish v. Emperor*, 28 Cr. L. J. 672=103 I. C. 208=10 N. L. J. 135=1927 A. I. R. (Nag.) 255 8 A. I. Cr. R. 195.

(10) See the case cited in the last note and *Abdul Aziz v. Emperor*, 40 C. 631=19 I. C. 510=14 Cr. L. J. 254=17 C. W. N. 825; *Tulsi Ram v. Emperor*, 35 A. 154=18 I. C. 679=11 A. L. J. 111=14 Cr. L. J. 119.

Aggregate of consecutive sentences passed for several offences at one trial exceeding four years.—Under sec. 35, sub-sec. (3), of the Code the aggregate of consecutive sentences passed for several offences at one trial is to be deemed a single sentence and where the sentence for each offence is of less than four years but the aggregate exceeds that term, an appeal lies to the High Court under proviso (b)(1). Concurrent sentences cannot, however, be calculated as aggregate sentences for the purpose of raising the status of the forum of appeal(2). Therefore, where an Assistant Session Judge passes sentences upon an accused each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Session Court and not to the High Court(3).

Magistrate acting under section 30.—An appeal by any person convicted in a case in which a Magistrate of the first class exercising enhanced powers under s. 30, has passed a sentence of imprisonment exceeding four years on any one of the accused, whether he be the appellant or any other person tried with him in the same case, shall lie only to the High Court(4). Where the appellant was sentenced by a Magistrate specially empowered under section 30 to a term of imprisonment exceeding four years : and his petition of appeal sent from the jail to the Sessions Judge was summarily dismissed by him on the merits it was held that under the provisions of section 530(r) of the Code the proceedings in the Sessions Court were void and the accused still had a right of appeal to the High Court(5).

'All or any of the accused'.—The advisability of inserting the words under comment is thus stated in the statement of objects and Reasons : "This amendment provides that in trial in which more than one person are accused, and in which by reason of the sentences passed an appeal lies in the case of some of the persons to the Sessions Judge and of others to the High Court, the appeal of all shall lie to the latter tribunal. This is in accordance with the decision in the undernoted(6) cases. The decision in *re Venkatakrishnayya*(7) is no longer good law. Under this proviso when one accused has been sentenced to more than four years, all the other accused convicted at the same trial have to appeal to the High Court even though they themselves have received smaller sentences, and this is so even if the accused, who has got more

(1) *Emperor v. Hamid*, 28 A. L. J. 1206=11 L. R. 172; *Emperor v. Tulsi Ram*, 35 A. 154=18 I. O. 679=11 A. L. J. 111=14 Cr. L. J. 119.

(2) *Emperor v. Tulsi Ram*, 35 A. 154=18 I. O. 679=11 A. L. J. 111=14 Cr. L. J. 119; *Gursahay v. Emperor*, 3 Pat. L. J. 139; *Sher Mohammad v. Emperor*, 25 P. R. 1901; *Emperor v. Tulsidas*, 11 Bom. L. R. 544; *Reg. v. Gulam Abas*, 12 Bom. H. C. R. 147; *Cf. Abdul Khalak v. Emperor* 17 O. W. N. 72.

(3) *Lakhmi v. Emperor*, 23 C. L. J. 595; *Emperor v. Tulsi Das*, 11 Bom. L. R. 544; *Sher Mohammad v. Empe-*

ror, 25 P. R. 1901 Cr; *Jagdish v. Emperor*, 10 N. L. J. 185=28 Cr. L. J. 672=103 I. C. 208=1927 Nag. 255;

(4) *Ahmad Khan v. Crown*, 5 P. R. 1916 Cr=17 Cr. L. J. 299=35 I. C. 171=56 P. W. R. 1916 Cr.

(5) *In re Abdulla*, 2 Rang. 886=26 Cr. L. J. 293=81 I. C. 437=A. I. R. (1925) B. 28.

(6) *Palani v. Emperor*, 17 M. L. J. 248; *Richhe v. Emperor*, 13 A. L. J. 272=16 Cr. L. J. 353=28 I. C. 737; *Empress v. Jai Singh*, 12 P. R. 1900 Cr; *Debi Din v. Emperor*, 24 A. L. J. 161=27 Cr. L. J. 175=91 I. C. 959.

(7) 40 M. 591=43 M. L. J. 561.

than four years, does not choose to appeal(1).

Proviso (c).—An appeal lies under ss. 35 (3) and 408, Prov (c), directly to the High Court from a conviction and separate sentences under ss. 124-A and 153-A of the Penal Code passed on the same trial(2).

409. An appeal to the Court of Sessions or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge :

Appeals to Court of Session how heard.

provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Scope.—All appeals lying to the Court of Sessions are to be heard only by the Sessions Judge or by an Additional Sessions Judge. A Sessions Judge has no power to transfer an appeal filed in his court to the Court of the Assistant Sessions Judge(3).

Proviso.—The provisions newly added restrict the power of the Additional Sessions Judge to hear appeals. But the proviso is not restricted to appeals arising within the jurisdiction of the Court of Session. Where, therefore, the High Court transferred a case from the Court of one Sessions Judge to the court of another Sessions Judge, the latter, unless the contrary is directly expressed can transfer to an Additional Sessions Judge, a case which had been transferred to him by the High Court(4).

410. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

Appeal from sentence of Court of Session.

Convicted on a trial.—An order by a Sessions Judge under s. 228, Penal Code imposing a fine on a person for intentional insult to the Judge, when sitting in a stage of a judicial proceeding, amounts to a trial, although by a summary mode, and is, therefore, appealable(5). The words under comment are important. An appellant whose appeal is dismissed by a Sessions Judge after he has taken additional evidence under s. 428 has no right of appeal to the High

(1) *Debi Din v. Emperor* 24 A. L. J. 151=27 Cr. L. J. 175=91 I. O. 959; *Hari Dayal v. Emperor*, 37 A. 471=18 A. L. J. 719=16 Cr. L. J. 606=80 I. C. 158; *Ahmad Khan v. Emperor*, 5 P. R. 1916 Cr. C. 214.

(2) *Empress v. Abdul Razzak*, 37 A. 296=23 I. C. 652=13 A. L. J. 353=16

Cr. L. J. 316. See *Nishi Chandra v. Romesh Chandra*, 14 Cr. L. J. 195=19 I. C. 195

(4) *Kedar Nath v. Emperor*, A. I. R. 1934 Pat. 114=1934 Cr. C. 300=15 P. L. T. 318=150 I. C. 927=35 Cr. L. J. 1167.

(5) *In re Chappu Menon*, 4 M. H. C. R. 146.

Court(1).

May appeal.—This section gives a right of appeal as distinguished from an indulgence to be heard or not to be heard. The word "may" as distinguished from "shall" does not make any practical difference(2).

High Court.—The Chief Court of Oudh is now included in the definition of the High Court in s. 4 (j). The case of *Thomas Bradshaw v. Emperor*(3) is no longer of any authority.

Appeal against conviction and notice of enhancement.—There is nothing incongruous in admitting an appeal and at the same time giving notice to an accused to enhance the sentence(4).

411. Any person convicted on a trial held by a

Appeal from sen-
tence of Presidency
Magistrate.

Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term ex-

ceeding six months or to fine exceeding two hundred rupees.

Sentences by Presidency Magistrate, when appealable.—This section refers in terms to a sentence of imprisonment exceeding six months or fine exceeding Rs. 200. It does not refer either to a sentence which awards imprisonment and fine or to any alternative imprisonment in default of payment of fine. The words of the section are confined in their meaning to substantive sentences and cannot be extended to include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid(5). No appeal, therefore, lies from a sentence of six months' rigorous imprisonment and a fine of Rs. 200 or a further period of three months' simple imprisonment passed by a Presidency Magistrate(6).

Concurrent sentences.—Two sentences, each of six months' imprisonment, passed simultaneously under section 35, and directed to run concurrently, cannot be held to be a single sentence of one year's imprisonment but would be considered as a single sentence of six months' imprisonment. If such a sentence is passed by a Presidency Magistrate, it will not be appealable under this section(7).

Order by Presidency Magistrate under s. 562—No appeal lies, having regard to the terms of s. 411, against an order passed by a Presidency Magistrate under s. 562 directing the accused to be released on his executing a bond for Rs. 200 with one surety of like amount to be of good behaviour for two years and to come up for sentence when required to do so(8).

412. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first

No appeal in cer-
tain cases when
accused pleads gulli-
ty.

(1) *Empress v. Isahak*, 27 O. 372=4 C.W.N. 497; *Empress v. Dhanobar*, 6 B.L. R. 463.

(2) *Empress v. Pohpi*, (1891) A. W. N. 48 (51).

(3) 18 O. C. 235=8 I. C. 873=11 Cr. L. J. 723.

(4) *Empress v. Babu*, 58 B. 392.

(5) *Empress v. Isahak*, 27 O. 372=4 C.W.N. 497.

(6) *Empress v. Dhanobar*, 6 B.L. R. 463.

(7) *Empress v. Pohpi*, (1891) A. W. N. 48 (51).

(8) 18 O. C. 235=8 I. C. 873=11 Cr. L. J. 723.

(9) *Empress v. Babu*, 58 B. 392.

(10) *Empress v. Isahak*, 27 O. 372=4 C.W.N. 497.

(11) *Empress v. Dhanobar*, 6 B.L. R. 463.

(12) *Empress v. Pohpi*, (1891) A. W. N. 48 (51).

(13) 18 O. C. 235=8 I. C. 873=11 Cr. L. J. 723.

(14) *Empress v. Babu*, 58 B. 392.

than four years, does not choose to appeal(1).

Proviso (c).—An appeal lies under ss. 35 (3) and 408, Prov (c), directly to the High Court from a conviction and separate sentences under ss. 124-A and 153-A of the Penal Code passed on the same trial(2).

409. An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge :

Appeals to Court of Session how heard.

provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Scope.—All appeals lying to the Court of Sessions are to be heard only by the Sessions Judge or by an Additional Sessions Judge. A Sessions Judge has no power to transfer an appeal filed in his court to the Court of the Assistant Sessions Judge(3).

Proviso.—The provisions newly added restrict the power of the Additional Sessions Judge to hear appeals. But the proviso is not restricted to appeals arising within the jurisdiction of the Court of Session. Where, therefore, the High Court transferred a case from the Court of one Sessions Judge to the court of another Sessions Judge, the latter, unless the contrary is directly expressed can transfer to an Additional Sessions Judge, a case which had been transferred to him by the High Court(4).

410. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

Appeal from sentence of Court of Session.

Convicted on a trial.—An order by a Sessions Judge under s. 228, Penal Code imposing a fine on a person for intentional insult to the Judge, when sitting in a stage of a judicial proceeding, amounts to a trial, although by a summary mode, and is, therefore, appealable(5). The words under comment are important. An appellant whose appeal is dismissed by a Sessions Judge after he has taken additional evidence under s. 428 has no right of appeal to the High

(1) *Debi Din v. Emperor* 24 A. L. J. 151=27 Cr. L. J. 175=91 I. C. 959;
Hars Dayal v. Emperor, 37 A. 471
 =18 A. L. J. 719=16 Cr. L. J. 606=80
 I. C. 158; *Ahmad Khan v. Emperor*,
 5 P. B. 1916 Cr.
 (2) *Joy Chandra v. Emperor*, 33
 C. 214.
 (3) *Empress v. Abdul Raszak*, 37 A.
 286=29 I. C. 652=19 A. L. J. 353=16

Cr. L. J. 316. See *Nishi Chandra v. Romesh Chandra*, 14 Cr. L. J. 195=19
 I. C. 195
 (4) *Kedar Nath v. Emperor*, A. L.
 R. 1931 Pat 114=1931 Cr. C. 300=15
 P. L. T. 318=150 I. C. 927=85 Cr. L. J.
 1167.
 (5) *In re Chappu Memon*, 4 M. H.
 C. R. 146.

appeal lies on fact as well as law, and, when made should be disposed of in a legal manner(1). A person who pleaded guilty to the charge and was convicted by a second class Magistrate, is not barred from contending in appeal that the conviction is illegal(2).

Appeal against acquittal.—Where the accused was convicted by a first class Magistrate on his plea of guilty and the Sessions Court without jurisdiction entertained an appeal against the conviction and set it aside, the High Court on appeal against such acquittal would consider the propriety of the conviction, before re-imposing sentence on the accused(3).

Appeal from conviction without sentence.—Where an accused person has been convicted on the strength of his own plea by a Magistrate of the first class and is released under the provisions of section 562 of the Code, his right of appeal is absolutely barred inasmuch as no sentence is passed upon him(4).

Revision.—An accused person, who pleads guilty before a Magistrate and is convicted, can contend under s. 412, in his application for revision, that his conviction is illegal(5). High Court in revision is not bound by this section but may examine the record for the purpose of seeing whether the accused have had a fair trial and whether their plea of guilty was based on a proper conception of the facts(6).

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session [* * *] passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.

Explanation.—There is no appeal from a sentence of imprisonment passed by such court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

Amendment.—This section has been amended by section 24 of the Criminal Law Amendment Act, 1923. Under this section as now amended, a sentence of one month alone passed by a Court of Session is not appealable, but such a sentence passed by Magistrate is appealable. The reason for this change is thus stated by Racial Distinction Committee: "We consider that outside the presidency towns in the case

(1) *Emperor v. Govind*, Rat. Un. Cr. Cas. 934.

(4) *Hayat v. Emperor*, 20 P. R. 1917 Cr.—18 P. W. R. 1917 Cr.—18 Cr. L. J. 401—98 I. C. 961.

(5) *Emperor v. Chunnial*, 23 Bom. L. R. 1023—27 Cr. L. J. 1148.

(6) *Ali Hossein v. Emperor*, A. I. B. 1930 Bang. 319—128 I. C. 845—1930 Cr. C. 1177.

class on such plea; there shall be no appeal except as to the extent or legality of the sentence.

Conviction on his own plea.—Where a person has pleaded guilty and has been convicted on such plea, he waives his right to question the legality of his conviction(1). The object of this section, construed in its plain and obvious sense, is to limit the right of appeal, when the accused has pleaded guilty, to such matter as may be a special ground of complaint with respect to the sentence as distinguished from the conviction itself, whether on the ground that the extent of the sentence is beyond what the circumstances of the case required, or that the sentence is illegal as not authorized by law(2). When a charge has been framed, under section 221 (7), of the Code, against an accused person, to the effect that he is a previous convict, and he has pleaded guilty to such charge, this section leaves the Appellate Court without power to re open the question whether the accused is a previous convict(3).

Plea of guilty based on misconception of legal rights.—Where an accused person pleads guilty on a charge under section 380 of the Indian Penal Code, but the said plea is founded upon an erroneous conception of one's right in the property, this section is inapplicable to the

e accused in pleading
l his right to appeal

except as regards the extent or legality of the sentence(5). Note that the exception is not only as to the extent, but also as to the legality of the sentence(6). Inasmuch as a Magistrate is not justified in putting questions for the purposes of incriminating the accused, a sentence passed on such an admission of guilt (a plea of guilty) is illegal(7). If, therefore, a person pleads guilty and is convicted on such plea, the court of appeal, when an appeal is preferred, must satisfy itself that the plea of guilty was properly made after the nature of the offence the accused was charged with, was explained to, and understood by the prisoner(8).

Rejection of appeal on ground of accused pleading guilty : Conviction by second class Magistrate.—The fact that an accused person has pleaded guilty before the Magistrate may be a ground for rejecting an appeal where the conviction has been by a Court of Session or a Presidency Magistrate or Magistrate of the first class, though even then the extent and the legality of the sentence would have to be considered. But where the conviction is by any other Magistrate, an

(1) *Emperor v. Akub Ali*, 31 C L J. 122=21 Cr. L. J. 547=56 I. C. 851; *Empress v. Jafar*, 5 B. 85.

(2) *Empress v. Jafar*, 5 B. 85 See *Superintendent v. Jananendra Nath*, 49 C. L. J. 432=38 C. W. N. 599=56 C. 1145=30 Cr. L. J. 1038=119 I. C. 301=1929 Cr. C. 395

(3) *Empress v. Kissan Yessu*, 9 Cr. L. J. 56=4 N. L. R. 163

(4) *Emperor v. Sat Narain*, 53 A. 437=29 A. L. J. 201=A. I. R. 1931 A. 265=130 I. C. 693=32 Cr. L. J. 676=

1931 Cr. C. 425

(5) *Empress v. Jafar*, 5 B. 85; *Shyama Charan v. Emperor*, A. I. R. 1934 Pat 390

(6) *Empress v. Kalu Dosan*, 22 B. 759

(7) *Empress v. Vasan*, 9 M. 224=2 Weir 115. *Emperor v. Kissan Yessu*, 9 Cr. L. J. 56=4 N. L. R. 163, *Queen-Empress v. Bhairub Chunder*, 2 C. W. N. 702

(8) *Empress v. Kalu Dosan*, 22 B. 759.

determining the right of appeal(1). Where a Magistrate passes two sentences of fine exceeding in the aggregate fifty rupees an appeal lies to the Court of Session under s. 408(2). But where the aggregate is less than Rs. 50 a right of appeal is barred(3). Where a person is charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies under this section or not(4).

Concurrent sentences.—An accused sentenced to concurrent terms of imprisonment, not one of which is individually appealable, has no right of appeal. Concurrent sentences cannot, for the purposes of appeal, be taken collectively(5).

Order under s. 562.—An order under s. 562 is appealable under s. 408 and is not restricted by the provisions of this section(6).

414. Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred rupees only * * *

Amendment.—This section has been amended by section 25 of Act No. XII of 1923. By this amendment of the section certain sentences passed on summary convictions which were originally non-appealable (viz., imprisonment for three months or less, or whipping) are now made appealable. Under the old law only European British subjects could appeal from such sentences(7).

Fine and suspension or confiscation.—It was held in *Queen-Empress v. Tagarajan*(8) that the addition of an order of confiscation to a sentence passed under section 51, Excise Act, does not render appealable a sentence otherwise not appealable, and that the order of confiscation is not part of the sentence. But in a recent case where a taxi driver was convicted and fined Rs. 60 and suspended for one year, it was held that the order of suspension of license was a part of the

(1) *Nawabali v. Jainab*, 59 C. 1131 = A. I. R. 1932 C. 551 = 30 C. W. N. 407;

R. 511; *Akabbur Ali v. Emperor*, 59 C. 19 = A. I. R. 1931 C. 642 = 33 Cr. L. J. 90 = 134 I. C. 1196 = 1931 Cr. C. 842 = 35 C. W. N. 75.

(5) *Aziz v. Emperor*, 40 C. 631; *Suknandan v. Emperor*, 17 C. L. J. 392; but see *Abdul Khalek v. Emperor*, 17 C. W. N. 72 = 13 Cr. L. J. 877 = 17 I. C. 813.

(6) *Madhav v. Emperor*, 90 I. C. 121 = 28 Bom. L. R. 671 = 1926 B. 382 = 27 Cr. L. J. 873.

(7) *Aryar* Cr. P. C. 1351; See *Jagdish Prasad v. Emperor*, 30 Cr. L. J. 869 = 118 I. C. 312 = A. I. R. 1929 Pat. 716 = Ind. Rul. (1929) Pat. 504.

(8) 1 L. B. R. 3.

(4) *Emperor v. Shidlingappa*, 28 Bom. L. R. 668 = 96 I. C. 270 = 1926 B. 116 = 27 Cr. L. J. 926; *Nawabali v. Jainab*, 59 C. 1131; *Akabbur Ali v. Emperor*, 59 C. 19; *Kandhai v. Emperor*, 1931 O. 27 = 33 Cr. L. J. 278 = 126 I. C. 245 = 17 A. I. Cr. R. 461.

(3) *Nawab Ali v. Jainab*, 59 C. 1131.

(6) *Empress v. Haradhan*, 3 C. L.

of all persons, both European and Indian, there should be an appeal against any sentence of imprisonment passed by a Magistrate. This involves a substantial modification of the general law of the land and will to a certain extent increase the work of the Sessions Court. Nevertheless we are of opinion on general grounds and apart from the particular case of the European British subject that an appeal should lie against any sentence. It is to be noted that short sentences of imprisonment should where possible be avoided; and the number of sentences of one month and under passed by District Magistrate and first class Magistrates should not as far as we can judge, be very large. In the case of sentence passed in a trial by a Court of Session, we would allow no appeal in respect of a sentence of one month or under." The words "or of whipping only" which occurred at the end of the section have been omitted.

"Notwithstanding anything hereinbefore contained."—These words are very important and set aside any right of appeal which might be held to have been created by ss. 407 to 410. Therefore, an accused, who is convicted and sentenced to a sentence which is not appealable at the same trial with other accused who are convicted and sentenced to appealable sentence, has no right of appeal(1).

Combination of sentence—Where the accused is sentenced to one day's imprisonment and a fine of fifty rupees there is combination of sentence for the purposes of appeal(2). But an order passed by a Magistrate under s. 31 of the Court-Fees Act directing the accused to pay the complainant the court-fee paid on his petition of complaint, is not part of the sentence so as to make it a sentence of fine within the terms of this section, and an order therefore sentencing an accused person to 14 days rigorous imprisonment and to pay the cost is not appealable(3).

Fine.—No appeal lies to the Sessions Court against a sentence of Rs. 50 fine passed by a first class Magistrate(4). But an order awarding compensation and re-payment of fines, etc., under section 22 of the Cattle Trespass Act, 1871, is appealable under s. 408. The compensation so awarded is not a fine, and consequently the restrictive provisions of this section do not apply(5).

Enhancing sentence to make it appealable at the request of the accused.—A non appealable sentence cannot be enhanced so as to make it appealable at the request of the accused. But where a Magistrate has enhanced the sentence so as to make it appealable, there is an appeal, irrespective as to whether the sentence is legal or illegal(6).

Aggregation of sentence.—Where two sentences of fine are passed, it is the aggregate which is to be looked into for the purpose of

(1) *Emperor v. Hussain Khan*, 39 A. 293=18 Cr. L. J. 546=39 I. C. 690=15 A. L. J. 136

(2) *Emperor v. Alam*, 33 A. 510=11 I. C. 253=8 A. L. J. 524.

(3) *Madan v. Haran*, 20 C. 687.

(4) *In re Chode Balari*, 9 I. C. 340

Cr. P. C.—91

=9 M. L. T. 322=12 Cr. L. J. 63.

(5) *Rodraks v. Papa Dada*, 46 B. 53=23 Bom. L. R. 836=63 I. C. 160=21 Cr. L. J. 624.

(6) *Emperor v. Kesharalal*, 35 B. 418=12 Cr. L. J. 431=11 I. C. 614=13 Bom. L. R. 650,

Combination of punishments mentioned in s. 413.—The punishments mentioned in s. 413 are sentences of punishment not exceeding one month passed by a Court of Session and a fine not exceeding Rs. 50 imposed by a Court of Session, or District Magistrate or other Magistrate of the first class(1). Where therefore the accused is sentenced to one day's imprisonment and a fine of fifty rupees, the two sentences of imprisonment and fine may be combined for the purposes of appeal(2).

Combination of punishments mentioned in s. 414.—The punishment referred to in s. 414 is a fine not exceeding Rs. 200. Where therefore in a summary trial a Magistrate imposes two fines one of Rs. 50 and the other of Rs. 20 the case is one in which two punishments such as are referred to in s. 414 have been combined and the sentence is appealable(3).

Explanation.—The imprisonment to be undergone in default of furnishing security is not a part of a substantive sentence so as to make the substantive sentence (which is not in itself appealable) appealable(4). But a contrary view was taken in another case in the following circumstances. There the appellant was tried summarily and sentenced to three months' rigorous imprisonment, and further ordered to give security for good behaviour under s. 31-A, Rangoon Police Act. This case dates from 1908, at which time a sentence of not more than three months passed in a summary trial was not appealable. It was held that the fact that sentence consisted of an order to furnish security in addition to three months' rigorous imprisonment made the conviction appealable, it being held that the order to give security was a part of the sentence(5).

415-A. Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

Scope of the section—This section is new. It gives right of appeal to an accused, whose sentence is not appealable, but who is convicted in one trial with other accused against whom an appealable judgment or order has been passed(6). In the absence of any provision such as is contained in the present section, there was a conflict of decisions as to whether in the case of several accused tried in one joint trial appealable sentences are passed on some and non-appealable sentences on others, whether those on whom non-appealable sentences were passed had also the right of appeal along with the others. On the one hand, it was held that if at a joint trial of two or more persons by a

(1) *Ibid.*

(2) *Emperor v. Alam*, 33 A. 510=8 A. L. J. 521=11 L. C. 253=12 Cr. L. J. 859

(3) *Kandhai v. Emperor*, A. I. R. 1932 O 27=33 Cr. L. J. 278=136 L. C. 419=17 A. I. Cr. R. 461.

(4) *Maghu v. Emperor*, 7 O. C 339=

1 Cr. L. J. 1054.

(5) *Kathan v. Emperor*, 4 I. B. R. 359=9 Cr. L. J. 868.

(6) *Emperor v. Madhav*, 28 Bom. L. R. 67=96 L. C. 121=27 Cr. L. J. 873=1926 D 392; *Akabar v. Emperor*, 69 C. 19.

sentence and it was open to him to appeal therefrom(1). This case is based upon *D'eklia Kunbi v. Emperor*(2). In that case the applicant was convicted of not producing his driving license on demand by the police and sentenced to pay a fine of Rs. 25 and the Magistrate passed an order under s. 18 (2) of the Act that his license should be suspended for six months. The learned Additional Judicial Commissioner held that the order of suspension was a part of the sentence. Another case nearer to the point is *Kathan v. Emperor*(3). In this case the appellant was tried summarily and sentenced to three months' rigorous imprisonment, and further ordered to give security for good behaviour under s. 31-A, Rangoon Police Act. This case dates from 1903 at which time a sentence of not more than three months passed in a summary trial was not appealable. It was held that the fact that the sentence consisted of an order to furnish security in addition to three months' rigorous imprisonment made the conviction appealable, it being held that the order to give security was a part of the sentence.

Combination of two punishments of fine.—Where in a summary trial a Magistrate imposes two fines one of Rs 50 and the other of Rs. 20 the case is one in which two punishments such as are referred to in this section have been combined and the sentence is appealable(4).

Order under s. 562.—As the Code does not say that there is no appeal in the case of a person who has been convicted and bound over under s. 562 the general rule laid down in s. 408 must prevail, and therefore the person who is only bound over under s. 562, has a right of appeal(5).

415. An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

Scope.—The word "therein" as used in s. 415 refers to ss. 413 and 414. In other words the section is intended to apply to cases in which two or more of the punishments mentioned in s. 413 or 414 have been combined(6).

(1) *Garanand v. Emperor*, 35 Cr. L. J 116—A. I. R 1933 E. 329—146 I. C. 545—1933 Cr. C. 1146—G. Rang 103

(2) A. I. R 1912 Nag 71—23 Cr. L. J 73—65 I. C. 425.

(3) 4 L. B. R. 359—9 Cr. L. J. 368

(4) *Kandhai v. Emperor*, A. I. R 1932 O 27—33 Cr. L. J. 278—126 I. C.

218—17 A. I. Cr. R. 461.

(5) *Emperor v. Hirralal*, 49 A 625—25 Cr. L. J 1214—52 I. C. 172—A. I. R. 1921 A. 705—22 A. L. J 751—L. R. 5 A. 131

(6) *Kandhai v. Emperor*, A. I. R 1932 O 27—33 Cr. L. J. 278—126 I. C. 218—17 A. I. Cr. R. 461.

nothing in it which shows that it is the District Magistrate alone who can move the Local Government to file an appeal. It is, in ordinary cases, a matter of practice that the Local Government is moved by private applicants or the police through the District Magistrate, or the latter, as the head of criminal administration in his district, himself moves the Local Government, but the Government can move otherwise(1). The intention of the Legislature is that there should be no interference by the High Court with acquittal even though improper, except upon a formal appeal by the Local Government(2). The law, by limiting the right of appeal against judgments of acquittal to the Local Government, prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and evidently intends that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter(3). The power of appeal against an acquittal under this section is one that should be exercised sparingly by Government. But the discretion to exercise that right to appeal appertains to Government and is not subject to the control of the court(4).

Reference by Sessions Judge or District Magistrate:—The High Court has jurisdiction to entertain a reference made by a Sessions Judge under s. 438, to set aside an order of acquittal, though such jurisdiction will be exercised most sparingly and only in exceptional cases, where there has been a grave and flagrant miscarriage of justice, or a denial of the right of a fair trial(5). The High Court can entertain such a reference even where the Local Government has not been moved to prefer an appeal under this section, or having been moved, has declined to prefer such appeal(6). But it is not in accordance with the practice of the Allahabad High Court to interfere with an acquittal on a reference by a Sessions Judge where the Government can appeal under this section and has not done so(7). A reference under s. 438 by the Sessions Judge, recommending that an erroneous acquittal by a Subordinate Court be set aside, is acceptable even in ordinary cases, for an appeal against such acquittal under this section by the Local Government is restricted to only exceptional cases(8). However, such reference by the District Magistrate; who has means to communicate with and move the Local Government under this section, may not be acceptable(9).

Public Prosecutor.—An appeal by the Local Government from a

(1) *Mul Singh v. Crown*, 1923 Lab. 163.

(2) *Empress v. Miyaji*, 3 B 150.

(3) *Du Leg. Rem v. Karuna*, 22 C. 164.

(4) *Emperor v. Moti Khoda*, 81 I. C. 906=26 Bom. I. R. 113=1924 B. 335=25 Cr. L. J. 786.

(5) *Nathu Lal v. Abdul Hag*, 123 I. C. 841=A. I. R. 1930 Lab. 159; Cf. *Emperor v. Achhar Singh*, 5 Lab. 16=81 I. C. 847=A. I. R. 1924 Lab. 451=25 Cr. L. J. 931; See *Hrishikesh v. Abadhaut*, 44 C. 703.

(6) *Nathu Lal v. Abdul Hag*, 123 I. C. 841=A. I. R. 1930 Lab. 159=31 Cr. L. J. 584=13 L. L. J. 5; but see *Emperor v. Ganpat*, 29 N. L. R. 365.

(7) *Qalandar Singh v. Muhammad Raza*, 83 I. C. 687=1924 A. 634=26 Cr. L. J. 127=A. I. R. 5 A. 120 Cr.

(8) *Wazir v. Emperor*, 7 Pat. 579=A. I. R. 1929 Pat. 139=116 I. C. 768=30 Cr. L. J. 673.

(9) See the case cited in the last note and *In re Aminud Din*, 24 A. 846; *Emperor v. Madar Baksh*, 25 A. 126; *Emperor v. Chandika*, 24 O. O. 4.

first class Magistrate an appealable sentence is passed against any of them, all the persons convicted have the same right of appeal even though their sentences may be of the kind against which appeal would have been barred by section 413, if they had been tried singly(1). On the other hand, it was held that section 413 prohibits an appeal by a person against whom a non-appealable sentence has been passed even, though appealable sentences have been passed against others jointly tried with him(2). This section gives effect to the former view. By operation of this section, a right of appeal is also conferred on those who are jointly tried with a person against whom an order under s. 562 (2) has been passed, and having been convicted, are given non appealable sentences(3).

416 — (Repealed by Act XII of 1923, s. 26.)

The repealed section enacted that nothing in ss. 413 and 414 applied to appeals from sentences passed under Ch. XXXIII on European British subjects. The repeal removes the distinction between European British subjects and Native Indian subjects and gives them equal rights of appeal.

417. The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court

Appeal on behalf of Government in case of acquittal.

Object of section.—The object of this section is to enable the Local Government to have a wrongful acquittal converted into a conviction or to have a re-trial and not to obtain opinions of a High Court on abstract points which do not arise on the facts established(4).

Appeal against Acquittal.—In cases of acquittal, the law allows an appeal only on behalf of the Government(5). The High Court has no authority to entertain the matter at all, except upon an application duly made with the sanction of the Government(6). The immunity given to an accused by the acquittal is only subject to the right of appeal by the Local Government, where interference is urgently demanded in the interest of public justice, it is always open to a private prosecutor to move the Government to appeal under this section(7). So far as the wording of this section is concerned, there is

(1) *Pheku v. Emperor*, 4 Pat. L.J. 435 = 20 Cr. L. J. 545; *Sheopal v. Emperor*, 15 O. C. 386; *Crown v. Naurati*, 30 P. R. 1915 Cr.; *Ba Thaw v. Emperor*, 9 Cr. L. J. 356; *Crown v. Jaisukh*, 16 P. R. 1916 Cr.; *Emperor v. Dal Singh*, 38 A. 395.

(2) *Bahadur v. Ismail*, 85 I. C. 135 = 29 C. W. N. 151 = 41 C. L. J. 45 = A. I. R. (1925) C. 329 = 26 Cr. L. J. 455 = 52 C. 461. *Emperor v. Madhar* 1926 B. 352 = 96 I. C. 121 = 27 Cr. L. J. 573 = 28 Bom. L. R. 671.

(3) *Emperor v. Fateh Din*, 14 P. R. 1909 Cr. = 4 I. C. 563 = 34 P. W. R. 1909 Cr. = 11 Cr. L. J. 63.

(4) *Thandaran v. Periantha*, 14 M. 363 = 2 Weir 571.

(5) *Luchi Behara v. Nityanand Das*, 19 W. R. Cr. 55.

(6) *Sher Khan v. Anicarkhan*, 23 N. L. R. 40 = 1917 Nag. 170. *Faujdar v. Kan*, 42 C. 612 at p. 616.

convicted of culpable homicide not amounting to murder and an appeal is preferred by the Government Pleader at the instance of the Legal Remembrancer it does lie so far as the charge of murder is concerned(1). A judgment passed by a Sessions Judge following the verdict of the Jury, acquitting the accused is a judgment of acquittal for purposes of an appeal by the Government(2). But there is no appeal given by this section from an interlocutory order, e. g., an order by a Sessions Judge refusing to add new charges(3). An appeal under s. 417 can be preferred although an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. A judgment which acquits the accused of a graver charge but convicts him of a minor offence can be attacked by filing two distinct appeals(4).

Cases in which Local Government can appeal.—The law gives Government the right to appeal against any acquittal and that right cannot be taken away by the court any more than the right to appeal against a conviction can be taken away from any private person(5). The Code makes no difference between an appeal from an acquittal and from a conviction. In order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the court below can be said to have obstinately blundered in coming to it, but upon sound principles of criminal jurisprudence the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction(6). An appeal under this section is not limited only to cases where a wrong decision has been arrived at, owing to error of law or misappreciation of evidence(7). In cases of acquittal, an appeal is allowed in the widest terms and without any limitation whatever(8). But an appeal by Government should be made only in cases of some importance where it can be shown that the judgment is so clearly wrong that its maintenance would amount to a miscarriage of justice and that there should be a conviction or re-trial(9). An appeal against an acquittal

(1) *Empress v. Judhoonath*, 2 C. 273; *Sitarom v. Emperor*, 12 O. L. J. 421=2 O. W. N. 550=26 Cr. L. J. 136.

(2) *Empress v. Judoonath*, 2 C. 273.

(3) *Empress v. Vajiram*, 15 Bom. 414.

(4) *Mohammadi v. Emperor*, A. I. R. 1932 Nag. 121=1932 Cr. C. 672=28 N. L. R. 233=33 Cr. L. J. 819=140 I. C. 149.

(5) *Crown v. Arjan*, 43 P. R. 1917 Cr.; *Emperor v. Bibhuti*, 17 C. 485.

(6) *Emperor v. Bakhtawar Lal*, 1927 Lah. 519=28 Cr. L. J. 556=102 I. C. 472=28 P. L. R. 313; *Emperor v. Chatter Singh*, 7 P. R. 1904 Cr.; *Empress v. Ullam*, 29 P. R. 1885 Cr.; *Empress v. Bibhuti*, 17 C. 485; *Empress v. Karigouda*, 19 B. 51; *Protap*

Chunder v. Empress, 11 C. L. R. 25; *Milan Khan v. Sagai Bepari*, 23 O. 347; *Cl. Emperor v. Mangat*, 11 P. R. 1903 Cr.; *Emperor v. Ghulam Muhammad*, 10 P. R. 1897 Cr.; *Empress v. Gaya Din*, 4 A. 148; *Empress v. Gobardhan*, 9 A. 528.

(7) *In re Sinnu*, 38 M. 1028=26 M. L. J. 160=(1914) M. W. N. 273=15 Cr. L. J. 236=23 I. C. 188.

(8) *Emperor v. Judoonath*, 2 C. 273.

(9) *Empress v. Khushal*, 15 P. R. 1598 Cr.; *Empress v. Ghulam Muhammad*, 10 P. R. 1897 Cr.; *Emperor v. Fateh*, 14 P. R. 1909 Cr.; *Empress v. Karuna*, 22 C. 164; *Emperor v. Smither*, 26 M. 1; *Emperor v. Kunja*, 23 Cr. L. J. 410.

judgment of acquittal must be presented by the Public Prosecutor. The direction by the Local Government to present an appeal to the High Court from an order of acquittal must be given to a Public Prosecutor. It may be given in a letter, whereby the Public Prosecutor is appointed as such; yet it does not follow that the mere fact that a person has been directed to present such an appeal to the High Court from an order of acquittal involves his appointment as Public Prosecutor for the purposes of the case(1). The Legal Remembrancer is a Public Prosecutor within the meaning of this section(2). An appeal against an acquittal, presented to the High Court by the Superintendent and Remembrancer of Legal Affairs, appointed by the Local Government to be Public Prosecutor, in all cases heard by the High Court in its appellate jurisdiction, is not incompetent(3). But the Legal Remembrancer of Bengal cannot be deemed to be Public Prosecutor for the Province of Bihar when he has not been specially appointed as a Public Prosecutor for that Province, and an appeal presented by him under instructions from the Government of Bihar is incompetent(4).

High Court—An appeal by the Local Government from a judgment of acquittal will lie to the High Court. A District Magistrate is not competent to entertain appeal against an order of acquittal(5). Nor has a Sessions Judge to entertain such an appeal(6).

Order of acquittal.—The withdrawal of a complaint by the complainant operates as an acquittal(7). But an order of discharge passed by a Session Judge under section 406, Cr. P. C., is neither an original nor an appellate order, of acquittal within the meaning of this section, so that no appeal lies to the High Court against that order; but the Local Government has a right to file a revision against it(8). The terms 'conviction' and 'acquittals' are wholly inapplicable to orders under s. 118. An order of a Sessions Judge setting aside an order of a Magistrate directing a person to furnish security for good behaviour is not, consequently, appealable under this section (9). Alteration of a conviction from one under s. 353, Penal Code, to one under s. 352 of the Code does not amount to an acquittal, and no appeal lies in such case under this section(10). But where an accused being charged under s. 302 is convicted under s. 302/109 his conviction under s. 302/109 can be regarded as an acquittal on the charge under s. 302 and an appeal from such acquittal is competent(11). Where, in a case tried by a Jury, an accused charged with murder, is acquitted of that charge but is

(1) *Dy Leg Rem. v Gaya Prosad*, 41 C 425 (432)—18 O L J 519—18 O. W N 279—22 I. C 190—15 Cr L J. 46

(2) *Leg Rem v Tularam*, 46 C 544—23 O. W N. 96—20 Cr. L. J. 170—49 I C 490.

(3) *Ibid*

(4) *Dy Leg Rem. v. Gaya Prosad*, 41 C. 426.

(5) *Rangasami v Narasimhulu*, 7 M. 219—2 Weir 477; *Sami v. Emperor*, 26 M. 478.

(6) *Bayjanath v. Gouri Kanta*, 20 O. 633; *Baroda Nath v. Karait Sheikh*, 2 O. W. N. celvi.

(7) *Luchi Behara v Nityanund*, 19 W R. Cr. 55

(8) *Emperor v. Samas Din*, 13 O L J 276—24 I C 402—27 Cr L J 626—3 O W N 390—A I R 1926 O 329.

(9) *Emperor v Babu Ram*, 106 I. C 684—26 A. I. J 99—L R 8 A. 163 Cr = A I R. 1928 A I—29 Cr L J 92—8 A I Cr R 557—1 L. T 40 A. 71.

(10) *Emperor v Gyan Singh*, 111 I. C. 665—A. I R 1928 Lah. 230—27 Cr. L J. 905.

(11) *Emperor v. Sada Singh*, A. I. R. 1930 Lah. 335—12 L. L. J 33—1930 Cr. C. 886.

convicted of culpable homicide not amounting to murder and an appeal is preferred by the Government Pleader at the instance of the Legal Remembrancer it does lie so far as the charge of murder is concerned(1). A judgment passed by a Sessions Judge following the verdict of the Jury, acquitting the accused is a judgment of acquittal for purposes of an appeal by the Government(2). But there is no appeal given by this section from an interlocutory order, e. g., an order, by a Sessions Judge refusing to add new charges(3). An appeal under s. 417 can be preferred although an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. A judgment which acquits the accused of a graver charge but convicts him of a minor offence can be attacked by filing two distinct appeals(4).

Cases in which Local Government can appeal.—The law gives Government the right to appeal against any acquittal and that right cannot be taken away by the court any more than the right to appeal against a conviction can be taken away from any private person(5). The Code makes no difference between an appeal from an acquittal and from a conviction. In order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the court below can be said to have obstinately blundered in coming to it, but upon sound principles of criminal jurisprudence the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction(6). An appeal under this section is not limited only to cases where a wrong decision has been arrived at, owing to error of law or misappreciation of evidence(7). In cases of acquittal, an appeal is allowed in the widest terms and without any limitation whatever(8). But an appeal by Government should be made only in cases of some importance where it can be shown that the judgment is so clearly wrong that its maintenance would amount to a miscarriage of justice and that there should be a conviction or re-trial(9). An appeal against an acquittal

(1) *Emress v. Judhoonath*, 2 C. 273; *Sitaram v. Emperor*, 12 C. L. J. 421=2 O. W. N. 550=26 Cr. L. J. 136.

(2) *Emress v. Judoonath*, 2 C. 273.

(3) *Emress v. Vajiram*, 15 Bom. 414.

(4) *Mohammadi v. Emperor*, A. I. R. 1932 Nag. 121=1932 Cr. C. 672=28 N. L. R. 233=33 Cr. L. J. 819=140 I. C. 149.

(5) *Crown v. Arjan*, 43 P. R. 1917 Cr.; *Emperor v. Bibhuti*, 17 C. 485.

(6) *Emperor v. Bakhtaicar Lal*, 1937 Lah. 519=28 Cr. L. J. 556=102 I. C. 491=28 P. L. R. 313; *Emperor v. Chatter Singh*, 7 P. R. 1904 Cr.; *Emress v. Uttam*, 29 P. R. 1883 Cr.; *Emress v. Bibhuti*, 17 C. 485; *Emress v. Karigonda*, 19 B. 51; *Protap*

Chunder v. Emress, 11 C. L. R. 25; *Alam Khan v. Gangi Ram*, 23 C.

1 P.

Cr.;

148;

(7) *In re Sinnu*, 38 M. 1028=26 M. L. J. 160=(1914) M. W. N. 273=15 Cr. L. J. 236=23 I. C. 188.

(8) *Emperor v. Judoonath*, 2 C. 273.

(9) *Emress v. Khushal*, 15 P. R. 1598 Cr.; *Emress v. Ghulam Muhammad*, 10 P. R. 1897 Cr. *Emperor v. Fateh*, 14 P. R. 1909 Cr.; *Emress v. Karuna*, 22 C. 164; *Emperor v. Smither*, 26 M. 1; *Emperor v. Kunja*, 23 Cr. L. J. 410.

should only succeed where the order of acquittal was clearly wrong, and involved a miscarriage of justice(1). The High Court will not accept an appeal against an acquittal merely because the trial in the court below was illegal on account of misjoinder of charges; the appellate court will interfere only where it is satisfied that the order of acquittal is obviously erroneous or is one which should not be maintained owing to the trial court having omitted to consider material evidence(2).

Interference by High Court, when justified.—The appellate court should not hesitate to convict in an acquittal appeal more than it should hesitate to acquit in an appeal from a conviction, provided there are valid grounds for reversing the decision of the learned Judge of the trial court(3). If the appellate court, after bearing in mind that there is a presumption of innocence in favour of the accused, still further strengthened by his acquittal, and that the trial court was in a better position to judge of the credibility of the witnesses examined before it and therefore great weight has to be attached to its view, is nevertheless fully convinced that the conclusion of the trial court was clearly wrong and its conclusion was contrary to the weight of the evidence, it would be fully justified in setting aside the order of acquittal. The mere fact that it is not possible to hold that the lower court has been incompetent, stupid or perverse or has come to an unreasonable and distorted conclusion or has obstinately blundered, would not be sufficient to prevent the appellate court, from allowing an appeal against an acquittal if it were fully convinced that the court below has been misled by the extremely clever nature of some false defence supported by forged documents(4). It is not because a Judge or Magistrate has taken a view of the case in which the Government does not coincide and has acquitted the accused persons that an appeal by the Local Government from his decision must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by this section. The doing so should be limited to these instances, in which the lower court has so obstinately blundered and gone wrong, as to produce a result mischievous at once to the administration of justice and the interests of the public(5). The indication of error in a judgment of acquittal ought to be more clear and palpable and the evidence more cogent and convincing, in order to justify its being set aside, than would be necessary in the case of conviction(6). The indications of the guilt of the accused must be obvious or the evidence too strong to be rejected before the High Court will

(1) *Emperor v. U San Win*, 10 Rang. 312; *Dy Leg Rem. v. Karuna*, 22 C. 164.

(2) *Emperor v. Jagat Ram*, 19 Cr. L. J. 997=48 I. C. 167.

(3) *Emperor v. Sulleman Khan*, 98 I. C. 467=27 Cr. L. J. 1347=A. I. R. 1937 Sind. 92; *Emperor v. Moti Khoda*, 81 I. C. 306=26 Bom. L. R. 113=25 Cr. L. J. 786=A. I. R. 1925 B. 335.

(4) *Emperor v. Sheo Janak*, 31 A. L. J. 1573=A. I. R. 1934 A. 27=56 A.

354=1934 Cr. C. 59=1934 A. L. R. 93=147 I. C. 298=85 Cr. L. J. 364, *Emperor v. Sital*, A. I. R. 1934 O. 229=11 O. W. N. 568=1934 O. L. R. 421=148 I. C. 1059.

(5) *Empress v. Gayadin*, 4 A. 148=(1831) A. W. N. 159; see *Emperor v. Nga Po Yin*, A. I. R. 1933 Rang. 387; and see *Pub. Pros. v. Thyampa Molli*, 3 Mad. Cr. Cas. 242.

(6) *Emperor v. Turezi*, 21 Cr. L. J. 349=55 I. C. 685.

interfere in an appeal against an order of acquittal(1).

Interference by High Court, when not justified.—In an appeal from an order of acquittal, the High Court cannot interfere unless the judgment of the court below is wrong and perverse, or without jurisdiction and based upon obvious errors in procedure(2). Where a judgment of acquittal is based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter affecting the jurisdiction or the regularity of the trial, the High Court will not interfere(3). The High Court will not interfere in a judgment of acquittal unless the lower court has been perverse in its judgment or taken such unreasonable and distorted conclusions of the facts as to cause a miscarriage of justice(4). If on appeal from an acquittal the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations, the opinion of the court which heard the witnesses must be treated as almost conclusive. The indications of mistake must be obvious, or the evidence too strong to be rejected, before the appellate court will interfere(5). The High Court hesitates to set aside an acquittal on appeal, and does not do so unless there has been a miscarriage of justice(6), or the original court's finding is clearly wrong and unreasonable on the evidence in the case(7), or it is satisfied that the case is conclusively proved in the sense in which this has to be done before an appeal from an acquittal can be accepted(8), or it comes to the conclusion that the decision was one which no body of sensible men could arrive at(9), or that the trying Judge was clearly wrong and the judgment is either perverse, or based on obvious error of procedure(10). In short the High Court will not interfere unless it has formed a firm and clear opinion as to the necessity of doing so(11); but interference is not limited to cases where the court has obstinately blundered(12).

(1) *Pallia v. Crown*, 12 P. W. R. 1919 Cr.=20 Cr. L. J. 189=49 I. C. 604;
Crown v. Chatter Singh, 2 P. W. R. 1901

403.

(2) *Dy. Sup. v. Amulya Charan*, 15 Cr. L. J. 160=18 C. W. N. 686=22 I. C. 796; *Emperor v. Kura*, A. I. R. 1934 Lah. 523=35 P. L. R. 591.

(3) See the first cited case in the last note.

(4) *Emperor v. Kunja Dusadh*, 67 I. C. 506=3 Pat. L. T. 396=23 Cr. L. J. 410

(5) *Emperor v. Samand*, 22 Cr. L. J. 172=59 I. C. 914.

(6) *Emperor v. Pruna Chandra*, 28 C. W. N. 579=83 I. C. 631=124 C. 611=26 Cr. L. J. 71.

(7) *Emperor v. Baklawari*, 26 P. W. R. 1913 Cr.=329 P. L. R. 1913=14 Cr. L. J. 525=20 I. C. 1005.

(8) *Crown v. Ibrahim*, 27 P. L. R. 197.

(9) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(10) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

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(12) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(13) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(14) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(15) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(16) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(17) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(18) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(19) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(20) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(21) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

(22) *Emperor v. Ram Prasad*, A. I. R. 1929 Pat. 508=3 Cr. Law. Pat. 7=119 I. C. 901=80 Cr. L. J. 1116=1929 Cr. O. 268

should only succeed where the order of acquittal was clearly wrong, and involved a miscarriage of justice(1). The High Court will not accept an appeal against an acquittal merely because the trial in the court below was illegal on account of misjoinder of charges; the appellate court will interfere only where it is satisfied that the order of acquittal is obviously erroneous or is one which should not be maintained owing to the trial court having omitted to consider material evidence(2).

Interference by High Court, when justified.—The appellate court should not hesitate to convict in an acquittal appeal more than it should hesitate to acquit in an appeal from a conviction, provided there are valid grounds for reversing the decision of the learned Judge of the trial court(3). If the appellate court, after bearing in mind that there is a presumption of innocence in favour of the accused, still further strengthened by his acquittal, and that the trial court was in a better position to judge of the credibility of the witnesses examined before it and therefore great weight has to be attached to its view, is nevertheless fully convinced that the conclusion of the trial court was clearly wrong and its conclusion was contrary to the weight of the evidence, it would be fully justified in setting aside the order of acquittal. The mere fact that it is not possible to hold that the lower court has been incompetent, stupid or perverse or has come to an unreasonable and distorted conclusion or has obstinately blundered, would not be sufficient to prevent the appellate court, from allowing an appeal against an acquittal if it were fully convinced that the court below has been misled by the extremely clever nature of some false defence supported by forged documents(4). It is not because a Judge or Magistrate has taken a view of the case in which the Government does not coincide and has acquitted the accused persons that an appeal by the Local Government from his decision must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by this section. The doing so should be limited to these instances, in which the lower court has so obstinately blundered and gone wrong, as to produce a result mischievous at once to the administration of justice and the interests of the public(5). The indication of error in a judgment of acquittal ought to be more clear and palpable and the evidence more cogent and convincing, in order to justify its being set aside, than would be necessary in the case of conviction(6). The indications of the guilt of the accused must be obvious or the evidence too strong to be rejected before the High Court will

(1) *Emperor v. U San Win*, 10 Rang. 312; *Dy Leg Rem. v. Karuna*, 22 C. 164.

(2) *Emperor v. Jagat Ram*, 19 Cr. L. J. 937=48 I. C. 167.

(3) *Emperor v. Sulleman Khan*, 98 I. C. 467=27 Cr. L. J. 1347=4 I. R. 1927 Sind. 92; *Emperor v. Moti Khoda*, 81 I. C. 306=26 Bom. L. R. 118=25 Cr. L. J. 786=4 I. R. 1925 B. 335.

(4) *Emperor v. Sheo Janak*, 31 A. L. J. 1573=A. I. R. 1934 A. 27=56 A.

354=1934 Cr. C. 59=1931 A. L. R. 93=147 I. C. 238=35 Cr. L. J. 364. *Emperor v. Sital*, A. I. R. 1934 O. 223=11 O. W. N. 568=1934 O. L. R. 421=143 I. C. 1059.

(5) *Empress v. Gayadin*, 4 A. 148= (1891) A. W. N. 159, see *Emperor v. Nga Po Yin* A. I. R. 1933 Rang. 357; and see *Pub Pros. v. Thyampa Molli*, 3 Mad. Cr. Cas. 242.

(6) *Emperor v. Turezi*, 21 Cr. L. J. 349=55 I. C. 685.

there has been an acquittal by a unanimous verdict of the Jury accepted by the Sessions Judge, the mere fact that there has been a misdirection to the Jury will not justify the reversal of the verdict, unless the misdirection has in fact occasioned a failure of justice(1).

Procedure in appeal.—The Government have the same right of appeal against an acquittal as a person convicted has of appealing against his conviction and sentence, and there is no distinction between the mode of procedure and the principles upon which both classes of appeals are to be decided(2). An appeal from an acquittal does not stand on a different footing with regard to the consideration of evidence to an appeal from a conviction. No distinction is drawn in the Code between an appeal from an acquittal and an appeal from a conviction. There are no special rules for dealing with the evidence in an appeal from an acquittal which, it is expressly provided in the Code, may lie on a question of fact. Due weight must of course be given to the decision of the court below and the reasons advanced for that decision(3). Examination of the rulings shows that in the High Courts at Calcutta(4), Madras(5), Bombay(6), Allahabad(7), and Patna(8), the weight of authority is for the principle that there is no difference between the treatment by a High Court of an appeal from a conviction and that in the Lahore High Court(9), the weight of authority is also on the same side, the inclination being perhaps in the interests of the person acquitted to attach more value and give greater prominence than other High Courts to the judgment of the lower court. The law makes no distinction; but there are certain established customs which supplement the statute law, and there are two such customs which all courts invariably follow. These are: (i) to presume every man to be innocent until he has been proved to be guilty: and (ii) to give to the prisoner the benefit of whatever doubt there may be. The appellant who is arguing against a conviction has these two principles in his favour, but they are both adverse to the appellant who is arguing against an acquittal(10).

Crown must show conclusively that inference of guilt is

(1) *Supt and Rememb v. Shyam Sunder*, 26 O. W. N. 558.

(2) *Empress v. Bibhuti*, 17 C. 485; *Empress v. Prag*, 20 A. 459; *Emperor v. Ghure*, 36 A. 168.

(3) *Dy. Leg Rem v. Malukdhari* 20 C. W. N. 128; *Emperor v. Sakharam*, 21 Bom. L. R. 1054.

(4) *Supdt and Rem. v. Amuly Charan* 22 I. C. 736=15 (r. L. J. 160=18 C. W. N. 666; *Empress v. Bibhuti* 17 C. 485.

(5) *Pub Pros v. Narayana*, 29 I. C. 637=16 Cr. L. J. 229; *In re Sinnu Gaundha*, 39 M. 1028=23 I. C. 189=15 Cr. L. J. 296=26 M. L. J. 160=(1914) M. W. N. 273.

(6) *Empress v. Karigouda*, 19 D. 51; *Emperor v. Moti Khoda*, 26 Bom. L. R. 113=25 Cr. L. J. 786=81 I. C. 806=A. I. R. 1924 B. 835.

(7) *Emperor v. Goyadin*, 4 A. 148; *Emperor v. Gobardhan*, 9 A. 528; *Empress v. Robinson*, 16 A. 212; *Empress v. Prag*, 20 A. 459.

(8) *Empress v. Ram Prasad*, 119 I. C. 901=A. I. R. 1929 Pat. 508=30 Cr. L. J. 116=Ind. Rul. (1929) Pat. 629; *Emperor v. Deboo Singh*, 8 Pat. 496=10 Pat. L. T. 838=120 I. C. 634=1929 Pat. 491=1929 Cr. C. 243=1 R. 1930 Pat. 50.

(9) *Emperor v. Chattr Singh*, 7 P. R. 1904 Cr. Crown v. Jauai, 19 P. W. R. 1918 Cr=44 I. C. 179=19 Cr. L. J. 275=70 P. L. R. 1918; *Bhai Khan v. Emperor*, 92 Cr. L. J. 1918.

(10) *Emperor v. Dhuro*, A. I. R. 1934 B. 84.

Indications of error in a judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction(1). The fact that fresh evidence has been discovered subsequent to the acquittal, is not a sufficient reason for setting aside the acquittal or ordering a re trial(2). The question of satisfactory identification of a particular rioter a matter eminently for the trial court and an appellate court would not be justified in interfering with an acquittal in a matter concerning identification of the accused(3).

Appeal from acquittal by lower appellate court.—Whatever may be the value of the judgment of a trial court, which had had the opportunity of seeing the witnesses and observing their demeanour, no such reason can apply where the trial court convicts the accused and it is the appellate court which acquits. In such a case the High Court is in as better a position to weigh the evidence as the lower appellate court and can interfere to set aside the lower court's order of acquittal(4). If in an appeal against the acquittal of the accused by the appellate court the grounds relate only to one section of the Penal Code, on acquittal under that section, the court cannot at that stage ascertain whether the appeal fell under any other section(5).

Appeal from acquittal by special Magistrate—An appeal to the High Court by the Local Government from an order of acquittal passed by a special Magistrate appointed under Bengal Act, XII of 1932 is not competent under s. 5 of Act XXIV of 1932(6).

Appeal from acquittal in a case tried by Jury.—No appeal at the instance of the Local Government, lies from an order of acquittal in a case which has been tried by a Jury, when the questions involved are purely questions of fact; for such an appeal to lie it must be supported upon a ground which is covered by s. 418(7). Where

(1) *Emperor v. Chattarsingh*, 7 P.R. 1904 Cr. *Emperor v. Maung Tun Nyan*, 8 Rang 671=A I. R. 1931 Rang 86=1931 Cr. C 374=132 I. C. 547=34 Cr. L. J. 929, *Emperor v. Rai Singh*, A. I. R. 1933 Lah. 871=1933 Cr. C 1116=146 I. C. 665=35 Cr. L. J. 187=34 P. L. R. 1010, *Emperor v. Chatter Singh*, A. I. R. 1933 Pesh. 27=142 I. C. 312=1933 Cr. C 327=34 Cr. L. J. 384, *Emperor v. Deboo Singh*, 8 Pat. 496=2 Cr. Law 634=1929 Pat. 491=1929 Cr. C 249=10 P. L. T. 18=120 I. C. 634; *Emperor v. Ram Karan*, 88 I. C. 453=2 Lah. Cas. 2=26 Cr. L. J. 1141=7 Lah. L. J. 528=A I. R. 1925 Lah. 600; *Emress v. Abdul Latif*, 99 I. C. 87=28 Cr. L. J. 55=A I. R. 1927 L. 178, *Emperor v. Kunja Duxadh*, 67 I. C. 506=23 Cr. L. J. 410=3 P. L. T. 395, *Emperor v. U Ba U*, A. I. R. 1931 Rang 44=148 I. C. 1069=35 Cr. L. J. 855=1934 Cr. C 267, *Emperor v. Soopi*, 150 I. C. 539=Ind. Rul. (1930)

Lah. 91=31 Cr. L. J. 141=A I. R. 1930 I. 84=31 P. L. R. 391, *Pub Pros v. Pakhirsuanani*, 2 Mad. Cr. Cas. 207 (308)=A I. R. 1929 M. 846=57 M. L. J. 548=20 Law W. 791=(1929) M. W. N. 785; See *Rameshwar v. Gobind Prasad*, 87 I. C. 426=23 A. L. J. 423=25 Cr. L. J. 970=A I. R. 1925 A. 473

(2) *Emperor v. Po Gyi*, 3 Cr. L. J. 351=31 B. R. 114

(3) *Pub Pro v. Subla Rao*, 3 Mad. Cr. Cas. 225

(4) *Emperor v. Mohammad Khan*, A. I. R. 1930 Lah. 403=129 I. C. 482=1930 Cr. C 463

(5) *Emperor v. Ahmad Din*, A. I. R. 1931 Lah. 813

(6) *Leq Rem v. Lachmi Narayan*, A. I. R. 1933 C. 776=145 I. C. 773=1933 Cr. C 1427=34 Cr. L. J. 1070=20 A. I. Cr. R. 352=33 C. W. N. 107=65 Cal. 1482.

(7) *Govt. of Bengal v. Parmeshur*, 10 C. 1023.

revision, at the instance of a private person, with an acquittal after trial by a proper tribunal, and applications for that purpose should be discouraged on public grounds(1).

418. (1) An appeal may lie on a matter of fact as well as a matter of law except where the trial was by Jury, in which case the appeal shall lie on a matter of law only.

Appeal on what matters admissible.

(2) Notwithstanding anything contained in sub-section (1) or in section 423, sub-section (2), when, in the case of a trial by Jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.

Explanation.—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

Amendment.—Sub-section (2) was added in 1923.

Scope of section.—Under this section, an appeal may lie on a matter of fact as well as on a matter of law except where the trial is by a Jury, in which case the appeal shall lie on a matter of law only. The alleged severity of a sentence is a matter of law for purposes of appeal(2). This section applies also to appeals by the Local Government against acquittals(3).

Appeals in cases tried by court—This section, as it now stands provides for an appeal on a matter of fact as well as on a matter of law where an acquittal is by a Judge trying the case with Assessors. No condition is imposed on High Court in such an appeal. All that the High Court has to see is whether the offence charged is proved against each of the accused persons(4). When the Code provides for an appeal on a matter of fact, it is always open to the appellant to contend that the evidence on behalf of prosecution is not sufficient to support the conviction; and in such a case it is the duty of the court of appeal to examine the evidence in order to come to a finding of its own as to whether the evidence is sufficient to support the conviction. It is no doubt true that in considering the oral evidence the court of appeal will attach weight to the opinion expressed by the trial court

C. 443=8 O. W. N. 344=A. I. R. 1931 O. 171=Ind Rul. (1931) Oudh. 248.

(3) *Gort. of Bengal v. Parmeshur*, 10 C. 1029; *Gulbi v. Empress*, 17 P. L. R. 75.

(4) *Emperor Sheo Dayal*, 55 A. 689 =A I. R. 1931 A. 535=1933 Cr. O. 570 =147 I. C. 15; *Emperor v. Basant Rai*, A. I. R. 1933 A. 574=1933 Cr. O. 913=14 L. R. A. Cr. R. 212=20 A. I. Cr. R. 98=146 I. C. 244=34 Cr. L. J. 1232.

Abdullah v. Emperor, 31 C. 103.

(2) *Mangal Singh v. Emperor*, 32 Cr. L. J. 535=132 I. C. 232=1931 Cr.

irresistible.—In an appeal by Government from an acquittal the accused starts with a double presumption in his favour. Firstly there is the rule that it is for the prosecution to make out their case and that until they do so beyond all reasonable doubt, the accused must be presumed to be innocent, and secondly, that the accused having succeeded in securing an acquittal from a court a superior court will not interfere until the crown shew conclusively that the inference of guilt is irresistible(1). The onus is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge(2). The Crown must satisfy the court that the guilt of accused is proved beyond any reasonable doubt, and when it has done that, it naturally follows that it has succeeded in proving to the satisfaction of the appellate court that the grounds given by the Court of Session in acquitting the accused are unreasonable and unsound(3). For an appeal against an order of acquittal to succeed it must be shown not merely that the correctness of the judgment appealed against is open to doubt but that it is so clearly wrong that its maintenance would amount to a miscarriage of justice(4). The High Court, in exercising jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular grounds of objection which are raised by the Government against the acquittal complained of(5).

Arrest and sentence.—In capital cases, where the Local Government appeals, under this section from an order of acquittal, it is, generally speaking, undesirable that the prisoner's fate should be discussed while he remains at large; and the Government should, in such cases, apply for the arrest of the accused, under s. 427 *post*(6). Where on the appeal of the Government, an order of acquittal is set aside and sentence passed, that sentence will commence to run from the date of the committal of the accused to the jail, and not from the date of their arrest or of the sentence on appeal(7).

Limitation.—An appeal by the Local Government from a judgment of acquittal must be presented within six months from the date of the judgment appealed against(8). But it is desirable that such appeals should be preferred with all reasonable expedition both in the public interest and in justice to persons whose acquittal it is sought to reverse(9).

Revision.—As a general rule it is expedient not to interfere, on

(1) *Emperor v. Ghulam Nabi*, 6 Pat. 768 (774)=A I. R. 1928 Pat 146=107 I. C. 835=9 A I Cr R. 885=29 Cr L J 301; *Govt. Advocate v Amir Hamea*, A I. R. 1934 Pesh. 129

(2) *Emperor v. Aular*, 47 A. 306=23 A.L.J. 25=26 Cr L J 676=A I. R. 1925 A 315=86 I C 52

(3) *Emperor v. Ram Dat*, 34 Cr L J. 698=143 I. C. 129=10 O W N 585=A I. R. 1933 O 940

(4) *Empress v Ghulam*, 10 P.R. 1897 Cr

(5) *Empress v Kari Gowda*, 19 B. 51, Per Kanado J.

(6) *Empress v. Gobardhan*, 9 A 529, per Edge, C J, see also *Queen v Gobind* 1 C 281; *Empress v Mangu*, 2 A 340

(7) *Empress v. Mahuddi*, 6 C. L. R. 349

(8) Limitation Act, Sch 2, Art. 157; *Supdt and Item v Baqirath*, A. I. R. 1934 O 219=11 O. W. N. 568=1934 O L R 422=148 I C 1059 (Whether it be an appeal under s. 417 or under s. 443)

(9) *Empress v Yakub Khan S.A.* 251 at p. 255, *Emperor v U San W'in*, 10 Rang 312=A I R 1931 Rang. 145=139 I C. 623=33 Cr. L. J. 704.

v. *Mohim Chunder*(1). The difficulty in accepting this view is that a Jury gives a single opinion. Assessors must give their opinions separately. Consequently the verdict of a Jury given as such is not and cannot be the same as the separate opinions of the members of the Jury(2). In a case where a person is tried by a Jury and there is also another charge which is tried by the Judge with the same Jury as Assessors, an appeal will lie on a matter of fact(3).

Trial held in High Court Sessions.—An appeal does not lie under s. 418 from the verdict and judgment in a trial held at the Sessions of the High Court(4).

Sessions trial by Judicial Commissioner.—An appeal lies from the decision of a Judge of the Court of the Judicial Commissioner of Sindh holding a Sessions trial where the Judge has accepted the finding of the Jury(5).

Matter of law.—This section gives an appeal on matter of law only, where the trial was by Jury. In *Wafadar Khan v. Empress*(6), the Calcutta High Court held that there being no appeal on matters of fact in a trial by Jury, s. 537, *post*, did not warrant an appeal court in a case where there had been a misdirection in the charge to a Jury, going into the evidence with a view to decide whether there was sufficient evidence to justify a conviction. Were the appeal court to go into the facts in such a case, it was said, it would be substituting the decision of the Judges of that court for the verdict of the Jury. In that case the court directed a new trial. See, however, *Empress v. Ramchand*(7) in which the Bombay High Court refused to follow that case. In a case tried by Jury, unless the parties who appeal and point out in what respect the law has been contravened, the appeal must be rejected(8).

Examples of matters of law.—Misdirection or non-direction is a matter of law(9). If the verdict of the Jury has been influenced by evidence, which was inadmissible or proceeds upon no evidence at all, this is a matter of law(10). The High Court, on a point of law, as to the admissibility of rejected evidence, can review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial; and a conviction might not be reversed, unless the omission of the rejected evidence would have affected the result of the trial(11). Where material evidence which ought not to be admitted is admitted and the Jury are placed in possession of it, there is an error of law in the trial under this section(12). Where a

(1) 3 C. 765.

(2) *Emperor v. Dakhani*, 55 A. 68 (70)=1933 Cr. C. 283=141 I. C. 800=34 Cr. L. J. 441=1931 A. L. J. 1103=19 A. I. Cr. R. 71.

(3) *Karuppa v. Emperor*, 18 Cr. L. J. 346=39 I. C. 730.

(4) *H. W. Scott v. Emperor*, A. I. R. 1935 Rang 67=13 Rang. 104 F. B. overruling *U. Zagaria v. Emperor*, 3 Rang 220=1925 Rang 230=89 I. C. 459=26 Cr. L. J. 1371.

(5) *Khudabux v. Emperor*, 85 I. C. 706=26 Cr. L. J. 562=A. I. R. (1926) Sind. 242.

(6) 21 C. 955; see also *Emperor v. Ikramuddin*, 89 A. 348=15 A. L. J. 205; *Romesh v. Emperor*, 23 C. W. N. 661.

(7) 19 B 742, p. 761.

(8) *Queen v. Gopal Bareewala*, 1 W. R. Cr. 21; *Empress v. Chinna Tevan*, 14 M. 36.

(9) *Emperor v. Israil*, 3 Cr. Law. All. 30=27 A. L. J. 1261=1930 A. 24.

(10) *Ibid*.

(11) *Imperatrix v. Pitambar Jina*, 2 B. 61; see also *Queen v. Hurrbole*, 1. C. 207=25 W. R. 36 Cr.; *Reg v. Navroji*, 9 Bom. H. C. R. 853.

(12) *Emperor v. Vaman*, 27 B. 626=5 Bom. L. R. 692.

as regards the credibility of witnesses and to consider the reasons given by the trial court for coming to the finding of the fact to which it may have come; the appellate court is not, however, relieved from the duty of coming to finding of its own on the question whether the evidence is sufficient to warrant a conviction(1). The Code itself makes no distinction between an appeal against an acquittal and an appeal against a conviction and the provisions of ss. 417 and 418 read together make it plain that in an appeal from an acquittal if the High Court thinks that the subordinate court has taken an erroneous view of the evidence it is bound to act on this opinion and convict the accused. But the High Court should not accept an appeal from an acquittal unless it is established beyond all reasonable doubt by the evidence on the record that the accused is guilty of the offence with which he was charged and in considering the evidence due weight ought to be given to the findings of the lower court, and its opinion concerning the effect of the evidence, and the credibility of the witnesses(2).

Trial by Jury.—Where there has been a trial by a Jury the appeal has to be confined within the restricted limits prescribed by the legislature. This section gives finality to the verdict of a Jury where there has been no error of law nor misdirection, and when the Judge has concurred with the majority of the Jury(3). Where, however, the verdict of the Jury was held to have been vitiated by misdirections, the appeal was heard on the facts(4).

Trial by Jury of an offence triable with Assessors.—Where a case not triable by a Jury has in fact been tried by a Jury, under section 536 the trial is not vitiated thereby. The verdict of the Jury in such a case cannot, however, be treated as being the opinion of Assessors, and by this section an appeal can lie on a matter of law only. The leading case on this point is the decision of a full bench of five Judges in the Bombay High Court in the case of *King-Emperor v. Parbhushankar*(5). This case has been followed in other cases(6). Opinions have been expressed in various High Courts that a verdict given by a Jury in a case which should have been tried with the aid of Assessors is valid. This view was held by one of two Judges in *Pattikadan Ummaru v. Emperor*(7), and a similar view seems to have been taken by the Calcutta High Court in the case of *Empress*

(1) *Aghore Dutta v. Emperor*, A. I. R. 1931 Pat. 379=12 Pat. L. T. 601=16 A. I. Cr. R. 175=1931 Cr. O. 907=32 Cr. L. J. 1197=131 I. O. 619=11 Pat. 143.

(2) *Emperor v. Maung Tun Nyan*, 8 Rang. 671=A. I. R. 1931 Rang. 86=1931 Cr. C. 374=132 I. O. 517=31 Cr. L. J. 929.

(3) *Empress v. Balappa*, Rat. Un. Cr. Cas. 730. *Emperor v. Dakhani*, 55 A. 68=30 A. L. J. 1103=A. I. R. 1933 A. 128=1932 A. L. J. 1103=142 I. C. 800=31 Cr. L. J. 441=1933 Cr. C. 283.

(4) *Jagmohan v. Emperor*, 120 I. C. 114=30 Cr. L. J. 1146=Ind. Rul. (1930)

All. 2=A. I. R. (1930) All. 29=(1930) A. L. J. 486=51 A. 207.; Cf. *Emperor v. Ikramuddin*, 39 A. 348=15 A. L. J. 205=39 I. C. 331=18 Cr. L. J. 491 and see *Dhiraji v. Akasi*, 24 A. L. J. 506=A. I. R. (1926) All. 429=27 Cr. L. J. 785=95 I. C. 855.

(5) 25 B. 680.

(6) *Ghulam Chand v. Emperor*, 27 Bom. L. R. 1416=1926 B. 134=27 Cr. L. J. 630=91 I. C. 602; *Emperor v. Dakhani*, 55 A. 68=19 A. I. Cr. R. 71=1933 Cr. C. 283=142 I. C. 800=31 Cr. L. J. 441=1932 A. L. J. 1103.

(7) 26 M. 213.

accused could only intervene on a point of law(1). In capital sentence cases, though the High Court is not bound by the verdict of the Jury, it must rely upon the Jury's verdict if it answers a reasonable test. But if there is no sufficient evidence to warrant a conviction, the High Court can set aside the conviction itself without directing a re-trial(2). This section is not controlled and narrowed down by section 423, clause 2. There may be points of law in which the court might have erred, points altogether unconnected with any erroneous verdict returned by the Jury by reason of misdirection on the part of the Judge, as for example, misjoinder of charges or misjoinder of accused person or other errors in the application of mandatory provisions relating to procedure amounting to illegality. This section covers such errors, while section 423(2) is confined to erroneous verdicts owing to misdirection by the Judge or misunderstanding of the law as laid down by him(3).

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a Jury, a copy of the heads of the charge recorded under section 367.

Scope of section.—This section prescribes the form of the petition as distinguished from section 420, which prescribes the manner in which, in the exceptional case of a prisoner in jail, the petition of appeal is to be presented. These are two different matters altogether, and these sections are not in *pari materia*. Section 420 is not derogatory to the rule laid down in s. 419. S. 419 applies as much to a prisoner in jail as any other appellant and section 419 requires that the petition shall be prepared in the form in which the section requires, while s. 420 is concerned only with the question of presentation of appeals from the jail(4). After the dismissal of an appeal forwarded by the jail an appeal through counsel cannot be filed(5).

Contents of petition.—This section lays down the manner in which a petition is to be written out(6). In a case tried by jury unless the parties who appeal point out in what respect the law has been contravened, the appeal should be rejected(7). Where an appeal petition to the High Court contains attacks, which are quite irrelevant on the trying Magistrate and on the private and public conduct of other officers of high rank in the service of the Government of India, the court should return the petition and refuse to receive it till the defamatory

(1) Statement of Objects and Reasons (1914).

(2) *Asraf Ali v. Emperor*, A. I. R. 1933 L. 426=87 C. W. N. 695=143 L. C. 173=1933 Cr. C. 624=34 Cr. L. J. 583=20 A. I. Cr. R. 20.

(3) *Venkataswami v. Govt. of Mysore*, 8 Mys. L. J. 121.

(4) *Empress v. Pohpi*, 18 A. 171 (179)= (1891) A. W. N. 48.

(5) *Emperor v. Khiali*, 44 A. 759=20 A. L. J. 739; *Gaya Din v. Emperor*, 24 O. C. 804=9 O. L. J. 1=65 I C 612=23 Cr. L. J. 148=A. I. R. (1923) Oudh 56.

(6) *Empress v. Pohpi*, 18 A. 171 (179).

(7) *Quett v. Gopaul*, 1 W. R. Cr. 21.

court has omitted to consider, or has given an erroneous or improper reason for disbelieving, or setting aside, as of no value, relevant evidence upon the essential question in a case, the omission or error is a matter of law(1). But the High Court will not interfere with the verdict of the Jury merely because the Sessions Judge admitted an inadmissible evidence regarding an unimportant matter which had only a remote bearing on the question in issue and the admission of which could not have affected the verdict of the Jury(2).

When facts may be gone into by the High Court.—Where a Judge, disagreeing with the verdict of a Jury, submits the case to the High Court, that court is empowered to exercise any of the powers which it may exercise on an appeal, and may therefore consider the facts(3). So also when a case is referred to the High Court for a confirmation of the sentence of death the Court is bound to go into the facts of the case(4). The restriction imposed on appeals in the Jury cases does not apply to references, and sub-section (2), which was added to this section in 1923, provides that where in a case tried by a Jury any person is sentenced to death any other person convicted in the same trial may appeal on a matter of fact as well as a matter of law(5). A High Court in the exercise of its jurisdiction confirming death sentences, has the power to go behind the verdict of the Jury and substitute its own finding for the unanimous finding of the Jury, but as a matter of practice, the High Court will not generally allow the verdict to be attacked arbitrarily, it being necessary for the convict to show *prima facie*, that the verdict is unsupported by evidence(6). In ordinary cases tried by Jury there is no appeal except on a matter of law under this section. Where, however, a case is tried by Jury under the provisions of Ch. XXXIII, an appeal lies to the High Court on matters of fact as well as on matters of law under s. 449. In such case also the findings of the Jury on question of fact are not final(7).

Sub-section(2).—This sub-section, which was added to this section in 1923, provides that where in a case tried by a Jury any person is sentenced to death any other person convicted in the same trial may appeal on a matter of fact as well as a matter of law(8). This amendment is intended to remove the anomaly under the existing law(9), that a High Court acting under section 374 could consider the facts of the case as regards the former accused, but on an appeal of the second

Cr. O. 774=140 I. C. 816=31 Cr. L. J. 83

(6) *Gul v. Emperor*, 23 Cr. L. J. 33 =64 I. C. 657=15 S. L. R. 103.

(7) *Emperor v. Bimal Pershad*, 6 Lah. 98=83 I. C. 857=1 Lah. Cas 467 =A. I. R (1925) Lah. 401=26 Cr. L. J. 1241.

(8) *Emperor v. Rashbehari*, A. I. R 1931 Pat. 302=13 P. L. T. 440=1931 Cr. C. 774=140 I. C. 816=31 Cr. L. J. 83.

(9) *Empress v. Chatradhari*, 2 C. W. N. 49

(4) *Queen v. Jaffer Ali*, 19 W. R. Cr. 57.

(5) *Emperor v. Rashbehari*, A. I. R. 1931 Pat. 302=13 P. L. T. 440=1931 Cr. P. C.=92

Cr. P. C.=92

accused in a case, and all of them prefer a joint appeal, only one copy of the judgment appealed against is required to be filed(1). Under this section the court of appeal has a discretion to dispense with the copy of order or judgment appealed against not only at the time of filing the appeal but even at any subsequent stage(2). This discretion should be exercised where injustice might result from a strict compliance with law. It should then send for the record and have the judgment or order before it when commencing to hear the appeal(3). Where an appeal is rejected because the copy of the judgment is not attached to the appeal the order of rejecting the appeal is not a judgment within the meaning of s. 369(4).

420. If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer-in-charge of the Jail, who shall thereupon forward such petition and copies to the proper appellate court.

Procedure when appellant in Jail. **Scope.**—This section prescribes the manner in which, in the exceptional case of a prisoner in Jail, the petition of appeal is to be presented. It does not dispense with the other formalities prescribed by s. 419(5). The officer-in-charge of the jail should give prisoners every facility to enable them to prepare their petition of appeal(6).

Notice of appeal.—Before rejecting an appeal under s. 421 the court should give a reasonable notice to the appellant or his pleader whether the appellant is confined in jail or not(7). But in a recent Sind case it has been held that when an accused person is in jail and makes his appeal through the Jailor under s. 420, it is not necessary to issue a notice of hearing to him and the court is competent to dismiss the appeal summarily after perusal of the papers submitted to it(8).

Right to be heard.—When an appellant is confined in a jail situated at the same station as the appellate court, there is nothing to prevent an appellant from applying to be heard in person and in all cases a person so situated may apply that he shall be heard by pleader(9). But in two cases it has been held that an appellant from jail has no right to appear at the hearing of his appeal, if he desires to do so, and has no pleader to represent him or does not wish to be represented by a counsel retained by the Crown(10). These cases have, however, been dissented

in the case cannot be deducted: *U. Zagaria v. Emperor*, 3 Rang 220=1925 Rang. 239=4 Bur. L. J. 44=69 I.C. 459=26 (r L. J. 1971.

(1) *Emperor v. Sitaram*, 5 Bom. L. R. 704. Appeals by different persons convicted by one judgment in a joint trial may be heard together but they must be made separately; *Maharaj Singh v. Emperor*, 1927 Nag. 48=97 I. C. 38=27 Cr. L. J. 1062.

(2) *Emperor v. ...*

(4) *Bansgopal v. Emperor*, A. I. R. 1954 A. 206=56 A. 209=147, I. C. 317=

85 Cr. L. J. 441=1934 A. L. J. 829=1934 Cr. C. 254.

(5) *Empress v. Pohpi*, 13 A. 171 (179)=(1891) A. W. N. 48.

(6) *Re Nitto Gopal*, 13 W. R. Cr. 69.

(7) *Re Kotina Butchaiya*, 2 Weir. 472.

(8) *Loung v. Emperor*, 96 I. C. 860=27 Cr. L. J. 933=20 S. L. R. 199=7 A. I. Cr. R. 16=1927 S. 223.

(9) *Re Kotina Butchaiya*, 2 Weir. 472.

(10) *Ram Prasad v. Emperor*, 103 I. C. 407=1 O. W. N. 638=28 Cr. L. J. 670=A. I. R. 1927 O. 312, *Empress v. Pohpi*, 13 A. 171=(1891) A. W. N. 48.

matter to be found in it is expunged(1). A criminal appeal is a continuation of the criminal case, and, except so far as there is a provision to the contrary, the appellant has the privilege of the accused and cannot be punished for making a false statement. Where an appellant, in his petition of appeal, stated falsely that the Magistrate has declined to summon the witnesses cited, and the appellate court asked him to give a statement to that effect on solemn affirmation which he did accordingly, held, that he could not be convicted under ss. 181 and 172, Penal Code(2).

Presentation of petition.—As regards presentation no special method is enjoined in the Code; and therefore the question is one of administrative convenience alone. So long as there is an actual presentation to an officer of the court, such as a Bench Clerk or to one of the Judges, its members, the presentation is not invalid(3). Where a petition of appeal was not presented to the court, but was deposited in a petition box kept for the convenience of parties within the court precincts and intended for the deposit of papers for the court, it was held that it had not been presented and was rightly returned for legal presentation(4). A petition of appeal sent by post is not presented to the court within the meaning of this section(5).

Presentation by person authorised by appellant.—A petition of criminal appeal may be presented by any person authorised by the appellant to present it(6). Presentation of an appeal petition by the clerk of the appellant's pleader is equivalent to a presentation by the pleader himself when it is signed by him and he is duly authorised(7). A petition of appeal under the Code is not duly presented when having been signed by a pleader, it is handed in by a person who is not his clerk and over whose conduct and actions he has no control(8). Where an appeal memorandum was prepared on behalf of three accused and signed under vakalat by their pleader, its presentation by another pleader who held a vakalat only from one of the accused was held to be a proper presentation(9). But where the prisoners had conflicting interests to each other, e.g., where each of the prisoners made confessions exonerating himself and incriminating the other, it would be improper for one pleader to present an appeal on behalf of both and to represent both who had conflicting interests(10).

Copy of judgment—Under this section where the order appealed against is not complete in itself and the reasons of the order are given in another judgment, a copy of such judgment must also be filed along with the memorandum of appeal(11). Where, however, there are several

(1) *In re Durant*, 15 B 483.

(2) *Empress v. Subbaya*, 12 M. 451
—1 Weir. 113.

(3) *Pub. Pros. v. Maliyakkal Kadiri*,
29 M. L. J. 101.

(4) *Empress v. Vasudevaraya*, 19 M.
354.

(5) *Empress v. Arappa*, 15 M. 137.

(7) *Empress v. Karuppa Udayan*,
20 M. 87.

(8) *Empress v. Ramaswami*, 21 M.
114.

(9) *Re Muthu v. Mira*, 2 Weir,
470.

(10) *Hira v. Empress*, 13 P.R. 160
Cr.

(11) *Parma Nand v. Mchanlal*, 114,
1 C. 61=19.9 L. 614=30 Cr. L. J. 235
A copy furnished in the prisoner's own
language is sufficient: *Lat. Un. Cr. Case*.
52 Time spent in obtaining diary orders

(2) Before dismissing an appeal under this section, the court may call for the record of the case, but shall not be bound to do so.

Dismissal for non-appearance of appellant.—The criminal appellate court cannot dismiss an appeal merely for non-appearance; it must decide the appeal on the merits(1). Even though no one may appear in a criminal appeal it is the duty of the court to examine the matter and come to some sort of decision on the merits(2). It is not competent to a Sessions Judge to reject an appeal under this section, without perusing the record, on the ground that there is no appearance for the appellant either by counsel or in person, because if the appellant is content to leave the question of admission or rejection to be determined by the Sessions Judge on the papers, the Sessions Judge is bound to peruse them, and the appellant is not bound to appear a second time, either by counsel or in person(3). If, however, an appellate court thinks it necessary for the purpose of disposing of an appeal to have a prisoner before it, the court has the same power to direct that the prisoner be brought before it as a court of first instance has, when, in pursuance of the direction of an appellate court, it takes further evidence in the presence of a prisoner(4).

Hearing and dismissal of appeal at the time of presentation.—This section does not prohibit a criminal appeal being heard and dismissed at the time of presenting the papers and there need not be special posting of the appeal for hearing after a reasonable time(5). It is however desirable, when the appellant or his pleader is unable to argue in support of the appeal when it is presented, that a court proceeding under this section should give sufficient time to the appellant or his pleader and inform him that he will be heard on a particular day in support of the appeal(6). If the court does send for the record, it is preferable to hear the pleader when the record is before the court; but there is nothing in this section to prevent the court from hearing the appellant's pleader at the time when he presents the appeal, if the appellant's pleader desires that course; and if the court desires to send for the record then it is not illegal summarily to dismiss the appeal without giving a further opportunity of the pleader being heard(7). But in some cases it has been held that after a record has been sent for, the

(1) *Roora v. Emperor*, 11 Lah. 242=31 P. L. R. 501=126 I. C. 77=A. I. R. 1930 Lah. 659=31 Cr. L. J. 979=Ind. Rul. (1930) Lah. 685; *Baldeo v. Emperor*, 72 I. C. 891=1 Pat. L. R. 29=24 Cr. L. J. 475; *Ram Bharose v. Emperor*, 14 A. L. J. 327; *Rattan Chand v. Emperor*, 11 P. L. R. 100=126 I. C. 865=127 I. C. 803=32 L. W. 203=(1930) M. W. N. 686=A. I. R. 1930 M. 863=59 M. L. J. 836=1930 Cr. C. 1039=32 Cr. L. J. 40; see *In re Husain Sahib*, 48 M. 385=84 I. C. 1051=20 L. W. 623=47 M. L. J. 661=(1924) M. W. N. 693=1924 M. 895=26 Cr. L. J. 411.

(2) See the cases cited in the last note and *Ramtohal v. Emperor*, 36 C. 385.

(3) *Emperor v. Basavanappa*, 29 Bom. L. R. 488=101 I. C. 595=28 Cr. L. J. 467=A. I. R. 1927 Bom. 361; *Deval v. Emperor*, 9 Pat. 768=126 I. C. 911=31 Cr. L. J. 1181=Ind. Rul. (1930) Pat. 671=A. I. R. 1930 Pat. 499=1930 Cr. C. 927.

(4) 2 Weir. 478.

(5) *In re Narasimhamurti*, 53 M.

from in the recent Full Bench case of *Lal Bahadur v. Emperor*(1), which lays down that where in an appeal by a convict in jail the stage has been reached of the appellant being given notice under s. 422, he is entitled, if he so desires, to appear, in person if he is not represented by a pleader.

entertained(2). When once a petition or appeal has been filed through counsel under section 419, it is improper to dismiss the appeal summarily at all, and order summarily dismissing an appeal while there is a petition presented through counsel pending and undisposed of on the file of the court, would be nevertheless an improper order, because it happened that another petition of appeal in the same matter has been received through the Superintendent of the jail(3). Where a Sessions Judge in ignorance of the fact that an appeal in the same case had been filed by a Mukhtar, dismissed a criminal appeal submitted from jail, it was held that, though the Sessions Judge could not review his own order, the High Court could set it aside in revision; and it was so done(4). A jail appeal can be heard and disposed of by a vacation Judge(5).

Presentation : Limitation.—An appeal by a prisoner in jail may be presented to the officer in charge under this section and such presentation is, for purposes of limitation, equivalent to presentation in court, whatever delay there may be in forwarding it (6).

Revision.—A court summarily dismissing under s. 421, an appeal received from jail is not required by law to give any reasons for the dismissal, and the omission to do so is no ground for revision(7).

421. (1) On receiving the petition and copy under section 419 or section 420, the appellate court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Summary dismissal of appeal. Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(1) 108 I. C. 122 = I. R. 9 A. 21 (r = 26 A. I. J. 275 = A. I. R. 1928 A. 61 = 29 Cr. I. J. 371 = 50 A. 513.

(2) *Gayon Din v. Emperor*, 23 Cr. I. J. 118 = 65 I. C. 612 = 9 O. I. J. 1 = 24 O. C. 301; *Emperor v. Khiali*, 41 A. 789 = 20 A. I. J. 739; *In re Kunhammad*, 46 M. 382 (392); *Ram Aular v. Emperor*, 11 O. I. J. 536 = 1 O. W. N. 351 = 25 Cr. I. J. 1319 = 62 I. O. 815; *Cl. Hulai v. Emperor*, 261. C. 133 = 3 O. I. J. 316 = 17 Cr. I. J. 453.

(3) *Empress v. Bhicani Dihal*, (1906) A. W. N. 303; *Lachhman v.*

Emperor, A. I. R. 1934 A. 288 (1) = 4 A. W. R. 311.

(4) *Emperor v. Meena Ram*, 48 A. 208.

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which thus summarily disposes of an appeal without discussing arguments of the advocate for the appellant takes a risk that the appeal should be remanded unless the High Court is satisfied that the appellate court really has considered the arguments adduced on behalf of the appellant, or has applied his mind to the consideration of the facts of the case which can only be if facts are unusually clear(1). An appellate court should exercise its powers under this section with great care(2). In a case in which there are disputed questions of fact and a large number of documents, and the trial court has come to certain findings, an appeal ought not to be summarily dismissed without sending for the record(3). The powers which are capable of being exercised under this section should be exercised with considerable caution, and where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been, even though it may be not very successfully, impugned, it is proper for the appellate court to call for the records and look at the evidence(4). Summary dismissal of a jail appeal filed under s. 420 does not debar the hearing of an appeal filed by counsel(5).

Appeal under s. 476-B.—An appeal under section 476-B of the Code is subject to all the provisions applicable to criminal appeals as laid down in section 419 and the following sections. It is therefore open to an appellate court to dismiss the appeal summarily under this section(6).

Appeal against conviction on two charges.—Where, in the accused's appeal against conviction on two charges in one trial, the appeal in respect of one charge is dismissed, the other charge, held that the lesirable(7).

Rehearing of appeal dismissed for default.—In *Anonymous*(8), a ruling is given to the effect that when a criminal appeal has been rejected without hearing the appellant's pleader under the corresponding section 421 and if it appears that an adequate excuse has been made for restoring the case to its file at expressed on this question High Court in *Emperor v.* with regard to the power to

(1) *Thaluri v. Emperor*, A. I. R. 1933 Pat 160 = 1933 Cr. O. 402 = 145 I. C. 652 = 34 Cr. L. J. 1017.

(2) *Thaluri v. Emperor*, A. I. R. 1933 Pat 160 = 1933 Cr. O. 402 = 145 I. C. 652 = 34 Cr. L. J. 1017.

(3) *Lachman v. Emperor*, A. I. R. 1934 A. 988 (1) = 4 A. W. R. 344.

A. I. R. 10, 340.

(7) *Ismail v. Emperor*, 5 Rang. 274 = 103 I. C. 845 = 28 Cr. L. J. 765 = A. I. R. 1927 Rang. 239.

(8) 7 M. H. C. R. App. 29 Cr.

(3) *Ranga Row v. Emperor*, 10 I. C. 518 at p. 519 = 12 M. L. T. 350 = 23 M. L. J. 371 = 13 Cr. L. J. 710 = (1919) M. W. N. 982; *Mohammad Sadiq v. Crown*, 7 Lab. L. J. 108; *In re Kinkhamad*, 46 M. 382 (402-403).

(10) 4 B. 101.

pleader must be heard(1).

"No sufficient ground for interfering."—A convicted person appealing is not in the same position before the appellate court as he is before the court trying him, he must satisfy the appellate court that there is sufficient ground for interfering with the order of conviction; and if no such ground is shown, it is the duty of the appellate court not to interfere(2). The appellate court is not, however, entitled to dismiss an appeal summarily in terms of this section, unless the court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal and where the appeal is not dismissed summarily, the court is bound, in order to the disposal of the appeal, to comply with the provisions of s. 422 as to notice, and with the provisions of s. 423 as to sending for the record, if such record is not already in court(3). The appellant's pleader should be allowed if necessary, to refer to the certified copies of the evidence to show that there were sufficient grounds for interfering. A Judge who disallows the pleader to refer to the evidence acts erroneously(4). Where important questions of fact and law are involved, the Sessions Judge should not summarily reject the appeal but should be heard fully and decided(5). On presentation to a court, by the party, in person, of a memorandum of appeal signed by the pleader, it is not competent for the court to summarily reject the appeal, under this section, without giving a reasonable opportunity to the pleader to appear and without calling for the records of the case, where the appellant urges reasonable grounds for discrediting the evidence of the witnesses of the other side(6).

Admission of appeal.—After a criminal appeal is admitted the court has no jurisdiction to dismiss it summarily(7). But the fact that "does not affect the appeal(8). When an to be heard on the whole case, and cannot be restricted to any selected ground from those specified in his petition. A restrictive order of admission of an appeal is not contemplated by s. 422 and is *ultra vires*(9).

Summary dismissal of appeal.—Although it is not illegal to dismiss an appeal summarily under this section still the appellate court

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- (5) *Empress v. Adam Isag*, Rst. Un. Cr. Cas 916.
 (6) *Ringacharu v. Emperor*, 29 M. 236=4 Cr. L. J. 57.
 (7) *Ram Hari v. Santosh Kumar*, 69 I. C 461=23 Cr. L. J. 733. A petition
 (8) *der*
 (9) *Nafr v. Emperor*, 41 C. 403;
Jaya Singh v. Emperor, 66 I. C. 718=6 Pat. L. T. 331=(1925) Pat. 453=3 Pat. L. R. 80 Cr.=4 Pat. 251=26 Cr. L. J. 862.
- W. 577.
 (2) *Empress v. Sajiwan Lal*, 5 A. 386; see *Koura v. Empress*, 21 P. R. 1895 Cr.
 (3) *Emperor v. Dahu*, A. I. R. 1935 P. C. 89.
 (4) *Manga v. Emperor*, 11 O. C. 360=9 Cr. L. J. 55.

at least so much as would satisfy the High Court, when an application for revision is made, that it has fully considered all the questions in issue and has appreciated the simplicity or gravity of the case(1). Although it is not required by law that a Sessions judge should write a regular judgment when exercising the powers of summary dismissal given to him by this section, still the matter being one for discretion on the part of the subordinate appellate courts, it is very important that such discretion should be exercised upon sound and reasonable lines(2). Where no reason is given for the summary dismissal, the High Court will either remand the appeal to the appellate court to be admitted and heard, or will itself examine the evidence(3).

Proviso : Right of appellant to be heard.—This section lays down that the appellant or his pleader shall have a reasonable opportunity of being heard in support of the appeal. This must be taken to include the possible right of reply if necessary(+). A criminal court should ordinarily hear the appellant's pleader before summarily dismissing an appeal presented beyond time(5). Under this section an appellate court has no power to dismiss an appeal summarily without hearing the advocate for the appellant, and such hearing should be on all points. Once the appellate court, however, decides to admit the appeal, it becomes unnecessary for the Advocate to address it further, and the power of the appellate court to dismiss the appeal summarily comes to an end, and this section ceases to apply to the case(6). The language of this section requires a reasonable opportunity to be given to the appellant to be heard in support of his appeal and if such reasonable opportunity is not given the court has no jurisdiction to dismiss the appeal(7). Where a criminal appeal is dismissed without reasonable opportunity having been given to the appellant or his counsel of being heard, the court has inherent power to make an order that the appeal should be reheard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the appeal(8). Where the District Magistrate called upon the appellant's pleader to argue the appeal on the same day that it was presented and on the pleader asking time, the Magistrate refused to grant him time and rejected the appeal, it was

Rule (1930) Pat 751=32 Cr. L. J. 86=
(1930) Cr. Cas 1016; *Gurubari v. Em-*
peror, 2 Pat. L. J. 695

(1) *Gurubari v. Emperor*, 2 Pat. L.
J. 695 (697).

(2) *Aman Ali v. Emperor*, 13 O. C.
309=8 I. C. 379=11 Cr. L. J. 631.

(3) *Gobind v. Emperor*, 2 Pat. L. T.
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(4) *Amanat v. Nagendra*, 38 O. 907
=9 I. C. 65=12 Cr. L. J. 9; *Muham-*
med v. Emperor, 2 Pat. L. T. 10; *Raj*
Kumar v. Tinkowari, 12 C. W. N. 248;
Ranga Row v. Emperor, 23 M. L. J.
371=13 Cr. L. J. 710=16 I. C. 518=12
M. L. T. 350=(1912) M. W. N. 982; *Rat-*
an Chand v. Emperor, 5 N. L. B. 76.

(5) *Nuruddin v. Emperor*, 29 Bom.

(6) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
29; *In re Kunhammad*, 46 M. 884;
Ratan Chand v. Emperor, 5 N. L. B. 76.

Shitram, 6 B. 14.

(7) *Nuruddin v. Emperor*, 29 Bom.

(8) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
29; *In re Kunhammad*, 46 M. 884;
Ratan Chand v. Emperor, 5 N. L. B. 76.

L. R. 701=103 I. C. 109=1927 B. 445=
28 Cr. L. J. 653.

(6) *Tau Pu v. Emperor*, 81 I. C. 549
=3 Bur. L. J. 18=1924 Rang. 294=25
Cr. L. J. 939.

(7) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
29; *In re Kunhammad*, 46 M. 884;
Ratan Chand v. Emperor, 5 N. L. B. 76.

(8) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
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Ratan Chand v. Emperor, 5 N. L. B. 76.

bind v. Emperor, 2 Pat. L. T. 10; *Raj*
Kumar v. Tinkowari, 12 C. W. N. 248;
Ranga Row v. Emperor, 23 M. L. J.
371=13 Cr. L. J. 710=16 I. C. 518=12
M. L. T. 350=(1912) M. W. N. 982; *Rat-*
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(8) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
29; *In re Kunhammad*, 46 M. 884;
Ratan Chand v. Emperor, 5 N. L. B. 76.

(8) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
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Ratan Chand v. Emperor, 5 N. L. B. 76.

(8) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
29; *In re Kunhammad*, 46 M. 884;
Ratan Chand v. Emperor, 5 N. L. B. 76.

(8) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
29; *In re Kunhammad*, 46 M. 884;
Ratan Chand v. Emperor, 5 N. L. B. 76.

(8) *Muhammad Sadig v. Emperor*,
88 I. C. 593=A. I. R. (1925) Lah 855=
26 Cr. L. J. 1169; 7 M. H. O. R. App.
29; *In re Kunhammad*, 46 M. 884;
Ratan Chand v. Emperor, 5 N. L. B. 76.

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rehear criminal appeals dismissed for default. This view receives additional support from the following cases(1).

Judgment and record of reasons.—A court of criminal appeal is not bound, when dismissing an appeal summarily under this section, to write a judgment as defined in section 367. It is, however, advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision(2). Though under the Code it is not necessary to deliver a formal judgment when an appeal is summarily dismissed under this section, a Magistrate who summarily dismisses an appeal, ought, save in very exceptional cases, to give some reasons for his decision which will show that he had really considered the points raised by the appellant; if no reasons are given and the High Court is not satisfied in revision that the Magistrate has properly applied his mind to the case, the case will be remanded for further hearing(3). Notwithstanding the provisions of the statute, it is desirable that a final court of facts should record concisely some reasons in rejecting an appeal summarily in order to enable the High Court in revision to appreciate the final findings of the lower appellate court on facts and to see if any question of law arises on those findings(4). The appellate court need not go to the length of writing an elaborate judgment but should notify briefly and clearly what objections were urged on appeal and how they were disposed of(5). An order couched in the words :—"The appeal is dismissed summarily", does not comply with the requirements of the law, and is, therefore, illegal(6). The appellate court which thus summarily disposes of an appeal without discussing the arguments of the advocate for the appellant
 Court is
 argument:
 to the consideration of the facts of the case(7). It should record
 be remanded unless the High
 really has considered the
 llant, or has applied its mind

(1) *Empress v. Bhimappa*, 19 B. 732; *Nazur Mohammad v. Hara Singh*, 26 P. L. R. 616.

(2) *Emperor v. Kundan*, 36 A. 496 = 24 I. C. 600 = 15 Cr. L. J. 512 = 12 A. L. J. 651; *Empress v. Warubai*, 20 B. 610; *Rash Behari v. Balgopal*, 21 C. 92; *Empress v. Ram Narain*, 8 A. 514; *Empress v. Nanhu*, 17 A. 211;

26 P. L. R. 616; *Taung Bo v. Crown*, 1 L. D. R. 270; *Kalachand v. Tatu*, 50 C. L. J. 285 = A. I. R. 1929 C. 773; *Emperor v. Krishnayya*, 25 M. 531; *Emperor v. Nga Sein Gyi*, (1904-1906) 1 U. B. R. 49 Cr.; *Jagnarain v. Ghinhu*, A. I. R. 1935 Pat. 32.

(3) *Thakur Sahu v. Emperor*, 125 I. C. 121 = 11 Pat. L. T. 242 = 31 Cr. L. J. 760 = A. I. R. 1930 Pat. 331 = 1930 Cr. C. 616; *Gurulari v. Emperor*, 2 Pat. L. J. 695.

(4) *Abdul Latif v. Ahmad*, A. I. R. 1933 (A. L. J. 515 = 37 Cr. L. J. 235 = 1933 Cr. C. 859 = 144 I. C. 701 = 34 Cr. L. J. 812; *Empress v. Nanhu*, 17 A. 241; *Rash Behari v. Balgopal*, 21 C. 92; *Empress v. Warubai*, 20 B. 540.

(5) *Ackours v. Emperor*, 32 C. 178.

(6) *Golind Behari v. Emperor*, 22 Cr. L. J. 521 = 61 I. C. 49 = 1 Pat. L. T. 10; see also *Barjoo v. Emperor*, A. I. R. 1935 Pat. 37.

(7) *Krishna Pati v. Emperor*, 127 I. C. 547 = A. I. R. 1930 Pat. 520 = Ind.

for the records and look at the evidence(1). A District Magistrate, on an appeal being preferred to him, is not required to call for the record in a case in which the only question is one of fact and the judgment of the trial court is plain and clear. But an appeal should not be rejected summarily when a point of law, which on the face of it is not without substance, has been raised. The Magistrate should not refuse to call for the record of a case when the judgment appealed from is a long and intricate judgment requiring careful consideration(2). After the record is sent for and received, the appellate court is bound to hear the pleader and cannot dismiss the appeal summarily without hearing him(3). But it is not illegal to dismiss summarily an appeal without hearing the appellant after the receipt of the record which has been called for, if, as a matter of fact, the appellant or his pleader is heard at the time of the presentation of the appeal(4).

Revision.—An order summarily dismissing an appeal virtually amounts to an order confirming the findings both of fact and law recorded by the lower court and there is no reason to discriminate between an order summarily dismissing an appeal under this section and an order dismissing an appeal after hearing under s. 424 so far as its liability to attack in revision for purposes of s. 439, cl. (6) is concerned(5). But it is within the power of the High Court in revision to say after having regard to the facts of each particular case whether or not the appellate court has exercised a proper discretion in acting under this section. If the High Court finds that the case is one which should not have been dealt with summarily, the High Court will send the case back ordering the appellate court to hear it on its merits and pass a judgment(6). Though the practice usually is to remand the case to the lower appellate court and ask for a judgment from the court after a regular hearing, the High Court has a discretion to go into the case itself, and, if necessary, to consider the questions of fact as if in first appeal(7).

422. If the appellate court does not dismiss the appeal summarily, it shall cause notice to

be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application

(1) *Padarath v. Emperor*, 24 Cr. L.J. 477=72 I. C. 693=A. I. R. 1922 Pat. 552.

(2) *Sukhdeo v. Emperor*, 3 Pat. L.J. 393.

(3) *Lalit Kumar v. Emperor*, A. I. R. 1926 C. 174=42 O. L. J. 551=92 I. C. 834=17 Cr. L. J. 831; *Surendra Nath v. Emperor*, A. I. R. 1926 C. 161=42 C. L. J. 554=17 Cr. L. J. 412=93 I. C. 74.

(4) *Deval v. Emperor*, 9 Pat. 788; *Emperor v. Basavanappa*, 29 Bom. L. R. 489.

(5) *Emperor v. Shidoo*, 111 I. C. 856=29 Cr. L. J. 936=22 S. L. R. 453=

A. I. R. 1929 S. 26. An order passed under this section dismissing an appeal filed under S. 419 is *prima-facie* final: *Shahu v. Emperor*, A. I. R. 1935 S. 84.

(6) *Nga Ba Myit v. Emperor*, 19 Cr. L. J. 316=44 I. C. 332; *Ram Kant v. Emperor*, 19 Cr. L. J. 301=44 I. C. 209.

(7) See the cases cited in the last note and *Amian Ali v. Emperor*, 18 O. O. 302 (313); See also *Isswar Chandra v. Emperor*, 10 C. W. N. 446.

held that appellant's pleader was not afforded reasonable opportunity of being heard(1). But it is not illegal to dismiss summarily an appeal without hearing the appellant after the receipt of the record which has been called for, if, as a matter of fact, the appellant or his pleader is heard at the time of the presentation of the appeal(2). Where the notice for hearing the appeal was served in the afternoon of 21st March on the appellant's pleader at Amalner, asking him to be present on the 22nd March at Jalgaon or any other place, where the camp of the District Magistrate might be and on the day in question the District Magistrate was encamped at Edlabad, which being at a considerable distance from Amalner, the appellant's pleader could not appear at that place and the appeal was consequently dismissed, the High Court held that the appeal had been disposed of in the absence of the appellants and there was no sufficient notice to their pleader of the date at the place of hearing(3).

Reasonable opportunity.—This section does not require that the appellant or his pleader shall be heard before the appeal is decided, but all that it requires is that a sufficient opportunity should be afforded to them of being heard. If a sufficient opportunity of being heard is afforded to either of them, the neglect of the appellant or his pleader who is his agent debars him from claiming a second hearing(4). A general notice posted in a Sessions Court house that appeals would be heard for admission only on the first court day after the date of presentation of the appeal was held not to give reasonable opportunity(5). The fact that the pleader of the accused is present in court when an order is made admitting an appeal, does not relieve the court from the necessity of giving notice to the appellant of the day fixed for the hearing of the appeal(6). If the hearing of the appeal is adjourned to another date, notice of the adjournment should be given to the appellant(7). The disposal of an appeal on a date previous to a date fixed for an adjourned hearing held to amount to a material error of procedure(8).

Sub-section (2).—An appeal raising questions of fact ought not to be disposed of under this section without the original records being called for from the lower court(9). The practice of summarily dismissing an appeal without calling for the records is always inconvenient and must not be adopted(10). The powers which are capable of being exercised under this section should be exercised with considerable caution, and where there has been a dispute as to fact and where the credibility of witnesses for the prosecution has been, even though it may be not very successfully, impugned it is proper for the appellate court to call

(1) *Emperor v. Gur Sihda*, 7 Bom.

(5) *Multan v. Queen*, 5 M. 11.

(6) *In re Gopal Chunder*, 10 C. L.B. 57

(7) *Shambehari Singh v. Emperor*, 20 Cr. L. J. 271=50 L. C. 91

(8) *Shanmugam Chettiar v. Alagior*, 2 Weir. 475

(9) *In re Turla Hussain*, 48 M. 335.

(10) *Emperor v. Jugal Kishore*, (1883) A W. N. 145,

granted against the order of a Sessions Judge, he is the proper person to show cause(1).

Appeal from order of compensation.—An accused person has no right to be heard on an appeal by the complainant against an order awarding compensation and notice of the appeal need not be given to the accused. The only person entitled to notice of such an appeal is the District Magistrate(2). Where, however, an appellate court sets aside the order of a Magistrate, awarding compensation to the accused, notice should be given of the appeal to the accused, on the principle *audi alteram partem*, so as to afford him an opportunity of supporting the order passed in his favour although there is no express provision of law directing the giving of such notice(3). In the case of an appeal against a conviction and order giving compensation to the complainant the fact that the notice of the appeal was not served on the complainant is no ground for interfering with an order of acquittal in appeal. The fact that the notice of the appeal was not sent to the officer appointed by the Government is also immaterial where the Government does not raise any objection on this score(4).

Effect of omission of service.—It has been held by the Madras High Court that mere omission to serve notice of appeal on the District Magistrate is only an irregularity and will not render the proceedings *ab initio* void(5). On the other hand, it has been held by the Bombay High Court that such omission is an illegality and not merely an irregularity(6). But where the objection on the ground of absence of notice to the District Magistrate comes not from him but from the complainant, the High Court will not interfere in revision(7). The fact that the notice of the appeal was not sent to the officer appointed by the Government is also immaterial where the Government does not raise any objection on this score(8). Where no notice of the hearing of appeal by the accused is given to the Public Prosecutor as provided by this section, the High Court will set aside an order of acquittal passed by the appellate court(9). Where the notice of appeal has to be served on the

(1) *Bepin Behari v. Nendi Hariani*, 7 C. W. N. 80.

(2) *Krishna Venkatesa Ram v. Nandi Hariani*, 25 Cr. L. J. 209 = 76 I. C. 641.

(3) *Emperor v. Palaniappa*, 29 M. 187 = 3 Cr. L. J. 452; *Venkatarama v. Krishna*, 38 M. 1091; *Ramchand v. Jesa Ram*, 25 Cr. L. J. 209 = 76 I. C. 641.

(4) *Emperor v. Palaniappa*, 29 M. 187 = 3 Cr. L. J. 452; *Venkatarama v. Krishna*, 38 M. 1091; *Ramchand v. Jesa Ram*, 25 Cr. L. J. 209 = 76 I. C. 641.

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(6) *Emperor v. Palaniappa*, 29 M. 187 = 3 Cr. L. J. 452; *Venkatarama v. Krishna*, 38 M. 1091; *Ramchand v. Jesa Ram*, 25 Cr. L. J. 209 = 76 I. C. 641.

(7) *Emperor v. Palaniappa*, 29 M. 187 = 3 Cr. L. J. 452; *Venkatarama v. Krishna*, 38 M. 1091; *Ramchand v. Jesa Ram*, 25 Cr. L. J. 209 = 76 I. C. 641.

(8) *Emperor v. Palaniappa*, 29 M. 187 = 3 Cr. L. J. 452; *Venkatarama v. Krishna*, 38 M. 1091; *Ramchand v. Jesa Ram*, 25 Cr. L. J. 209 = 76 I. C. 641.

(9) *Emperor v. Palaniappa*, 29 M. 187 = 3 Cr. L. J. 452; *Venkatarama v. Krishna*, 38 M. 1091; *Ramchand v. Jesa Ram*, 25 Cr. L. J. 209 = 76 I. C. 641.

583 = A. I. R. 1926 C. 1054 = 27 Cr. L. J. 1086; *Devendra v. Shettappa*, 25 Bom. L. R. 251 = 86 I. C. 28 = A. I. R. 1923 B. 264 = 26 Cr. L. J. 651; *Mohan*

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of such officer furnish him with a copy of the grounds of appeal; and, in cases of appeals under section 417, the appellate court shall cause a like notice to be given to the accused.

Restriction order of admission.—When an appeal has been admitted, the appellant is entitled to be heard on the whole case, and cannot be restricted to any selected ground from those specified in his petition. A restrictive order of admission of an appeal is not contemplated by this section and is *ultra vires*(1). Except in the case provided for in s. 412, an appeal cannot be admitted on the limited ground of sentence only; if it is admitted at all, the whole appeal must be heard(2).

Notice—Notice to the appellant of the time and place of hearing is obligatory under this section when notice of the appeal by the accused has gone to the prosecutor(3). The fact that the pleader of the accused is present in court when an order is made admitting an appeal, does not

The provisions of this section then become mandatory, and it is the duty of the court *inter alia* to cause notice to be given to the appellant, or his pleader if he appears, besides perusing the record(5).

Notice to public prosecutor or other officer.—Under this section the appellate court must issue notice to the officer appointed by the Local Government before disposal of the appeal. Omission to do so is a good reason for ordering the appeal to be re-heard(6). Where no notice of the hearing of an appeal by the accused is given to the Public Prosecutor as provided by s. 422, the High Court will set aside an order of acquittal passed by the appellate court(7). But where the lower appellate court disposes of an appeal preferred by the accused and acquits him without notice to the District Magistrate, the High Court will not interfere in revision at the instance of the complainant where the objection on the ground of absence of notice to the District Magistrate comes not from him but from the complainant(8).

Rules issued by the High Court.—Rules issued by the High Court are addressed to the District Magistrates as a matter of convenience and in accordance with the practice for appeals followed under this section, the Local Government having under this section appointed the District Magistrate as the officer to receive notices of appeals. If a rule is

(1) *Nasir Sheikh v. Emperor*, 41 C. 406=20 I. C. 741=14 Cr. L. J. 495=18 O. W. N. 147; *Gaya Singh v. Emperor*, 4 Pat. 254=26 Cr. L. J. 861=3 Pat. L. R. 80 Cr.=A. I. R. 1925 Pat. 453=6 Pat. L. T. 381=86 I. C. 718.

R. 57.

(5) *Tapu v. Emperor*, 3 Bur. L. J. 18 (20)=25 Cr. L. J. 933

(6) *Bharasa v. Suldeo*, 63 C. 969=97 I. C. 62=27 Cr. L. J. 1036=43 C. L. J. 583=A. I. R. 1926 C. 1054; *Per Davul, J.; Emperor v. Palaniappa*, 29 M. 187=9 Cr. L. J. 459.

(7) *Bharasa v. Suldeo* 97 I. C. 62=43 C. L. J. 583=A. I. R. 1926 C. 1054=27 Cr. L. J. 1056.

(8) *Dvendra v. Sheltappa*, 25 Bom. L.R. 251=A. I. R. 1923 B. 261.

1017.

(3) 2 Weir 475.

(4) *In re Gopal Chunder*, 10 C. L.

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It is the duty of the Government to protect the rights of its citizens and to maintain the peace and order of the country. The Government is responsible for the welfare of its people and for the security of its borders. The Government is also responsible for the development of the country and for the improvement of the living standards of its citizens. The Government is the guardian of the Constitution and the laws of the country. The Government is the representative of the people and is accountable to them. The Government is the source of authority and is responsible for the execution of the laws. The Government is the defender of the rights of the people and is the protector of the country. The Government is the promoter of the welfare of the people and is the maintainer of the peace and order of the country. The Government is the guardian of the Constitution and the laws of the country. The Government is the representative of the people and is accountable to them. The Government is the source of authority and is responsible for the execution of the laws. The Government is the defender of the rights of the people and is the protector of the country. The Government is the promoter of the welfare of the people and is the maintainer of the peace and order of the country.

The appellant is entitled to a writ of habeas corpus and to a writ of certiorari. The writ of habeas corpus is a writ of right and is not subject to the discretion of the court. The writ of certiorari is a writ of right and is not subject to the discretion of the court. The writ of habeas corpus is a writ of right and is not subject to the discretion of the court. The writ of certiorari is a writ of right and is not subject to the discretion of the court.

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District Magistrate who himself heard the appeal, there is no necessity to give notice to himself(1). But the fact that the appeal, which was heard ultimately by a Joint Magistrate, was originally filed before the District Magistrate would not relieve the court hearing the appeal from giving notice to the District Magistrate(2).

Time and place of hearing.—Notice to all parties of date fixed for hearing is obligatory(3). It is not enough that the Magistrate has directed that an appeal to him will be heard in a certain month the particular date of hearing being omitted. The appellant ought to be informed of the date on which his appeal would be heard(4). Ss. 422 and 423 make it imperative on a criminal appellate court to hear the appeal at the time and place named in the notice of appeal issued by it(5). Where a notice is issued fixing a particular place for the hearing of the appeal, a court of appeal cannot hear the appeal at a different place without giving notice of the change of the place(6). When notice is issued to an appellant in a criminal case to appear at headquarters and on the date fixed the officer before whom he is cited to appear is not present at headquarters, it does not justify a dismissal in default that general orders have been issued to direct such appellant to follow such officer in camp(7).

423 (1) The appellate court shall then send for the record of the case, if such record is not already in court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears, and in case of an appeal under section 417, the accused, if he appears, the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

Powers of Appellate Court in disposing of appeal.

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge

(1) *Krishna Kone v. Narayana Dass*, 22 Cr. L. J. 583—62 I. C. 823—13 L. W. 669=(1921) M. W. N. 887—41 M. L. J. 172

(2) *Mohammad Mustafa v. Shanmuga*, 25 Cr. L. J. 1389—A. I. R. 1925 M. 375.

(3) *Vellayun v. Solai*, (1915) M. W. N. 540; *Devendra v. Shettyappa*, 25 Bom. L. R. 251; *In re Arjun*, 21 Bom. L. R. 188.

(4) *Empress v. Wasir*, (1881) A. W. N. 46.

(5) *Ratan Chand v. Emperor*, 5 N. L. R. 76.

(6) *Bahawal v. Emperor*, 7 P. R. 1891 Cr.

(7) *Nihal Singh v. Emperor*, 11 P. R. 1905 Cr.—117 P. L. R. 1905 Cr.—2 Cr. L. J. 61; See also *In re Arjun*, 21 Bom. L. R. 188.

the accused, or order him to be retried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3), with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same ;

(c) in an appeal from any other order, alter or reverse such order ;

(d) make any amendment or any consequential or incidental order that may be just or proper

(2) Nothing herein contained shall authorize the court to alter or reverse the verdict of a Jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him.

Powers of appellate court.—The powers of an appellate court are defined in this section, and in this section a clear distinction is drawn between the power which may be exercised in an appeal from an order of acquittal and in an appeal from a conviction(1). The general intention of the Code is that an acquittal should stand until appealed against by the Local Government under section 417. The provisions of section 423 (1) (b), however, are very wide and enable a court in disposing of an appeal from a conviction to alter the finding(2). An appellate court can, under this section in an appeal from a conviction, alter the finding of the lower court, and find the appellant guilty of an offence of which the lower court has declined to convict him(3). There is no restriction on the powers of the appellate court to deal with a case of which it has complete seisin in any of the manners provided by this section(4). The rule by which a criminal appellate court is to be guided in dealing with a criminal appeal is that it has to come to a conclusion for itself upon the evidence on the record, assisted so far as it might be by such reasons or arguments as it might elicit from the conclusions and reasons contained in the judgment of the original court. If the appellate court entertains any doubt about the correctness of the conviction or the

(1) *Darbari Mal v. Emperor*, 12 I. C. 839=8 A. L. J. 1129=12 Cr. L. J. 575.

(2) *Dhanpat Singh v. Emperor*, 18 Cr. L. J. 982=42 I. C. 598=(1917) Pat. 297=2 Pat. L. W. 188.

(3) *Emperor v. Sanyal*, 12 I. C. 839=8 A. L. J. 1129=12 Cr. L. J. 575.

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(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge

(1) *Krishna Kone v. Narayana Dass*, 22 Cr. L. J. 583=62 I. C. 823=19 L. W. 689=(1921) M. W. N. 387=41 M. L. J. 172

(2) *Mohammad Mustafa v. Shanmuga*, 25 Cr. L. J. 1389=A. I. R. 1025 M. 375.

(3) *Vellayan v. Solai*, (1915) M. W. N. 540; *Lecendra v. Shettappa*, 25 Bom. L. R. 251; *In re Arjun*, 24 Bom. L. R. 183.

(4) *Empress v. Wazir*, (1891) A. W. N. 46.

(5) *Ratan Chand v. Emperor*, 5 N. L. R. 76.

(6) *Bahawal v. Emperor*, 7 P. R. 1891 Cr.

(7) *Nihal Singh v. Emperor*, 11 P. R. 1905 Cr.=117 P. L. R. 1905 (Cr.=2 Cr. L. J. 61; See also *In re* Bom. L. R. 183.

as to how, where and by whom the injuries were caused to the complainant in a case under s. 324, I. P. C. If the accused sets up the plea of self-defence, but does not produce any evidence, the appellate court should consider whether by cross-examination of the prosecution witnesses matters have elicited which might go to support that defence(1).

Records to be sent for.—Unlike s. 421 this section uses the word "shall" and makes it obligatory on the part of appellate court to send for the record. If the records of a case are lost, it is the duty of the appellate court to order a new trial(2).

Perusal of records.—The criminal appellate court cannot dismiss an appeal merely for non-appearance; it must decide the appeal on the merits(3). Where an appeal is admitted by the Sessions Judge and notice issued, the subsequent dismissal of the appeal owing to the absence of the appellant and his pleader is not authorised by any provision of the Code; under this section the court of appeal has to peruse the record and to form an opinion as to whether there is or is not sufficient ground for interference(4). The appellate court is, therefore, bound to peruse the record, and decide an appeal on the merits even if the appellant does not appear(5). In other words it is incumbent on the appellate court to go through the record and to dispose of the appeal on the merits. It cannot dismiss the appeal merely because there is default in the appearance of the pleader for the appellant(6).

Right of the parties to be heard.—Under this section the court is bound to hear the appellant or his pleader if he appears, before disposing of the appeal(7). Where a Sessions Judge, not knowing the fact that the appellant was represented by a pleader, disposed of the appeal in chambers, the High Court directed the re-hearing of the appeal(8). But where the appellate court disposed of the appeal on the merits after perusing the records and considering the grounds of appeal, the judgment of the appellate court would not be set aside on the mere ground that the pleader for the accused was not heard in the appellate court(9). There is nothing in this section, to preclude an

(1) *Nogendra Nath v. Emperor*, 22 Cr. L. J. 414=61 I. C. 654

(2) (1889) A. W. N. 85; *Empress v. Ramzam*, (1885) A. W. N. 117.

(3) *Roora v. Crown*, 11 Lah. 242=126 I. C. 77=31 P. L. R. 501=A. I. R. 1930 Lah. 659=31 Cr. L. J. 979=Ind. Rul. (1930) Lah. 685=(1930) Cr. C. 803; *Tain v. Emperor*, 125 I. C. 848=7 O. W. N. 208=A. I. R. 1930 O. 834=1930 Cr. C. 460=31 Cr. L. J. 939=Ind. Rul. (1930) Oudh. 352.

(4) *Trimbak Balvant v. Emperor*, 50 B. 673=1926 B. 548=28 Bom. L. R. 1022=97 I. C. 751=27 Cr. L. J. 1167; *Empress v. Deoshanker*, Rat. Un. Cr. C. 593; *Empress v. Pohpi*, 13 A. 171; *Koura v. Empress*, 21 P. R. 1695 Cr.

(5) *Kuldip v. Emperor*, 6 Pat. 16=100 I. C. 871=A. I. R. 1927 Pat. 176=98 Cr. L. J. 351=8 Pat. L. T. 376; See also *Olayat Khan v. Emperor*, 71 I. C. 246=4 Pat. L. T. 98=1 Pat. 589=A. I. R. (1922) Pat. 587=24 Cr. L. J. 118

(6) *Bansi v. Brojeswar*, 50 C. 972=78 I. C. 974=27 C. W. N. 947=1924 C. 95=39 O. L. J. 274=25 Cr. L. J. 1150

(7) *Kuldip Singh v. Emperor*, 6 Pat. 16, *Empress v. Pohpi*, 13 A. 171; *Shambehari v. Emperor*, 20 Cr. L. J. 271=50 I. C. 31.

(8) *Empress v. Chunia*, Rat. Un. Cr. Cas. 914.

(9) *Olayat Khan v. Emperor*, 1 Pat. 589 (500)=71 I. C. 246 (247)=4 Pat. L. T. 98=(1922) Pat. 587=24 Cr. L. J. 118.

commission of the offence, it should discharge the accused(1). If the appellate court is unable, even with the aid of the Magistrate's finding of fact, to form an independent judgment, as to whether the prisoners had committed the offence or not the accused ought to be acquitted(2). It is not necessary in criminal cases that the appellant should clearly establish that the order of the lower court was wrong, and in this respect a criminal appeal differs from a civil appeal(3). The sound rule to apply in trying a criminal appeal where questions of fact are in issue is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one. There the court must be convinced, before reversing a finding of fact by a lower court that the finding is wrong(4). The powers conferred by the Code upon a court of appeal are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge which he has to meet(5).

Duties of appellate court.—It is the duty of an appellate court in dealing with an appeal preferred to it, to consider the evidence, both oral and documentary, and to apply its mind to the case before recording a judgment therein. Where an appellate court fails to do this, its judgment cannot be said to be in accordance with law(6). The court of a Sessions Judge is the final court on facts, and it is incumbent on the Sessions Judge in appeal to go into the evidence and to refer to it in such a manner as to show that he has applied his mind intelligently and carefully to the consideration of the evidence(7). An appellate court is bound precisely in the same way as the court of first instance to test evidence extrinsically as well as intrinsically even though it is bound to give every reasonable weight to the conclusion which the original court has arrived at upon a question depending upon evidence(8). It is the duty of the appellate court, to look into the evidence for the defence, and after dealing with it to come to a decision thereon, notwithstanding that the counsel for the appellant has practically ignored it during his arguments(9). In an appeal from a conviction and sentence, it is for the appellate court to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the accused has been established beyond all reasonable doubt. It is not for the appellants to satisfy the appellate court that the first court had come to a wrong finding(10). It is the duty of the appellate court to come to a definite finding of its own

(1) *Milan Khan v. Sagai Bepari*, 23 O. 347 (349); *Maula Bakhsh v. Empress*, 6 P. R. 1898 Cr.; *Ma Ka v. Po Saw*, 4 L. B. R. 340.

(2) *Kheraj Mullah v. Janab Mulla*, 20 W. R. 13 Cr.

(3) *Milan Khan v. Sagai Bepari*, 23 O. 347 (348).

(4) *Protap Chander v. Empress*, 11 O. L. R. 25.

(5) *Debi Singh v. Emperor*, 16 Cr. L. J. 598—30 I. O. 151.

(6) *Narain Prasad v. Emperor*, 1 Pat. L. T. 716—21 Cr. L. J. 648—57 I. C. 664; *Emperor v. Nur Ahmad*, A. I. R.

1934 A. 842—3 A. W. R. 783—151 I. C. 114—1934 A. L. J. 839—1934 All. L. R. 793—1934 Cr. O. 1028—35 Cr. L. J. 1229a (The powers of the appellate court are exactly the same in the case of an order of acquittal as in the case of an order of conviction.)

(7) *Jivan v. Emprer*, 72 I. O. 519—1 Pat. L. R. 55—4 Pat. L. T. 502—24 Cr. L. J. 407.

(8) *In re v. Goomanee*, 17 W. R. Cr. 59.

(9) *Fidoi Hossein v. Emperor*, 40 O. 376.

(10) *Kanchan v. Emperor*, 42 O. 876.

jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular acquittal complained by the Government(1). If the Local Government has filed no appeal from the acquittal of an accused on a particular charge, it is not open by the High Court in an appeal by the accused, from his conviction on another charge to take an independent view of the evidence and come to a finding contrary to the one arrived at by the lower court in acquitting the accused(2). But in one case it has been held otherwise(3). In criminal appeals by accused persons, where questions of fact are at issue the sound rule is to consider whether the conviction is right, and by analogy the sound rule on such questions in an appeal against an acquittal is to consider whether the acquittal is wrong(4). In order to justify interference with a judgment of acquittal on a question of fact it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate court whether or not the unreasonableness amounts to perversity, stupidity or incompetence, but upon sound principles of criminal jurisprudence the indications of errors in the judgment of the acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction(5). There is nothing in the language of this clause to differentiate the way in which the powers of the appellate court are to be exercised according as it is a Jury trial or not. The language of the section is wide enough to enable the court to deal with the entire case on an appeal against an order of acquittal, though in a Jury trial, and finally dispose of the same(6).

Objections raised at late stage.—It would not be proper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government(7). But an objection that the Jury were not empanelled in the manner prescribed by law will be taken notice of by the High Court, even if it is raised at a late stage, as it involves a question of jurisdiction going to the root of the trial(8). A ground of objection not taken in the petition of appeal may be allowed, if it has not prejudiced the accused, and sufficient time has been given to the other side to be prepared for the same(9).

(1) *Empress v. Karigowda*, 19 B. 51.

(2) *Kishan Das v. Emperor*, 118 I. C. 478=30 Cr. L. J. 944=1st Rul. 1929 Nag. 265=A. I. R. 1929 Nag. 325.

(3) *Dhanpat Singh v. Emperor*, 18 Cr. L. J. 982=42 I. C. 598=(1917) 1st. 297=2 Pat. L. W. 188.

(4) 17 C. P. L. R. 75 (87).

(5) *Emperor v. Dhanpat Singh*, 18 Cr. L. J. 982=42 I. C. 598.

1573=56 A. 354; *Ram Nidh v. Ram Saran*, 81 I. C. 314=26 O. C. 281=1924 O. 64=25 Cr. L. J. 794; see *Empress v. Gaya Din*, 4 A. 148; *Emperor v. Nur Ahmad*, A. I. R. 1934 A. 842=3 A. W. R. 783=151 I. C. 114 (Presumption of innocence is neither strengthened by acquittal nor weakened by conviction).

(6) *Government of Bengal v. Santi Ram*, 58 C. 96=A. I. R. 1930 C. 370=127 I. C. 657; See *Champa v. Emperor*, 108 I. C. 81=1928 P. 326.

(7) *Empress v. Kargowda*, 19 B. 51.

(8) *Intaz Mandal v. Emperor*, 115 I. C. 522=32 O. W. N. 1172=1929 C. 92.

(9) *Reg v. Farnajirav*, 12 Bom. H. C. R. 1 (7); See also *Ram Lotan v. Emperor*, 6 Luck. 886=A. I. R. 1931 O. 113=15 A. I. R. Cr. R. 312=1931 Cr. O.

LUCK. 886=A. I. R. 1931 O. 113=15 A. I. R. Cr. R. 312=1931 Cr. O.
 R. 428=32 Cr. L. J. 691=A. I. R. 1931 O. 116; *Mohammadi v. Emperor*, A. I. R. 1931 Nag. 121; *Emperor v. Shéo Janak*, A. I. R. 1934 A. 27=31 A. L. J.

appellant or his pleader from replying to the arguments of the Public Prosecutor in an appeal, and as a matter of principle such right of reply should be conceded to him(1). An accused has no right of reply under this section, but the privilege of replying should never be refused by an appellate court(2). A private prosecutor cannot claim to be heard, as of right, in a criminal appeal although the court may in its discretion hear him in support of the judgment(3). Consequently, when a conviction is set aside after hearing the appellant and without hearing the pleader who appears for the private complainant, the order of acquittal is not bad in law(4). If, however, the Public Prosecutor does not appear on behalf of the Government, a vakil privately instructed to support the prosecution may be heard(5).

Applicability of the clause.—It is only s. 417 which provides for appeal against orders of acquittal, and that section requires that such an appeal should be (i) directed by Government, (ii) presented to the High Court. Accordingly cl. (a) of this section can only apply to the High Court(6). A Deputy Magistrate has no power, under this section, to reverse an order acquitting an accused person of a charge of theft. The words "reverse the finding and sentence" in cl. (b) mean reverse the finding upon which a conviction is based, and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High Court) to reverse or set aside an acquittal(7). But an appellate court has jurisdiction to reverse a finding of acquittal "upon facts upon which there was a conviction in the first court under another provision of the law(8). A Sessions Judge has, however, no power to set aside the order of acquittal and direct the commitment of the accused to the Court of Session(9) or to direct further inquiry to be made in a case of acquittal by a Magistrate. Such a power can be exercised only by the High Court(10).

Appeal against acquittal.—In an appeal against acquittal under s. 302 of the Indian Criminal Procedure Code, the appellate court may uphold the order of acquittal and to convict the accused of an offence, with which he was not charged in the court below, but of which he might have been convicted under section 237 of the Code(11). But the High Court in exercising

(1) *Bala Singh v. Crown*, 21 P. B. 1917 Cr. 18 Cr. L. J. 3—36 I. C. 835; *Promoda Bhushan Ray v. Emperor*, 11 C. W. N. XLIII, *Amanat Sardar v. Nagendra*, 38 Cal. 307.

(2) *Bahra v. Emperor*, 82 I. C. 37—23 Cr. L. J. 1173—A. I. R. 1925 O. 60.

(3) *Behari v. Hari*, 85 C. W. N. 976—54 C. L. J. 144—A. I. R. 1932 O. 61—1932 Cr. O. 9—33 Cr. L. J. 305—17 A. I. Cr. R. 477—186 I. C. 474; *Akbar v. Emperor*, 29 P. R. 1886 Cr.; 7 M. H. O. R. App. 12; 9 C. W. N. 15.

(4) *Behari v. Hari*, 85 C. W. N. 976. (5) 2 Welb. 476.

(6) *Rangaswami v. Narasimhulu*, 7 M. 213 (214).

(7) *Sami Ayyar v. Emperor*, 26 M. 478; *Kishan Dass v. Emperor*, 118 I. C. 473—30 Cr. L. J. 914—Ind. Rul. (1929) Nag. 265—A. I. R. 19:29 Nag. 325.

(8) *Dhanpat Singh v. Emperor*, 18 Cr. L. J. 993—42 I. C. 503—(1917) Pat. 297—2 Pat. L. W. 168; *Cl. Kishan Das v. Emperor*, 118 I. C. 473—30 Cr. L. J. 914.

(9) 2 C. W. N. clvi.

(10) *Baijanath v. Gauri Kanta*, 20 C. 633.

(11) *Emperor v. Ismail*, 20 Decm. L. R. 330—108 I. C. 501—10 A. L. Cr. R. 118—A. I. R. 1923 Decm. 130—29 Cr. L. J. 403—52 B. 555; *Begu v. Emperor*, 6 Lah. 229.

grave reasons for doing so(1). The power of ordering a retrial under this section should be exercised with discretion. A retrial may properly be ordered when the original trial is void for want of jurisdiction, or for misjoinder, or when the inquiry has been obviously superficial and material witnesses have not been examined(2). A retrial should not be ordered with the object of enabling the prosecution to fill up deficiencies in the evidence of the prosecution(3). The appellate court has no power to order a retrial when there is no evidence against the accused but it ought to acquit the accused(4). Before quashing the conviction and ordering a new trial on the ground that though the accused was shown by the evidence to have committed some offence he has been convicted under a wrong section, the appellate court must come to a certain conclusion as to the offence which the accused has shown by the evidence to have committed, and it ought to consider whether, if the evidence showed that the accused should properly have been convicted of another offence than that he was charged with he would be prejudiced by amending the conviction. Before ordering a retrial, the appellate court is bound to see what possible object could be served by a fresh trial(5).

Re trial when to be ordered : Want of jurisdiction.—An order for re-trial would be proper where the trial was illegal, irregular or defective, *e. g.*, (i) where evidence was improperly rejected by the lower court; (ii) where the court comes to the conclusion that the accused, rightly acquitted of one offence, ought to have been tried for another offence; (iii) where persons who ought not to have been tried together have been so tried(6). The meaning of the words in cl. (b), "or order him to be tried by a court of competent jurisdiction subordinate to such appellate court, or committed for trial," is as follows: "If in an appeal from a conviction the appellate court finds that the accused person, who was triable only by a Magistrate of the first class, or by a court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate court may in that case reverse the finding and sentence, and order the accused to be retried by a Magistrate of the first class or by the Court of Session"(7). There is, however, nothing in the language of cl. (b) to limit the power of an appellate court to direct a retrial to cases in which the trying Magistrate had no jurisdiction(8). The appellate court may order the accused to be retried by a court of competent jurisdiction subordinate to such appellate court, when it appears to the appellate court that the convicting Magistrate, though of competent jurisdiction to try the case, was not competent to punish the accused adequately(9).

(1) *Emperor v. Mohanlal*, 13 A L J. 477; *Emperor v. Moula Baksh*, 15 A. 205.

(2) *Hamdu Meah v. Emperor*, 8 I. C. 594=8 Bur. L. T. 9=11 Cr. L. J. 684

(3) *Ibid*

(4) 9 Cr. L. R. 263.

(5) *Re Jyachikone*, 2 Weir 480

(6) *Jeremiah v. Vas*, 12 I. O. 961=10 M. L. T. 506=(1911) 2 M W N, 576=12 Cr. L. J. 585=22 M. L. J. 73,

(7) *Empress v. Sukha*, 8 A. 14=(1895) A. W. N 298; *Hamdu Miah v. Emperor*, 3 Bur. L. T. 9=11 Cr. L. J. 684=8 I. O. 594; 2 Weir 482; 2 Weir. 484; see also *Abdul Ghaniv. Emperor*. 29 C. 412.

(8) *Sarat Chandra v Emperor*, 7 C. W. N. 301.

(9) *Dani v. Empress*, 16 P. R. 1895 Cr.

Further inquiry.—This section does not enable a court of appeal to direct that further inquiry be made into a case, in which an order of discharge or dismissal may have been passed. This clause confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal(1).

Clause (B) : Powers in appeal from order of conviction.—In an appeal from a conviction, the appellate court may, under this section, reverse the finding and sentence and order the accused to be retried by a court when it appears to the appellate court that the convicting Magistrate, though of competent jurisdiction to try the case was not competent to punish the accused(2). The provisions of this section do not preclude an appellate court, when it reverses the finding and sentence under appeal, from trying the offender itself, if the offence is one ordinarily triable by it. In such cases, the appellate court takes cognizance under section 190 (b) and not section 190 (c)(3), though there is authority to the contrary also(4). Before an appellate court can set aside a conviction, it must be satisfied that the conviction is wrong. It seems a logical consequence of this that when without finding the conviction to be wrong the appellate court set it aside, the appellate order would be *ultra vires*(5). The sound rule to apply in trying a criminal appeal where questions of fact are in issue, is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one. There the court must be convinced, before reversing a finding of fact by a lower court, that the finding is wrong(6). Where, therefore, the Sessions Judge admitted that he was "perplexed by the difficulties and incongruities of the case," but upheld the conviction on the ground that an appellate court should not interfere with the finding of the first court unless clearly convinced that it was erroneous, it was held that the judgment of the Sessions Judge must be set aside, and the appeal heard *de novo*(7). An appellate court should not set aside a conviction on the ground that all the witnesses cited for the defence were not examined. The proper course in such a case is to have the evidence taken of the other witnesses before disposing of the appeal(8). But in a case where the lower court has refused to take the defence of the accused, the proper procedure is to set aside the conviction and sentence, and direct the Magistrate to begin the proceedings anew against the accused from the stage when his evidence was refused(9).

Re-trial.—A Sessions Judge has power to order a new trial when the case comes before him in appeal. This power should, however, be sparingly exercised and a retrial should not be ordered unless there are

273=32 Cr. L. J. 91=128 I. C. 209=7 O. W. N. 972.

(1) *Choroobala v. Barendra*, 27 G. 126; Iyer P. 1387.

(2) *Dani v. Empress*, 16 P. R. 1895 Cr. A person dealt with under s. 562 has a right of appeal: *Mavandi Nadar v. Pala Kuduban*, A. I. R. 1935 M. 167.

(3) *Emperor v. Mainilka Gram-mant*, 30 M. 223.

(4) *G. C. Sircar v. Emperor*, 3 Rang 68=4 Bur. L. J. 29=26 Cr. L. J. 1119=

A. I. R. 1925 Rang 230=23 I. C. 257.

(5) *Emperor v. Sheikh Rasul*, 17 C. P. L. R. 97.

(6) *Prolat Chunder v. Emperor*, 11 O. L. R. 25; followed in *Milan Khan v. Bagai*, 23 C. 347; But see *Empress v. Soyucan Lal* 5 A. 3-6; *Empress v. Ithibhuti*, 17 C. 485.

(7) *Empress v. Maula Buz*, 6 P. R. 1893 Cr.

(8) *Re Turaka Pakir*, 2 Welc. 451.

(9) *Gohar v. Empress*, 23 P. R. 1854 Cr.

jurisdiction to try the charge against the accused committed an error in procedure in convicting the accused upon evidence which was not given in their presence, held, that the court was competent to order a re-trial(1). An order of re-trial is necessary and proper in a case where the conviction is reversed on account of an irregularity in the procedure by which material evidence is excluded(2). Where the trial court has failed to record a judgment in conformity with section 367, the proper procedure for the appellate court is to reverse the order of the court below and to remand the case for a hearing *de novo*(3).

Jury trial.—A re-trial may be ordered in a case in which the appellate court sets aside the conviction on the ground of misdirection to the Jury(4). If the court is of opinion that on the evidence appearing from the record, there is a case which ought to have been investigated by a Jury, it may direct the appellant to be re-tried according to law(5). But a Sessions Judge cannot direct a retrial of the accused in respect of the offences of which they were acquitted by the trial Judge(6).

Omission to make order for re-trial.—When a Sessions Judge on appeal annuls the conviction of a Magistrate for want of jurisdiction, and omits to order a re-trial at the time under this section, he is not precluded, from passing such an order subsequently. The order annulling the conviction in such a case does not amount to an acquittal(7). If the original trial is held by a Magistrate who has no power to hold it, the Sessions Judge, on appeal, need not order a retrial inasmuch as the former trial by an incompetent Magistrate is no trial at all(8). Where the High Court on appeal set aside the verdict of the Jury who convicted the accused and observing that it would be open to the Crown to proceed further with the case, if so advised, directed the petitioner to be released on bail until fresh trial, if any, it was held that the order amounted to an order of re trial(9).

Scope of re-trial.—When a conviction is set aside and a re-trial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed(10). A contrary decision was given in the following circumstances. Accused who were tried under four charges were acquitted of two charges but convicted of the two other charges. No appeal was filed against the order of acquittal; but accused appealed from the order of conviction. The case was sent back for retrial, whereupon the lower court Judge framed charges under the sections, the offences of which the accused were already acquitted and convicted them. It was held that the appellate court Judge could order re-trial only of the charges on which the accused were convicted and

(1) *Re Pira Naicken*, 2 Weir. 481.

(2) *Empress v Sada Shiv*, Bat Un. Cr. Cas 938; *Jeremiah v. Vas*, 36 M. 457.

(3) *Karupiah v. Emperor*, (1920) M W N 120.

(4) *Sadhu Sheikh v. Empress*, 4 C. W. N. 576.

(5) *Brendra Lal v Emperor*, 30 C. 822—7 C. W. N 639.

(6) *Nitya Gopal v. Emperor*, A. I., R. 1935 C 120.

(7) *Rami Reddi v. Seshu Reddi*, 3 M. 48; *Sikandar Lal v. Emperor*, 1929 Lah 692—1929 Cr. O 219.

(8) *Abdul Ghani v. Emperor*, 29 C. 412.

(9) *Beni Madhab v Emperor*, 46 C. 212—23 C. W. N. 94—20 Cr. L. J. 225—49 I. C. 849.

(10) *Nazimuddi v. Emperor*, 40 C. 163—13 Cr. L. J. 497—15 I. C. 641; *Krishnadhan v. Empress*, 22 C. 377; See *Abdul Hamid v. Emperor*, A. I.

Re trial may be ordered when court of appeal finds accused guilty of another offence.—Where a Sessions Judge on appeal is of opinion that the appellant ought to have been convicted of an offence different from that with which he was charged in lower court he ought to annul the conviction and order the retrial of the case according to law(1). If on appeal from a conviction the Judge finds that the evidence discloses the commission of a more serious offence he may set aside the conviction and sentence and order the accused to be retried by a court of competent jurisdiction or commit for trial according to the nature of the evidence against him(2). But the appellate court should come to a definite conclusion as to the offence which the accused is shown by the evidence to have committed(3).

Illegal trial of accused along with another person.—An appellate court, when setting aside the conviction and sentence in a warrant case on the ground that the accused has been illegally tried along with another person is competent to direct that the accused be retried on a fresh charge framed on the evidence already recorded for the prosecution(4). An appellate court in discharging the accused on the ground of misjoinder of parties has power to add to that order a direction that the accused should be retried. It cannot be contended that further proceedings should be left in the discretion of the Magistrate. There is no reason at all why the superior court should not point out to the Magistrate the course which should be taken in such a matter(5).

Absence of a charge or defect in a charge.—A Sessions Judge has the power to direct a retrial to be had upon a charge, framed in whatever manner he thought fit, on the ground that the accused had been misled in their defence by the absence of a charge or a defect in the charge(6). Where an accused was charged under s. 471 of the Penal Code of dishonestly using as genuine a false document; and the Magistrate convicted him under s. 500 of that Code of defamation, of which offence there was no charge framed against him, it was held that the Sessions Judge, if he thought a new trial necessary, should have proceeded under s. 232, under which an appellate court is competent to direct a retrial, and not, as he did, under s. 423(7).

Trial invalid on legal grounds.—A retrial ought to be ordered if it is found that the accused has not been properly convicted(8). Where a trial has been invalidated on legal grounds, and the real question in the case has not been legally tried, a retrial ought to be held unless it appears from the record that there is no evidence against the prisoner or that there is no evidence against the prisoner(9). Where there has been irregularity in the trial, the appellate Judge is competent to order a retrial(10).

(1) *Empress v. Ram Prasad*, (1882) A. W. N. 112.

(2) 11 C. W. N. O. (Jour).

(3) *De v. D. v. D.*, 11 C. W. N. O. 400.

(4) *De v. D. v. D.*, 11 C. W. N. O. 400.

(5) *De v. D. v. D.*, 11 C. W. N. O. 400.

C. W. N. O. 400.

(7) *Kumudini v. Empress*, 28 C. 104.

(8) *Abdool v. Khater*, 3 C. W. N. 332.

(9) *Durga Charan v. Emperor*, 8 C. L. J. 59.

(10) *Govind v. Garth*, 23 C. 63=5 C. W. N. 819.

again(1). The fact that a Sessions Judge obviously failed to apply his mind to the determination of questions before him, and declined to adjudicate therein himself, because the police did not attempt to adjudicate as to the guilt or innocence of persons implicated, is an indication of a complete misconception of the respective duties of the courts and the Police, and the High Court will in such a case, under the wide powers conferred upon it by this section, direct a lower appellate court to retry an appeal which was before it for determination(2).

'By a court of competent jurisdiction.'—Where an appellate court reverses a conviction and sentence it can, under this section, order the appellant to be retried by a specified court of competent jurisdiction(3). If an order for retrial is made by the High Court and it is not stated in the order whether the retrial is to be held by the same Magistrate or by some other Magistrate, then it should not be presumed that it was the intention of the court to direct that the retrial should be held by the same Magistrate. The matter is left entirely to the discretion of the Magistrate who has got to appoint the court by which the case is to be tried(4). An appellate court may order retrial of an accused person by another court of competent jurisdiction, even where the first trial has been held by the court of competent jurisdiction(5). If an appellate court finds that the accused had committed another offence which the lower court was not competent to try, the appellate court ought to order a retrial by a court competent to try the offence(6). This section does not empower an appellate court to try the accused person itself(7), though there is authority to the contrary also(8).

Order of commitment.—It is competent to a Sessions Judge acting as a court of appeal under this section, having reversed the finding and sentence, to order the appellant to be committed for trial to the Court of Session(9). This section is not limited to cases triable exclusively by the Court of Sessions. An appellate court has under this section the power to order an accused person to be committed for trial by the Court of Sessions in cases which are not exclusively triable by the court of Sessions(10). Clause (b) gives to an appellate court the power to order an accused person to be committed for trial when it considers that that is the procedure that should have been adopted by the Magistrate in the case(11). Where there is no competent Magistrate to try the offence, a committal may be ordered(12). A commitment may be ordered by the appellate court if it is of opinion

(1) *Bhola Nath v. Emperor*, 7 O. W. N. 30.

(2) *Emperor v. Chanda Singh*, 2 P. R. 1912 Cr. = 13 Cr. L. J. 737 = 43 P.W.R. 1912 Cr. = 7 P. L. R. 1913 = 17 I. O. 49.

(3) *Empress v. Kasturbhai*, Rat. Un. Cr. C. 367.

(4) *Bali Ram v. Sita Ram*, 30 C. W. N. 1002 = 97 I. C. 948 = 1926 Cal. 1173 = 27 Cr. L. J. 1188.

(5) *Empress v. Shaik*, P. J. L. B. 238.

(6) *Empress v. Sukha*, 8 A. 14; 2 Weir. 484.

(7) *G. C. Sircar v. Emperor*, 88 I. C. 257 = 4 Bur. L. J. 29 = A. I. B. 1925 R. 230

= 3 Rang. 68 = 26 Cr. L. J. 1119; *Dheraji v. Akasi*, 24 A. L. J. 506 = 95 I. O. 385 = L. R. 7 A. 123 = 1926 A. 429 = 27 Cr. L. J. 785; *Empress v. Fakira*, Rat. Un. Cr. Cas. 981.

(8) *Emperor v. Manikla*, 30 M. 228 = 2 M. L. T. 46; 2 Weir. 481.

(9) *Empress v. Maula Bukhsh*, 15 A. 205 = (1893) A. W. N. 105, overruling *Empress v. ...*

(10) *Emperor v. Abdul Rahiman*, 16 B. 580.

(11) *Emperor v. Abdul Rahiman*, 16 B. 580.

(12) 2 Weir. 484.

against which appeal was filed, and that the lower court Judge was not justified in framing charges and convicting them under sections of which offence they had already been acquitted(1). When an order is passed by the appellate court under this section and not under s. 428 the court cannot restrict the evidence to be taken to that mentioned in its order, but it should order the case to be retried in view of the instructions contained and its order. The accused is entitled to adduce such additional evidence as he may desire(2). Thus, where on an appeal against a conviction and sentence the Sessions Judge remanded the case to the trying Magistrate to be retried on the evidence recorded during the first trial, the High Court held that the order passed by the Sessions Judge was irregular(3).

Retrial when not to be ordered.—A Sessions Judge can order retrial under this section only in certain circumstances rather for supplying formal defects but hardly where the prosecution has hopelessly broken down in every respect a retrial cannot be ordered so as to enable the prosecutor to substantiate some new charge against the accused, or to produce evidence which might easily have been produced at the first trial(4). Where the only defect in the procedure of the lower court was the omission to bring on record certain evidence it can be cured by letting in evidence which was omitted. A retrial of the whole case is unnecessary(5). If the Magistrate's decision is not as satisfactory, as the Sessions Judge thinks it should, it is his duty as Session Judge to go into the whole facts fully and dispose of the case; he cannot devolve this duty on the Magistrate who tried the case(6). Where there is ample evidence on the record to enable the Sessions Judge to decide the appeal on its merits and there is no reason to suppose fresh evidence would be forthcoming at a trial, there are no grounds for ordering a retrial. If inadmissible and irrelevant evidence has been admitted the same should be separated(7). A retrial should not be ordered with the object of enabling the prosecution to fill up deficiencies in the evidence of the prosecution(8).

Retrial of appeal—Where in the judgment of the appellate court no facts are stated, nor reasons are given of the conclusions arrived at by the appellate court in upholding the conviction, the deficiency in the judgment cannot be made up by having recourse to the judgment of the Magistrate who convicted the accused. The appeal must be tried

R. 1927 Pat. 13=97 I. O. 364=27 Cr. L. J. 1100-6 Pat 208=8 Pat L. T. 12=7 A. I. Cr. R. 164.

(1) *Lala v. Emperor*, A.I.R. 1933 A. 941=31 A. L. J. 1446=56 A. 210=1933 Cr. C. 1561=15 L. R. A. Cr. 24=21 A. I. Cr. R. 24.

(2) *Saricar Jan v. Emperor*, 3 C. L. J. 303=3 Cr. L. J. 304.

(3) *Basu Singh v. Emperor*, 3 Pat. L. W. 224; *Gajanand v. Emperor*, 1 Pat. L. J. 99.

(4) *Rathnavelu v. Emperor*, (1930) M. W. N. 191=3 Mad. Cr. Cas. 92=123 I. C. 497=A. I. R. 1930

M. 189; *Dara Lakshmi v. Satyanarayana*, A.I.R. 1931 M. 227=1930 M. W. N. 1215=4 M. Cr. C. 79=1931 Cr. C. 323=131 I. C. 454=32 Cr. L. J. 753=35 L. W. 98.

(5) *Ishwar Prasad v. Emperor*, 16 A. L. J. 325=19 Cr. L. J. 485=45 I. C. 149; *Emperor v. Luchman*, 31 C. 710.

(6) *Tara Chand v. Emperor*, 32 C. 1069.

(7) *Boudville v. Emperor*, 1 Bur. L. J. 92; *Empress v. Maganlal*, Rat. Un. Cr. C. 630.

(8) *Hamdu v. Emperor*, 8 I. C. 594=3 Bur. L. T. 9=11 Cr. L. J. 684.

again(1). The fact that a Sessions Judge obviously failed to apply his mind to the determination of questions before him, and declined to adjudicate therein himself, because the police did not attempt to adjudicate as to the guilt or innocence of persons implicated, is an indication of a complete misconception of the respective duties of the courts and the Police, and the High Court will in such a case, under the wide powers conferred upon it by this section, direct a lower appellate court to retry an appeal which was before it for determination(2).

'By a court of competent jurisdiction.'—Where an appellate court reverses a conviction and sentence it can, under this section, order the appellant to be retried by a specified court of competent jurisdiction(3). If an order for retrial is made by the High Court and it is not stated in the order whether the retrial is to be held by the same Magistrate or by some other Magistrate, then it should not be presumed that it was the intention of the court to direct that the retrial should be held by the same Magistrate. The matter is left entirely to the discretion of the Magistrate who has got to appoint the court by which the case is to be tried(4). An appellate court may order retrial of an accused person by another court of competent jurisdiction, even where the first trial has been held by the court of competent jurisdiction(5). If an appellate court finds that the accused had committed another offence which the lower court was not competent to try, the appellate court ought to order a retrial by a court competent to try the offence(6). This section does not empower an appellate court to try the accused person itself(7), though there is authority to the contrary also(8).

Order of commitment.—It is competent to a Sessions Judge acting as a court of appeal under this section, having reversed the finding and sentence, to order the appellant to be committed for trial to the Court of Session(9). This section is not limited to cases triable exclusively by the Court of Sessions. An appellate court has under this section the power to order an accused person to be committed for trial by the Court of Sessions in cases which are not exclusively triable by the court of Sessions(10). Clause (b) gives to an appellate court the power to order an accused person to be committed for trial when it considers that that is the procedure that should have been adopted by the Magistrate in the case(11). Where there is no competent Magistrate to try the offence, a committal may be ordered(12). A commitment may be ordered by the appellate court if it is of opinion

(1) *Bhola Nath v. Emperor*, 7 O. W. N. 30.

(2) *Emperor v. Chanda Singh*, 2 P. R. 1912 Cr = 13 Cr. L. J. 737 = 43 P.W.R. 1912 Cr = 7 P. L. R. 1913 = 17 I. O. 49.

(3) *Empress v. Kasturbhai*, Rat. Un. Cr. C. 367.

(4) *Bali Ram v. Sita Ram*, 30 C. W. N. 1002 = 97 I. C. 948 = 1926 Cal. 1173 = 27 Cr. L. J. 1168.

(5) *Empress v. Shaik*, P. J. L. B. 238.

(6) *Empress v. Sulha*, 8 A. 14; 2 Weir. 481.

(7) *G. C. Sircar v. Emperor*, 68 I. C. 237 = 4 Bur. L. J. 29 = A. I. B. 1925 R. 230

= 3 Rang. 68 = 26 Cr. L. J. 1119; *Dheraji v. Akasi*, 24 A. L. J. 506 = 95 I. C. 385 = L. R. 7 A. 123 = 1926 A. 429 = 27 Cr. L. J. 785; *Empress v. Fakira*, Rat. Un. Cr. Cas. 981.

(8) *Emperor v. Manikha*, 30 M. 228 = 2 M. L. T. 46; 2 Weir. 481.

(9) *Empress v. Maula Bukhsh*, 15 A. 205 = (1893) A. W. N. 105, overruling *Empress v. Sukha*, 8 All. 14.

(10) *Misirilal v. Lachmi Narain*, 23 O. 350; *Empress v. Abdul Rahiman*, 16 B. 580.

(11) *Emperor v. Abdul Rahiman*, 16 B. 580.

(12) 2 Weir. 484.

that the Magistrate though of competent jurisdiction to try the case was not competent to punish the accused adequately(1). If the proceedings of a Magistrate are merely improper but not void, the proceedings should not be set aside and the appellant ought not to be committed for trial when there was no failure of justice(2). Clause (b) does not authorise a Sessions Court to commit a case to itself but only empowers it as a court of appeal to direct a competent Magistrate to make a commitment to itself(3). Section 215 of the Code does not apply to a commitment ordered by Sessions Judge under section 423, but the High Court can deal with the order of a commitment in exercise of its powers of revision(4).

Alteration of finding—An appellate court is empowered to alter the finding and to convict the appellant for an offence which the facts established by the prosecution properly constitute(5). The power of an appellate court under clause (b) to alter the finding while maintaining the sentence is not confined to cases falling under sections 237 and 238 of the Code. The finding which an appellate court may alter under cl. (b) may relate either to an offence with which the accused is apparently charged in the lower court or to one of which he might be convicted under sections 237 and 238 without a distinct charge. In cases not falling under ss. 237 and 238 he cannot be convicted of an offence with which he was not charged in the lower court. Where, however, he has been charged and the lower court has recorded a finding on such charge, the appellate court can alter the finding(6). In the case of an accused person charged with offence under more than one section of the Penal Code, it is open to the appellate court under this section, to alter the conviction from one section to another, even though the trial court may have acquitted the accused under the later section(7). But in convicting an accused of an offence with which he was not charged in the lower court, the appellate court can act only in accordance with the provisions of sections 237 and 238 of the Code(8). So, where an accused person has been charged only with murder and has been convicted and the conviction is set aside by the High Court on appeal that court cannot alter the conviction to one under one of the sections of the Penal Code dealing with offences against property(9). Where the Court of Sessions had tried, convicted, and sentenced an accused person under s. 409 of the Penal Code, and the High Court was of opinion that the conviction was not sustainable under that

(1) *Dani v. Empress*, 16 P R 1895 Cr.

(2) *Ayyan v. Vellayappa*, 21 M. 675
—2 Weir, 699.

(3) (1907) A. W. N. 178

(4) *Emperor v. Nga Thet She*, 11
L. B. R. 375=77 I. C. 98=A. I. R.
1922 L. B. 40=25 Cr. L. J. 518, *Ram*
Samujh v. Emperor, 11 O L J 748=
1 O W. N. 625=25 Cr. L. J. 1975=82
I. C. 767=A. I. R. 1925 O 33

(5) 13 C. P. L. R. 195.

(6) *Emperor v. ...*

(7) See the cases cited in the last note

and *Janki Prasad v. Emperor*, 6 A. I.
Cr. R. 559.

(8) *Padmanaba v. Emperor*, 7 M. L.
T. 78=5 I. C. 145=20 M. L. J. 84;
Emperor v. Sakharan, 8 Bom. L. R.
120; *G C Sircar v. Emperor*, 8 Rang
68=4 Bur. L. J. 29; *Mahabir v.*
Emperor, 49 A. 120=24 A. L. J. 598=
27 Cr. L. J. 1118=97 I. C. 430.

(9) *Wallu v. Crown*, 4 Lah. 373;
Ghaus v. Emperor, 7 Lah. 561=27
P. L. R. 610=27 Cr. L. J. 1004=96 I. C.
860=2 Lah. Cas. 316=A. I. R. 1926 Lah.
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(4) *Bali Ram v. Sita Ram*, 30 C. W. N. 1002 = 97 I. C. 918 = 1925 Cal 1173 = 27 Cr. L. J. 1188.

(5) *Empress v. Shaik*, P. J. L. B. 238.

(6) *Empress v. Sukha*, 8 A. 14; 2 Weir. 484.

(7) *G. C. Sircar v. Emperor*, 88 I. C. 257 = 4 Bur. L. J. 29 = A. I. B. 1925 R. 230

= 3 Rang. 68 = 26 Cr. L. J. 1119; *Dheraji v. Akasi*, 24 A. L. J. 506 = 95 I. C. 985 = L. R. 7 A. 123 = 1926 A. 429 = 27 Cr. L. J. 785; *Empress v. Fakira*, Rat. Un. Cr. Cas. 981.

(8) *Emperor v. Manikka*, 30 M. 228 = 2 M. L. T. 46; 2 Weir. 481.

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(4) *Emperor v Nga Thet She*, 11
L. B R 375=77 I. C 982=A I R.
1922 L. B 40=25 Cr L J 518. *Ram*
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(5) 13 C P L R 195.
(6) *Golla Hanumappa v. Emperor*,
35 M 243, *Sharif v. Emperor*, A I. R.
1933 Pesh. 9=1933 Cr C 151=142 I. C.
162=34 Cr L J 266=19 A I. Cr. R. 365.

(7) See the cases cited in the last note

and *Janki Prasad v Emperor*, C A. I.
Cr R, 559

(8) *Padmanaba v. Emperor*, 5 M L.
T 78=5 I. C. 145=20 M L J. 84;
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68=4 Bur L. J. 29; *Alahabir v.*
Emperor, 49 A 120=24 A. L. J. 928=
27 Cr L J. 1118=97 I. C 480

(9) *Wallu v. Crown*, 4 Lah. 373.
Ghauvs v Emperor, 7 Lah. 561=27
P. L. R. 610=27 Cr L. J. 3004=96 I. C.
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section, the court refused to alter the finding, under this section to a conviction for some other offence for which the accused had not been charged or tried(1). A charge cannot be so altered by an appellate court as to make it necessary for an accused to meet an absolutely different case from that with which he is charged in the court of the committing Magistrate(2).

Power of appellate court to alter charge or finding into one for graver offence.—An appellate court is competent, acting under this section, to alter a conviction into one of an offence which is graver than the one for which the accused were charged and convicted, provided such a course does not prejudice the accused, and it is not necessary to order a retrial expressly on the altered charge(3). But it is not competent to an appellate court to find a prisoner on appeal guilty of a graver offence than that with which he was charged at his trial, unless an opportunity is afforded to him of defending himself against the altered charge(4). It would obviously be improper and unfair to the accused that on his appeal he should be convicted of a more serious offence to which he had never pleaded on the trial, especially if the new offence was not cognate to the offence for which he was tried and convicted and if there were circumstances of aggravation to which he had not pleaded guilty(5). It is not competent to an appellate court to alter a charge under s. 376 of the Penal Code to one under s. 366 of the Code, inasmuch as the charge under the latter section involves different elements and different questions of fact from a charge under s. 376(6). Nor is it competent to an appellate court to alter a conviction under s. 159 (3) of the Madras Local Boards Act to one under s. 163 (1) of the Act(7). Where certain accused are expressly charged under ss. 304 and 147, and the Sessions Judge simply convicts them under s. 304, but from the language used in his judgment it is clear that he found that the accused were guilty of rioting and that the killing of the deceased and the injuring of certain other villagers were incidents in the course of the riot, it is open to the High Court to convict the accused under s. 147(8).

Power to alter conviction for one offence into conviction for lesser offence.—A court can substitute a conviction for a lesser offence in appeal from that which has been held to have been committed by the court of first instance(9). An appellate court has

(1) *Empress v. Imdad Khan*, 8 A. 120.

(2) *Mula v. Emperor*, 23 A. L. J. 924=26 Cr. L. J. 1494=A. I. R. 1925 A. 33=90 I. C. 150=6 L. R. A Cr 169.

(3) *Kauromal v. Emperor*, 81 I. C. 881=25 Cr. L. J. 1057=A. I. R. 1925 Sind 105.

(4) *In re Dwarka Manjee*, 6 C. L. R. 427.

(5) *Lala Ojha v. Empress*, 26 C. 863; *Emperor v. Po Yin*, 3 L. B. R. 232; *Mi Mo Dha v. Emperor*, 3 L. B. R. 383.

(6) *G. C. Sircar v. Emperor*, 26 Cr. L. J. 1119=3 Rang 68=4 Bur. L. J. 29=88 I. C. 287=A. I. R. 1925 Rang. 230.

(7) *In re Thiruppal*, 87 I. C. 924=21 L. W. 520=A. I. R. (1925) M. 706=26 Cr. L. J. 1036.

(8) *Emperor v. Raghunath*, 55 A. 834=A. I. R. 1933 A. 565=1933 Cr. C. 897=14 L. R. A. Cr 251=20 A. I. Cr. R. 137=145 I. C. 849=1933 A. L. J. 1377=34 Cr. L. J. 1064.

(9) *Jawad Hussain v. Emperor*, 103 I. C. 401=1 Luck. Cas 159=28 Cr. L. J. 673=A. I. R. 1927 Oudh. 296=8 A. I. Cr. R. 321=2 Luck. 505.

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(3) *Kauromal v. Emperor*, 81 I. O. 881=25 Cr. L. J. 1057=A. I. R. 1925 Sind 105.

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(6) *G. C. Sircar v. Emperor*, 26 Cr. L. J. 1119=3 Rang. 68=4 Bur. L. J. 29=88 I. O. 227=1 I. B. 1005 B. I. J. 220.

(7) *Emperor v. Raghunath*, 55 A. 834=A. I. R. 1933 A. 865=1933 Cr. C. 897=14 L. R. A. Cr. 251=20 A. I. O. R. 137=145 I. O. 849=1933 A. L. J. 1877=84 Cr. L. J. 1034.

(8) *Emperor v. Raghunath*, 55 A. 834=A. I. R. 1933 A. 865=1933 Cr. C. 897=14 L. R. A. Cr. 251=20 A. I. O. R. 137=145 I. O. 849=1933 A. L. J. 1877=84 Cr. L. J. 1034.

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power to alter a conviction under section 353 of the Indian Penal Code to one under s. 189 of the same Code(1), or to convert the accused's conviction from one under s. 405 to s. 403, I. P. C.(2). It has likewise power to alter a conviction under section 147 of the I. P. C., to one under section 323 of the same Code(3), though there is authority to the contrary also(4). An appellate court has power under this section to alter a conviction from one under section 353 of the Penal Code to one under section 183(5). It is legal for the appellate court to alter the conviction from one of cheating to one of criminal breach of trust(6). In a trial under s. 368, I. P. C. conviction under s. 366-A can be made even though no specific charge is framed(7). Similarly, in a trial under s. 324, I. P. C. conviction under s. 323 can be made even though the sentence is maintained(8). It is legal for the appellate court to alter the conviction from one under s. 471 to one under section 218 of the Indian Penal Code(9). The High Court on appeal has power to alter a conviction recorded against the appellant from s. 474 to s. 193 of the Penal Code(10). But the alteration of the conviction of the accused from section 325 to section 323 by the appellate court is unauthorised, when they have not been given an opportunity of answering the charge in the first instance of inflicting injuries other than the one charged(11).

Appellate court cannot pass a finding which first court may not have passed.—Clause (b) does not authorise an appellate court to pass a finding which the first court could not have passed. Therefore, where the first court has convicted a person of an offence under s. 150 of the Punjab Municipal Act upon the complaint of a person who is authorised by the committee to prosecute offenders under that section, the appellate court cannot alter the conviction to one under section under which the complainant is not authorised to prosecute(12). Where the accused was convicted for cheating on a general charge and on appeal the conviction was maintained, but for cheating another person, of which altered charge no indication had been given at the trial, it was held that the accused was materially prejudiced and

in contravention of the
altering the finding while

maintaining the sentence, conferred on appellate courts by cl. (b) does not empower those courts to act in contravention to the provisions of

(1) *Ibid.*

(2) *Mangal Prasad v. Emperor*, A. I. R. 1935 O 4

(3) *Hanuman v. Emperor*, 20 A. L. J. 213=23 (r. L. J. 198=65 I. C. 854

(4) *Rakhal Chandra v. Jamini Kanta*, A. I. R. 1926 C. 481=26 Cr. L. J. 1018=87 I. C. 842=30 C. W. N. 528

(5) *Kunhambu v. Emperor*, 19 I. C. 835=(1912) M. W. N. 1110=14 Cr. L. J. 239.

(6) *Jagannath v. Emperor*, A. I. R. 1933 Pat 26=1932 (r. C. 941=142 I. C. 703=24 Cr. L. J. 419

(7) *Emperor v. Ganpat*, A. I. R. 1933

Nag. 259=1933 Cr. C. 930=29 N. L. R. 365=35 Cr. L. J. 28=146 I. C. 832.

(8) *Rangaswami v. Emperor*, 89 M. L. T. 20=A. I. R. 1927 M. 789=104 I. C. 440=63 M. L. J. 694=28 Cr. L. J. 824.

(9) *Janki Prasad Emperor*, A. I. R. 1926 A. 700=7 L. R. A. Cr. 93=27 Cr. L. J. 901=96 I. C. 218

(10) *Empress v. Amrit*, (1890) A. W. N. 86.

(11) *Patal v. Emperor*, 24 Cr. L. J. 812=72 I. C. 72=1924 C. 532.

(12) *Ahmad Din v. Crown*, 4 P. R. 1917 (r.=39 I. C. 479=18 Cr. L. J. 511.

(13) *Rattan Singh v. Emperor*, A. I. R. 1931 Lah. 898=85 P. L. R. 886.

s. 233. Where petitioner and four others were being tried jointly under s. 454, I. P. C. the other four were convicted of the offence and the petitioner of its abetment and in appeal the petitioner was convicted under s. 411/414, I. P. C., it was held that the altered conviction could not be sustained(1).

Power to alter the conviction into one of the element of the composite offence.—Where the accused was convicted of house-breaking by night, under s. 457, I. P. C., and the appellate court altered the conviction to one under s. 414, I. P. C., it was held that section 457, I. P. C. applied to a composite offence, and under sec. 238 of the Code an accused may be convicted of an element of the composite offence, and that under this section it was competent to the appellate court to alter the finding(2).

Altering a finding of acquittal into one of conviction.—The appellate court can, under the provisions of this section, in an appeal from a conviction, alter the finding of the lower court and find the appellant guilty of an offence of which he was acquitted by that court(3).

Where an accused person charged under ss. 148 and 325, Penal Code, is acquitted under s. 148, but convicted under s. 325 by a Magistrate, the Sessions Judge on the accused's appeal can alter the conviction under s. 325 into one under s. 148, I. P. C.(4). Similarly, where three persons are equally guilty of murder but the lower court finds only one of the accused guilty of murder and acquits the others of murder but convicts them of other offences, an appeal opens out the entire case and the appellate court may find all the three persons guilty of murder(5). Where the evidence against certain persons convicted of murder, grievous hurt, etc., is discrepant, and the accused were charged by the lower court also with the offence of rioting and unlawful assembling under s. 149, I. P. C. but acquitted of that charge, it is open to the appellate court to alter the finding of the lower court upon that charge and convict those against whom there is sufficient evidence of the minor offence and acquit the rest(6). Where accused who are charged with offences under ss. 399 and 402 are acquitted under s. 402 but are convicted under s. 399 and the accused file an appeal, the High Court can set aside, if necessary, the order of acquittal under s. 402 if the conviction in respect of the charge under s. 399 cannot be supported. It can alter the finding while maintaining the sentence without enhancing it(7).

Power of High Court to alter conviction acting under ss. 423 and 439.—Where there is an appeal by a prisoner, and, in addition, the High Court takes seisin of the case under its revisional jurisdiction,

(1) *Sahab Singh v. Emperor*, 38 P. R 1905 Cr

(2) *Rat. Un. I. Cas.*, 233.

(3) *Emperor v. Jahanulla*, 23 C. 1905

474=8 M. L. T. 313.

(4) *Appana v. Pithani*, 84 M. 545.

(5) *Dulli v. Emperor*, 16 A. L. J. 918.

(6) *Golla Hanumppa v. Emperor*, 10 M. L. T. 66=10 I. C 372=21 M. L. J. 805=(1911) 2 M. W. N. 106.

(7) *Lakhan Singh v. Emperor*, A.I. R 1934 O.200=11 O. W. N. 531.

power to alter a conviction under section 353 of the Indian Penal Code to one under s. 189 of the same Code(1), or to convert the accused's conviction from one under s. 405 to s. 403, I. P. C.(2). It has likewise power to alter a conviction under section 147 of the I. P. C., to one under section 323 of the same Code(3), though there is authority to the contrary also(4). An appellate court has power under this section to alter a conviction from one under section 353 of the Penal Code to one under section 183(5). It is legal for the appellate court to alter the conviction from one of cheating to one of criminal breach of trust(6). In a trial under s. 368, I. P. C. conviction under s. 366-A can be made even though no specific charge is framed(7). Similarly, in a trial under s. 324, I. P. C. conviction under s. 323 can be made even though the sentence is maintained(8). It is legal for the appellate court to alter the conviction from one under s. 471 to one under section 218 of the Indian Penal Code(9). The High Court on appeal has power to alter a conviction recorded against the appellant from s. 474 to s. 193 of the Penal Code(10). But the alteration of the conviction of the accused from section 325 to section 323 by the appellate court is unauthorised, when they have not been given an opportunity of answering the charge in the first instance of inflicting injuries other than the one charged(11).

Appellate court cannot pass a finding which first court may not have passed.—Clause (b) does not authorise an appellate court to pass a finding which the first court could not have passed. Therefore, where the first court has convicted a person of an offence under s. 150 of the Punjab Municipal Act upon the complaint of a person who is authorised by the committee to prosecute offenders under that section, the appellate court cannot alter the conviction to one under section under which the complainant is not authorised to prosecute(12). Where the accused was convicted for cheating on a general charge and on appeal the conviction was maintained, but for cheating another person, of which altered charge no indication had been given at the trial, it was held that the accused was materially prejudiced and

in contravention of the

altering the finding while

maintaining the sentence, conferred on appellate courts by cl. (b) does not empower those courts to act in contravention to the provisions of

(1) *Ibid.*

(2) *Mangal Prasad v. Emperor*, A. I. R. 1935 O 4

(3) *Hanuman v. Emperor*, 20 A. L. J. 213=23 Cr. L. J. 198=65 I. C. 854

(4) *Rakhal Chandra v. Jamini Kanta*, A. I. R. 1916 C. 431=26 Cr. L. J. 1018=87 I. C. 812=80 C. W. N. 528

(5) *Kunhambu v. Emperor*, 19 I. C. 335=(1912) M. W. N. 1110=14 Cr. L. J. 239.

(6) *Jagannath v. Emperor*, A. I. R. 1933 Pat. 26=1932 Cr. C. 941=142 I. C. 703=34 Cr. L. J. 419.

(7) *Emperor v. Ganpat*, A. I. R. 1933

Nag. 259=1933 Cr. C. 930=29 N. L. R. 365=35 Cr. L. J. 28=146 I. C. 832.

(8) *Rangaswami v. Emperor*, 39 M. L. T. 20=A. I. R. 1927 M. 789=104 I. C. 440=53 M. L. J. 694=28 Cr. L. J. 824.

(9) *Janki Prasad Emperor*, A. I. R. 1926 A. 700=7 L. R. A. Cr. 93=27 Cr. L. J. 901=96 I. C. 218

(10) *Empress v. Amrit*, (1890) A. W. N. 86.

(11) *Patal v. Emperor*, 24 Cr. L. J. 812=72 I. C. 72=1924 C. 632.

(12) *Ahmad Din v. Crown*, 4 P. R. 1917 (r.=39 I. C. 479=18 Cr. L. J. 611).

(13) *Rattan Singh v. Emperor*, A. I. R. 1934 Lah. 839=85 P. L. R. 666.

sentence for the offence of which the petitioner was acquitted(1). When a Magistrate, on convicting a person of two offences passed a single sentence of imprisonment and fine, it was held that separate sentences ought to have been passed and that the appellate court in reversing conviction for one offence cannot regard the imprisonment as imposed for one offence and the fine for the other and reduce the sentence by eliminating the fine(2).

Clause (b) (3) : Enhancement of sentence.—It is not open to an appellate court, when setting aside the conviction of one of two or more offences, to confirm the sentence imposed by the trial court for the other offence, the reason being that when a single sentence is awarded for two offences, each part of it must be deemed to have been incurred for the one offence and not part for the other, so that to maintain the whole sentence for only one of the offences amounts to such an enhancement, as is prohibited by clause (1) (b) (3) of this section (3). It depends upon the circumstances of the particular case whether the retention of the sentence awarded by the trial court constitutes an enhancement of sentence(4). In applying the portion of this section which allows an appellate court to alter the sentence finding maintaining the sentence but not so as to enhance the same, the test of enhancement must be found not among the technicalities of the penal definition, but by answering the broad question whether the sentence imposed by the appellate court has inflicted punishment more severe than that originally awarded(5). But when an appellate court, adopting the view taken by the original court as to the act committed by the accused and only differing from it in its application of the law, alters a finding from a graver to a less grave offence, and maintains the same sentence as that of the trial court, neither the letter nor the spirit of this section is violated so as to constitute it an enhancement of punishment(6). The High Court dealing with an appeal can resort to its power of revision and enhance the sentence(7).

What amounts to enhancement of sentence—An appellate court has no power to maintain the entire sentence passed by the original court, when it reverses the conviction on only one of charges, such a maintenance being an enhancement of the sentence(8). In the case of two separate convictions under sections 147 and 325, I. P. C.

(1) *In re Mari*, 7 M. L. T. 81=5 I. C. 754.

(2) *Empress v. Pascoe*, Rat. Un. Cr. Cas. 409.

(3) *Empress v. Pascoe*, Rat. Un. Cr. Cas. 409.

(4) *Empress v. Pascoe*, Rat. Un. Cr. Cas. 409.

(5) *Empress v. Pascoe*, Rat. Un. Cr. Cas. 409.

(6) *Empress v. Pascoe*, Rat. Un. Cr. Cas. 409.

(7) *Empress v. Pascoe*, Rat. Un. Cr. Cas. 409.

(8) *Empress v. Pascoe*, Rat. Un. Cr. Cas. 409.

20=28 Cr. L. J. 824=104 I. C. 440=A. I. R. 1927 Mad. 789=53 M. L. J. 694.

(6) *Ibid*

(7) *Chunbidya v. Emperor*, A. I. R. 1935 P. C. 85; *Emperor v. Dahu*, A. I. R. 1935 P. C. 89.

(8) *Emperor v. Hanma*, 22 B. 760; *Empress v. Natha*, Rat. Un. Cr. Cas. 618; *Azim Khan v. Empress*, 45 F. R. 1887 Cr.; *Ramzan v. Ram Khela*, 24 C. 306; *Mangal v. Crown*, 3 F. R. 1916 Cr.; *Paramasiva v. Em*.

(4) *Bechu Singh v. Emperor*, 120 I. C. 764=10 Pat. L. T. 557=1930 Pat. 79=31 Cr. L. J. 173.

(5) *In re Rangaswami*, 39 M. L. T. 4

the conviction for a lesser offence, where the prisoner has been suitably charged, can be converted into one under section 302 of the Indian Penal Code, and the sentence enhanced accordingly, under the combined provisions of sections 423 and 439, of the Code(1). Where therefore, a person convicted under section 304 of the Penal Code appeals to the High Court, and the court also takes action under section 439 of the Code, it has power to alter the conviction into one under s. 302 of the Penal Code and to set aside the implied acquittal of the appellant under that section, because in such a case the High Court is acting both under s. 423 and section 439 of the Code(2). But as a rule it would obviously be unfair to the accused that he should be convicted of a more serious offence to which he had not pleaded in the lower court. The general principle is that on appeal or revision an accused person cannot be convicted of an offence of which he could not have been convicted by the court which tried him(3). If the appellate court finds that the sentence is illegal or inadequate, and does not think it expedient to order a new trial, it may alter the conviction in order to legalise the sentence(4).

When to exercise power of altering conviction.—The exercise of court's discretion in altering a conviction, ought to be regulated by a consideration of the nature of the evidence in support of the charge against the accused; and of the facts whether the alteration of conviction is reasonably supported by the evidence on the record and whether such alteration is in any way prejudicial or injurious to the accused(5). An appellate court when it acts under this clause and "alters the finding, maintaining the sentence," is not bound in respect of such altered finding by such conditions precedent, as, for example, sanction or complaint by the person aggrieved, as would be binding on a court of first instance. Hence when in appeal from a conviction under s. 182 the appellate court altered the conviction to one under s. 500 of the Indian Penal Code, it was held that this was within the competence of the appellate court, notwithstanding that there was in existence no complaint by the person aggrieved(6).

Alteration when improper.—A charge cannot be so altered by an appellate court as to make it necessary for an accused to meet an absolutely different case from that with which he is charged in the trial court(7). The offence of cheating under s. 420 of the Penal Code is an entirely different offence from that under section 471 of the Code, *viz.*, using as genuine a forged document, knowing it as such, and a conviction for the former offence cannot be altered by an appellate court

(1) *Kamban Bali v. Emperor*, 37 M. 119=15 Cr. L. J. 180=22 I. C. 756; *Bhola v. Emperor*, 12 P. R. 1904 Cr.=1 Cr. L. J. 942=110 P. L. R. 1904.

(2) *On Shice v. Emperor*, 1 Rang. 436=76 I. C. 711=1924 K. 93=25 Cr. L. J. 247.

(3) *Emperor v. P'o Yin*, 3 L. B. R. 232; *In re Duarka Manjhee*, 6 C. L. R. 427; *Emperor v. Inad Khan*, 8 A. 120; *Alonoranjan v. Empress*, 3 C. W. N. 367, *Empress v. Lala*,

26 C. 863=3 C. W. N. 633; *Fatu v. Mahabir Singh*, 27 C. 660.

(4) *Emperor v. Kyaw Ala*, 3 L. B. R. 112.

(5) *Empress v. Amrit*, (1890) A. W. N. 86.

(6) *Emperor v. Gur Narain*, 25 A. 531=(1903) A. W. N. 100.

(7) *Mula v. Emperor*, 23 A. L. J. 921=20 I. C. 150=L. R. 6 A. 159 Cr.=26 Cr. L. J. 1491=A. I. R. 1916 A. 33.

the proposition that where the aggregate period of imprisonment which the accused persons might have to undergo, even in default of payment of fine does not exceed the total amount of imprisonment which they might have to undergo under the order of the trying Magistrate the sentence passed by the appellate court does not amount to an enhancement(1). But these decisions, it was pointed out in *Emperor v. Mehar Chand*(2), overlook the fact that a sentence of fine is not wiped out by serving the alternative sentence of imprisonment but is still liable to be enforced under process of the court. But the new proviso added to sub-section (1) of s. 386 *supra* says that if the offender had undergone the whole of imprisonment in default, no court shall issue a warrant for the levy of the fine unless for special reasons, and therefore, the chief reason given in *Mehar Chand's* case does not hold good. There is, however, no enhancement of sentence when the aggregate period of imprisonment is less than the period of original sentence although fine is imposed in addition(3). It was held by the Calcutta High Court in *Rakhal v. Khirode*(4) that no general rule can be laid down to determine what is or is not an enhancement of sentence when only a portion of the sentence is altered to a punishment of a lesser degree of severity. In each case the court has to consider what is the effect of the alteration. If on an appeal from a sentence of one week's rigorous imprisonment (which had already been undergone) the sentence is altered into one of Rs. 50 fine or in default one week's rigorous imprisonment, the sentence is illegal as it amounts to an enhancement(5). Where the accused was sentenced to undergo 2 months' rigorous imprisonment and pay a fine of Rs. 50 or in default to undergo one month's rigorous imprisonment, and on appeal the appellate court changed the sentence to one month's rigorous imprisonment and a fine of Rs. 200 or in default two months' rigorous imprisonment, it was held that the effect of the order of the appellate court was an enhancement of sentence(6).

Substituted sentence must be within original court's power.—If an appellate court alters a sentence of imprisonment into a sentence of fine, it cannot inflict a fine beyond the maximum which could have been imposed by the first court. The altered sentence taken as a whole must be within the power of the original court(7). Where on appeal from conviction by a second class Magistrate of three months' imprisonment the appellate court altered the sentence to one of Rs. 400 fine, such alteration was held illegal(8).

Alteration of sentence of imprisonment into sentence of fine.—A sentence of fine is always considered lighter than a sentence of imprisonment(9). The alteration by an appellate court of a sentence of a

R. 1915 Cr.,—26 P. L. R. 1916—16 Cr. L. J. 603—30 I. C. 155

(4) 27 C. 175.

(5) *Mehar Chand v. Emperor*, 17 Cr. L. J. 212—5 P. W. R. 1916 Cr.,—34 I. C. 324; cf. *Kirpa Ram v. Emperor*, 7 P.

25 Cr. L. J. 312

(9) *Empress v. Chagan*, 23 B 432 (441).

with separate sentences the Sessions Judge on appeal cannot enhance the sentence under section 147, I. P. C., while setting aside the conviction under s. 325(1). Where a Magistrate passes separate sentences for each offence found proved, the reversal of the conviction under any one of them must carry with it the sentence resting on it(2). Thus, where a person was convicted by a Magistrate of rioting and theft and was sentenced for the first offence to four months and for the latter offence to two months' rigorous imprisonment, and the District Magistrate on appeal acquitted the accused of rioting but upheld the conviction for theft and sentenced him to six months' rigorous imprisonment, it was held that the effect of the order was to enhance the sentence for theft, which he had no authority to do under this section(3). Even in the case of a combined sentence of imprisonment and fine for two offences, for each of which a separate sentence should have been passed, the appellate court, on reversing the conviction for one offence is not justified in treating the sentence of fine as the punishment for one offence and the sentence of imprisonment as the punishment for the other and retaining the full sentence of the imprisonment(4). But where a Magistrate finds an accused person guilty of acts which in law constitute a single offence, but by erroneously splitting them, convicts him of two distinct offences and passes either two distinct sentences or one combined sentence for the two supposed offences, the appellate court, if it concurs in the finding, is competent to alter the two convictions to the proper one for the single offence committed, while maintaining the aggregate of the two sentences or the whole of the combined sentence inflicted by the Magistrate. Such an alteration is one of form only and does not involve enhancement of sentence in violation of the section(5).

Cases where only a portion of the sentence is altered to a lesser degree of severity.—Where an appellate court reduces a sentence of four months' rigorous imprisonment into one of three months, but, adds a sentence of fine or in default six weeks' rigorous imprisonment such sentence is in excess of the powers of an appellate court(6). Where, however, the appellate court altered a sentence of one month's imprisonment and a fine of Rs. 5 into one of three days imprisonment and a fine of Rs. 100 or in default of payment of fine to a further term of one month's imprisonment, it was held by the Allahabad High Court that in the absence of any evidence that the accused was unable to pay the fine or regarded the sentence passed on appeal as more severe than the original sentence it could not be said that the sentence had been enhanced(7). There is good deal of authority for

(1) *Mangal Singh v. Crown*, 31 P. R. 1916 Cr. = 18 Cr. L. J. 372 = 38 I. C. 756.

(2) *Ramzan v. Ram Khelawan*, 24 O. 316; *Arpan v. Arobbi*, 24 O. 317 (note); *Empress v. Hanma*, 22 B. 760;

(3) *Ramzan v. Ramkhelawan*, 24 O. 316.

(4) *Empress v. Pascoe*, Rat. Un. Cr. C. 409.

(5) *Balbhadri v. Tribhuban*, 3 N. L. R. 67; *Lala Ujha v. Empress*, 26 O. 863 = 3 U. W. N. 653.

(6) *Empress v. Ishri*, 17 A. 67.

(7) *Emperor v. Mehar Chand*, 36 A 485.

756 = 31 P. R. 1916 Cr.; *Torpey v. Emperor* 7 A. I. Cr. R. 334.

Conviction affirmed, but sentence reversed.—A Magistrate in appeal cannot affirm the conviction and reverse the sentence absolutely. Every conviction should be followed by a sentence(1).

Clause (c) : Appeal from order.—When an appeal is preferred from an order other than an order of acquittal or conviction (e. g., order under s. 107 to give security), the appellate court has no jurisdiction to order a *de novo* trial. It can only alter or reverse the order under this clause, and under cl. (d) may pass any consequential order that might be just and proper(2). An appeal to the District Magistrate from an order demanding security for good behaviour falls under cl. (c); but if the District Magistrate alters the order of the lower court, he is not competent to make the alteration in such a way as to increase the severity of the lower court's order(3). A District Magistrate, while setting aside on appeal an order requiring a person to furnish security under section 110, cannot remand a case for fresh inquiry(4). The High Court has, under ss. 439 and 423 (c), power to revise an order passed by a District Magistrate under section 515 or by any Magistrate under section 154 of the Code(5). Under s. 439 a High Court has jurisdiction to exercise the powers of an appellate court conferred by this clause and *a fortiori* to reverse or alter an order of commitment passed by a Sessions Judge under cl. (b)(6). An appellate court can set aside an order for compensation if it is based in wrong findings of fact(7). Where against an order directing a prosecution under section 211, Indian Penal Code, the accused applied for revision to the High Court, it was held that the High Court had jurisdiction to treat the application as an appeal under this clause and "to alter or reverse" the order and further to make "any incidental order that may be just and proper"(8).

Clause (d) : Amendment.—This clause empowers an appellate court to make any amendment that may be just and proper. The word "amendment" in this clause means amendment of an effective order of the court below. A High Court has no authority to expunge remarks from judgments of subordinate criminal courts which reflect on certain witnesses in cases in which the effective orders of the lower courts are not before the High Court in appeal or in revision(9). But in some cases courts have ordered such portions of a record to be expunged(10). An order passed under section 517 of the Code may be reconsidered and amended on appeal(11). Where the Sessions Judge had directed certain

J. 1213; *In re Vermuri Seshanna*, 26 M. 421; *Emperor v. Karuppana*, 29 M. 183.

(1) *Empress v. Lakshimbai*, Rat. Un. Cr. C. 545.

(2) *In re Narappa Reddy*, A. I. R. 1934 Mad. 202 (1) = 1933 M. W. N. 241 = 1933 M. Cr. O. 90 = 145 I. O. 306 = 34 Cr. L. J. 947.

(3) *Rameshwar Bakhsh v. Emperor*, 9 O. L. J. 23.

(4) *Chandan v. Emperor*, 115 I. O. 544 = 1929 Lab. 28 = 2 Cr. Law. 195 = 30 Cr. L. J. 491 = 30 P. L. R. 416.

(5) *Emperor v. Karam Baha Din*, 18 I. O. 223 = 5 S. L. R. 179 = 13 Cr. L. J. 81.

(6) *Ram Samujh v. Emperor*, 82 I. O. 767 = 10 O. and A. L. R. 957 = 25 Cr. L. J. 1875.

(7) *Surendra v. Basanta*, A. I. R. 1932 C. 120 = 35 C. W. N. 1151 = 58 O. 1486 = 136 I. O. 140.

(8) *In re Pampappa*, C. A. I. Cr. R. 319.

(9) *Emperor v. Dunu*, 44 A. 401 = 23 Cr. L. J. 319 = 66 I. O. 1005 = 20 A. L. J. 261.

(10) *Baroda v. Karait*, 2 O. W. N. p. cclvi (Jour); *Ma Kaya v. Kin Lat*, 11 I. O. 1000; *Emperor v. Thomas*, 14 I. O. 643; *Lachchu v. Emperor*, 24 I. O. 156.

(11) *Gopi Nath v. Emperor*, 3 A. L. J. 771 (772).

fine of Rs. 50 or in default two months' simple imprisonment to a sentence of six months' rigorous imprisonment is an enhancement of the sentence, and, as such, prohibited by this section(1). Where, on an appeal from a conviction of causing simple hurt in which the accused had been sentenced to fine only, the appellate court altered the conviction into one of causing grievous hurt, under section 325, Penal Code, and in order to make the sentences legal under that section, passed a nominal sentence of one day's imprisonment (in addition to fine), it was held that the sentence of the appellate court being an enhancement of the sentence under appeal was illegal(2).

Substitution of sentence of whipping—Under this section, an appellate court has power to alter a sentence of imprisonment into one of whipping where the offence is punishable with whipping in lieu of any other punishment. It can so alter the sentence in the case of an accused who has already undergone a part of the original sentence of imprisonment. The court must however take into consideration the part of the sentence already undergone and may impose a sentence of whipping provided it does not become in effect an enhancement of the original sentence(3). If the appellate court retains the sentence of imprisonment awarded by the trial court, and substitutes a further sentence of imprisonment in lieu of the illegal sentence of whipping, the court is in effect enhancing the sentence(4). Where the trying Magistrate is not competent to award a sentence of whipping, alteration of a sentence of fine into one of whipping by the appellate court amounts to an enhancement of sentence and is *ultra vires*(5). The addition of a sentence of whipping by the appellate court, although the sentence of imprisonment is reduced amounts to an enhancement of the sentence (6).

Solitary confinement—The imposition of solitary confinement is an enhancement even though the sentence is reduced(7).

Power of appellate court to direct security.—An appellate court can pass an order under s. 106 (3) requiring the accused to furnish security. Such an order can be made, even after the expiration of the substantive punishment passed by the original court, and it would not amount to an enhancement of sentence(8).

Direction to pay complainant's court fee.—An order under section 31 of the Court-Fees Act (now s. 546-A of this Code) made by an appellate criminal court, directing the accused to repay the complainant, the court-fee paid on the complaint petition is not an enhancement of sentence, which an appellate court has no power to impose but is only an incidental or consequential order which an appellate criminal court is entitled to make(9).

(1) *Empress v. Lachmi Kant*, 18 A. 301; see also *Empress v. Dansang*, 18 B. 751.

(2) *In re Chadalarada*, 2 Weir 486.

(3) *Emperor v. Nga Aung Myat*, 10 Rang 317; cf. *Emperor v. Chit Pon*, 7 Rang. 319; *In re Kyaua Nga*, 1928 Rang 265; *Empress v. Po Wun*, 18 Cr L.J. 773=41 I.C. 149=8 L.B.R. 466=10 Bur.L.T. 211; *Queen-Empress v. Banda Ali*, 6 B. L. R. App. 95=15 W. R. Cr. 7.

(4) *Emperor v. Ba Cho*, 12 Rang.

607=A. J. R. 1935 Rang 64.

(5) *Yusuf v. Mun. Com. Murree*, 120 I.C. 787=31 Cr.L.J. 166=A.I.R. 1930 Lab 318=21 P.L.R. 264.

(6) *In re Appu*, 2 Weir. 487.

(7) *Empress v. Peman*, 1890 A.W.N. 170.

(8) *Miran v. Emperor*, 21 P.R. 1905 Cr.; *Maharaj Singh v. Emperor*, 20 Cr. L.J. 760=53 I.C. 488.

(9) *Thimmiah v. Emperor*, 47 M. 914=52 I.C. 141=(1924) M. W. N. 489=20 L. W. 293=47 M. L. J. 355=25 Cr.L.

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(6) *Ram Samujh v. Emperor*, 82 I. O. 767 = 10 O. and A. L. R. 957 = 25 Cr. L. J. 1975.

(7) *Surendra v. Basanta*, A. I. R. 1932 C. 120 = 35 C. W. N. 1151 = 58 O. 1436 = 136 I. O. 140.

(8) *In re Pampappa*, 6 A. I. Cr. R. 919.

(9) *Emperor v. Dunu*, 44 A. 401 = 23 Cr. L. J. 349 = 66 I. O. 1005 = 20 A. L. J. 261.

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(11) *Gopi Nath v. Emperor*, 3 A. L. J. 771 (772).

property to be handed over to the Magistrate as unclaimed property, the High Court amended the order by directing that the Magistrate should dispose of the property according to law(1).

Incidental or consequential orders.—The nature of consequential or incidental orders under this sub-section was discussed by a Full Bench of the Calcutta High Court in *Mehi Singh v. Mangal Khandu*(2). That Full Bench considered that the only consequential or incidental orders within the purview of the provision were orders which follow as a matter of course, being the necessary complements to the main order passed, without which the latter would be incomplete or ineffective such as directions as to the refund of fines realized from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation passed under s. 250 for which no separate authority is needed, and orders which are ancillary in character require more than the support of a criminal court's inherent jurisdiction and could not be passed without express authority. This view receives an additional support from a decision of the Allahabad High Court(3). This clause does not apply to a release on bail pending the decision of the appeal(4).

Disposal of property.—Under this clause as well as under s. 520 of the Code(5). An order in a case of criminal misappropriation directing restoration of the property which is found to have belonged to the complainant is clearly a consequential or incidental order within the meaning of this sub-section and one which is under the circumstances just and proper(6). An accused person may upon his acquittal be restored to the possession of a property from which he has been deprived in favour of the complainant(7). The case reported as *Ram Chandra v. Nobin*(8) was decided before the Code of 1898 came into force.

Order for costs under s 148 (3).—An order for costs under s. 148 (3) of the Code is an order incidental to an order for possession under s. 145. Where a Magistrate has given his decision under s. 145, but has failed to make any order for costs under s. 148 (3) the High Court in revision has to make an order for the payment of the costs of such proceedings(9).

Order as to compensation—An appellate court has power to pass an order for compensation in favour of the accused under s. 250, if it

(1) *Abadi Begum v. Ali Husen*, (1897) A. W. N. 26

(2) 39 C. 157=12 I. C. 297=12 Cr. L. J. 523=14 C. L. J. 437=16 C. W. N. 10

(3) *Emperor v. Dunu*, 44 A. 401(401, 405)=23 Cr. L. J. 349=66 I. C. 1005.

(4) *Darsu v. Emperor*, A. I. R. 1934 A. 845=4 A. W. N. 76.

(5) *Thiraj v. Crown*, 10 Lah. 187=1928 L. 567=29 Cr. L. J. 810.

(6) *Gopi Nath v. Emperor*, 3 A. L. J.

771=4 Cr. L. J. 370=(1906) A. W. N. 256.

(7) *Manki v. Bhagwant*, 27 A. 416=2 A. L. J. 84=(1905) A. W. N. 19=2 Cr. L. J. 24; *Ahmed Ali v. Keenoo*, 36 C. 44; *Muhammad Din v. Crown*, 14 P. R. 1919 Cr.

(8) 25 C. 630.

(9) *Ma Mya Khin v. Maung Po Hwa*, 11 Rang. 361=A. I. R. 1933 Rang. 288=35 Cr. L. J. 1=145 I. C. 837

finds that the case brought against him is frivolous or vexatious(1), though there is authority to the contrary also(2).

Order as to payment of court fee.—An order under section 31 of the Court Fees Act (now s. 546-A) made by an appellate criminal court directing the accused to repay the complainant the court-fee paid on the complaint is an incidental or consequential order which an appellate criminal court is entitled to make under this clause(3).

Order under s. 106.—An order under s. 106, Cr. P. C. may be set aside on appeal. An order in appeal setting aside an order under s. 106, Cr. P. C. is an incidental order within the meaning of this clause(4).

Power to sanction a compromise.—This clause being expressly mentioned in s. 439 of the Code a High Court can, in revision if it sees fit, give leave for the composition of an offence under section 325, Indian Penal Code(5).

Order for safe custody of lunatic.—A trial court's omission to pass an order under section 471 will not preclude a High Court from passing such an order. Such an order is in the nature of a consequential or an incidental order within the meaning of this clause(6).

Power of appellate court to apply s. 562.—Though s. 562 Cr. P. Code read by itself would seem to confine the power to use the section to the court convicting the accused yet reading it with this clause it is clear that an appellate court or a court of revision can also use the section(7).

Competence of appellate court to direct a retrial.—It is competent to a court hearing an appeal in a case under s. 107 of the Code to direct that the case before him be retried(8).

Order returning judgment to be signed by the other member of the bench.—A district Magistrate, on an appeal from the decision of a Bench of Honorary Magistrates, found that although the case had apparently been heard by a Bench of two Magistrates, the judgment was signed by only one member of the bench, and accordingly returned the judgment to be signed by the other Magistrate who heard the case. It was held that this procedure was in no way opposed to this section(9).

Appeal from consequential or incidental order.—Under this clause, a Magistrate of the first class specially empowered to hear appeal from subordinate Magistrates has jurisdiction to hear an appeal with reference to an order passed by a subordinate Magistrate under s. 522 of the Code(10).

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(3) *Thinniah v. Emperor*, 17 M. 914 (1915); *Emperor v. Karupana*, 29 M. 153; *Contra Empress v. Tungacelu*, 22 M. 153.

(4) *Abdul Wahed v. Amiran*, 30 C. 101.

(5) *Emperor v. Ram Piari*, 32 A. 153 = 5 L. C. 696 = 7 A. L. J. 103 = 11 Cr. L. J.

203.

(6) *Muhammad v. Emperor*, 23 Cr. L. J. 71 = 65 L. C. 423; 8 L. B. R. 290

(7) *Narayani v. Government of Mysore*, 4 Mys. L. J. 192 Cr; *Emperor v. Burch*, 24 A. 306; *Narayana v. Emperor*, 29 M. 567.

(8) *Bhagwat Singh v. Emperor*, 49 A. 501 = 21 A. L. J. 506 = 27 Cr. L. J. 945 = 1916 A. 403.

(9) *Emperor v. Gopal Das*, 41 A. 217.

(10) *Gourhary v. Alay*, 29 C. 734.

property to be handed over to the Magistrate as unclaimed property, the High Court amended the order by directing that the Magistrate should dispose of the property according to law(1).

Incidental or consequential orders.—The nature of consequential or incidental orders under this sub-section was discussed by a Full Bench of the Calcutta High Court in *Mehi Singh v. Mangal Khandu*(2). That Full Bench considered that the only consequential or incidental orders within the purview of the provision were orders which follow as a matter of course, being the necessary complements to the main order passed, without which the latter would be incomplete or ineffective such as directions as to the refund of fines realized from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation passed under s. 250 for which no separate authority is needed, and orders which are ancillary in character require more than the support of a criminal court's inherent jurisdiction and could not be passed without express authority. This view receives an additional support from a decision of the Allahabad High Court(3). This clause does not apply to a release on bail pending the decision of the appeal(4).

Disposal of property.—Under this clause as well as under s. 520 of the Code, the appellate court is competent to pass appropriate orders for the disposal of moveable property produced at the trial, even though the trial Magistrate had not passed any order in respect of it under s. 517 of the Code(5). An order in a case of criminal misappropriation directing restoration of the property which is found to have belonged to the complainant is clearly a consequential or incidental order within the meaning of this sub-section and one which is under the circumstances just and proper(6). An accused person may upon his acquittal be restored to the possession of a property from which he has been deprived in favour of the complainant(7). The case reported as *Ram Chandra v. Nobin*(8) was decided before the Code of 1898 came into force.

Order for costs under s. 148 (3).—An order for costs under s. 148 (3) of the Code is an order incidental to an order for possession under s. 145. Where a Magistrate has given his decision under s. 145, but has failed to make any order for costs under s. 148 (3) the High Court in revision has to make an order for the payment of the costs of such proceedings(9).

Order as to compensation—An appellate court has power to pass an order for compensation in favour of the accused under s. 250, if it

(1) *Abadi Begum v. Ali Husen*, (1897) A. W. N. 26.

(2) 39 C. 157=12 I. C. 297=12 Cr. L. J. 529=14 C. L. J. 497=16 C. W. N. 10.

(3) *Emperor v. Dunu*, 44 A. 401(404, 405)=23 Cr. L. J. 349=66 I. C. 1005.

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(6) *Gopi Nath v. Emperor*, 3 A. L. J.

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(7) *Manki v. Bhagwant*, 27 A. 416=2 A. L. J. 84=(1905) A. W. N. 19=2 Cr. L. J. 24; *Ahmed Ali v. Keewoo*, 36 C. 44, *Muhammad Din v. Crown*, 14 P. R. 1919 Cr.

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(9) *Thimiah v. Emperor*, 47 M. 914 (915). *Emperor v. Karupana*, 29 M. 158; *Contra Empress v. Tungavelu*, 22 M. 153.

(4) *Abdul Wahed v. Amiran*, 30 C. 101.

(5) *Emperor v. Ram Piar*, 32 A. 153—5 I. C. 696—7 A. L. J. 103—1 Cr. L. J.

203.

(6) *Muhammad v. Emperor*, 23 Cr. L. J. 71—65 I. C. 423; 8 L. B. R. 290

(7) *Narayani v. Government of Mysore*, 4 Mys. L. J. 192 Cr.; *Emperor v. Buch*, 24 A. 306; *Narayana v. Emperor*, 29 M. 567.

(8) *Bhagat Singh v. Emperor*, 48 A. 501—24 A. L. J. 506—27 Cr. L. J. 945—1916 A. 403.

(9) *Emperor v. Gopal Das*, 41 A. 217.

(10) *Gourhary v. Alay*, 29 C. 724.

Orders which cannot be passed.—This clause does not permit a Sessions Judge to review a wrong order by his predecessor(1). An appellate court cannot excuse the delay in presenting an appeal under this clause(2). An appellate court has no power to order compensation such as is contemplated by s. 250 of the Code(3). In revision against orders passed under section 145 of the Code, the High Court has no power to make any order as to costs of the revision(4). It is not open to the Sessions Judge to keep the appeal pending and direct the Magistrate to record the cross-examination of the witnesses and forward the record to him(5).

Sub-section (2) : Interference with verdict of Jury.—By sub-section (2) nothing in this section shall authorize the court to alter or reverse the verdict of a Jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the Jury of the law as laid down by him. In other words before the High Court can interfere it must be reasonably satisfied that not only had the Judge misdirected the Jury but that his misdirection had caused them to come to a conclusion which was in fact wrong(6). The High Court is not entitled to alter or reverse the verdict of a Jury unless it is of opinion that the verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the Jury of the law as laid down by the Judge(7). The power conferred by this sub section of reversing the verdict of a Jury if it is erroneous owing to misdirection by the Judge ought not to be lightly exercised. It is the intention of the legislature that it should be exercised only on occasions(8). The High Court cannot, on an appeal from the verdict of the Jury, interfere with it, in the absence of a misdirection by the Judge, when there is some circumstantial evidence of the guilt(9). Where a sentence has been passed after a verdict of guilty in a trial by Jury the arguments on behalf of the convicted person before the appellate court must be limited to the matters referred to in this sub-section and accused cannot claim to have wider rights and to reopen the whole matter(10).

Erroneous.—The word 'erroneous' is not to be read as meaning 'wrong on the facts'; it must rather be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of

(1) *Emperor v. Lakshman*, 1920 B 309=53 B 528=121 I. C. 583=31 Bom. L. R. 593.

(2) *In re Mitor Moideen*, 71 I. C. 217=43 M. L. J. 561=16 L. W. 764=1923 M. 95=24 Cr. L. J. 89.

(3) *Mehi Singh v. Mangal*, 39 C. 157=14 Cr. L. J. 437=16 C. W. N. 10=12 I. C. 297=12 Cr. L. J. 529.

(4) *Veerappa v. Atudoyammal*, 48 M. 262; *Bai Jiba v. Ambalal*, 94 I. C. 709=27 Bom. L. R. 1353=27 Cr. L. J. 661=1926 B. 91.

(5) *Emperor v. Lakshman*, 121 I. C. 588=31 Bom. L. R. 593=A. I. R. 1929

B 309=53 B 528.

(6) *Suroy Kumar v. Emperor*, A. I. R. 1932 C. 474=33 Cr. L. J. 851=59 C. 1361=139 I. C. 578; *Aziz Khan v. Emperor*, A. I. R. 1935 A. 103.

(7) *Public Prosecutor v. Bonigiri*, 33 M. 179; *Emperor v. Smither*, 28 M. 1; *In re Shambhu*, 10 Bom. L. R. 565; *Emperor v. Waman*, 27 B. 626.

(8) *In re Shambhu*, 10 Bom. L. R. 565.

(9) *Mohini v. Emperor*, 46 C. 635.

(10) *Khoda Bux v. Emperor*, A. I. R. 1934 C. 105=37 C. W. N. 1122=61 C. 6=147 I. C. 1124.

the law. The appellate court cannot reverse the verdict of a Jury unless there is any misdirection by the Judge or any misunderstanding on the part of the Jury of the law as laid down by him. Then only can the verdict be said to be tainted with error in the process by which it has been arrived at. It throws upon the appellate court the duty of ascertaining whether the process or method which the Judge directed the Jury to follow as to the acceptance or discarding of the evidence or as to the view taken of the law was erroneous on any material point, but not the duty of determining for itself whether the verdict as a conclusion of fact, was right or wrong(1). Before a verdict can be interfered with, the High Court must be satisfied that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the Jury as to the law laid down by him and that there has been a failure of justice by reason of such misdirection(2). The High Court will not be justified in setting aside the verdict of a Jury even though it be erroneous unless the court is satisfied that the prisoner is prejudiced by the errors and that there has been a failure of justice(3). The effect of this clause is, evidently, to prevent the appellate court from reversing the verdict of a Jury on account of any misdirection by the Judge or any misunderstanding on the part of the Jury of the law as laid down by him, unless such misdirection or misunderstanding of the law is on a point material to the verdict, so that the verdict can be said to be tainted with the error in the process by which it has been issued(4).

Misdirection.—See notes under s. 297.

Misunderstanding.—Mere misunderstanding on the part of bystanders in court, or counsel engaged in a case, of expressions used by a Judge in charging a Jury, (where it appears that the expressions used by the Judge were such as ought to have been understood by any reasonable man, having regard to what was proved in the case, and what was said to Jury afterwards) will not constitute misdirection(5).

Verdict must be set aside in its entirety.—The term 'verdict' in this sub section means the entire verdict on all charges and not merely the verdict upon each charge separately. Therefore, if the verdict of a Jury is found to be erroneous; owing to a misdirection by the Judge, it must be set aside in its entirety, as the appellate court cannot go into facts and substitute its own verdict for that of the Jury. Where the appellate court reverses the verdict of a Jury and orders a retrial, such retrial, unless the appellate court has limited the scope, must be taken to be one upon all charges originally framed(6).

Power of High Court upon interference with verdict.—When a verdict is set aside on the ground of misdirection, as a matter of

(1) *Wafadar v. Empress*, 21 C. 955 (977); *Emperor v. Waman*, 27 B. 626; *Empress v. Lalsing*, Rat. Un. Cr. C. 452.

(2) *In re Elahie*, 5 W. R. 80 Cr.; *Ali v. Empress*, 25 C. 230; *Biru v. Empress*, 25 C. 561.

(3) See the cases cited in the last note.

(4) *Wafadar v. Empress*, 11 C. 955

(917); *Empress v. Lalsing*, Rat. Un. Cr. C. 452.

(5) *Empress v. Shib Chunder*, 10 C. 1079.

(6) *Krishna Dhan v. Empress*, 22 C. 377; *Jamiruddi v. Emperor*, 16 C. W. N. 909; *Bhola v. Emperor*, 12 P. R. 1901 Cr.

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(7) *B. v. B.*, 1935 A. 103.

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(9) *Mohini v. Emperor*, 46 C. 635.

(10) *Khoda Bux v. Emperor*, A. I. R. 1934 C. 105=37 C. W. N. 1122=61 C. 6=147 I. C. 1124.

Appellate judgment.—This section makes the rules contained in Chapter XXVI of the Code as to the judgments of criminal courts of original jurisdiction applicable to the judgments of any appellate court other than a High Court(1). The rule embodied under ss. 367 and 424 is based on sound principles and has to be observed by every court of criminal appeal other than the High Court(2). The provisions of section 424, read with section 367 are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically, and that the appellate court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the trial court, but should, without being a long and elaborate one, be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record(3).

Contents of judgment.—Under section 424, read with section 367, the judgment of a lower appellate court must among other matters contain the point or points for decision, the decision thereon, and the reasons for the decision(4). A judgment which is deficient in these points is illegal and cannot be allowed to stand(5). An appellate court is not required to write a long and elaborate judgment, but it is clearly its duty, not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided. An appellate court, which writes a judgment which a High Court is unable to follow without reference to the judgment of the trial court, obviously fails in the discharge of the duty imposed upon it by the law(6). A judgment of an appellate court which does not contain the points raised in the memorandum of appeal, the decision thereon and the reasons for the decision is not a legal judgment under section 424 read with section 367(7).

Reasons for decision.—Reasons for the decision should be given

(1) *Emperor v. Pragmadho*, 55 A. 131= A. I. R. 1933 A. 40=1933 A. L. J. 13=1933 Cr. C. 51=19 A. I. Cr. R. 128=144 I. C. 149=34 Cr. L. J. 703; *Talebar v. Emperor*, 18 Cr. L. J. 750=40 I. C. 750=2 Pat. L. W. 49; *Safar Jama v. Satiya*, A. I. R. 1925 C. 266=82 I. C. 290.

(3) *Aghore Dutta v. Emperor*, 11 Pat. 143= A. I. R. 1931 Pat. 379=12 Pat. L. T. 601=16 A. I. Cr. R. 175=1931 Cr. C. 907=32 Cr. L. J. 1197= 134 I. C. 619; See also the case cited in the last note.

(3) *Bhag v. Emperor*, 75 I. C. 226=2 Bur. L. J. 101=1 Rang. 201=1923 Rang. 185=21 Cr. L. J. 910; *Qadir Baksh v. Emperor*, 110 I. C. 449=A. I. R. 1914 Lah. 63=10 A. I. Cr. R. 492=29 Cr. L. J. 705; *Dalip Singh v. Emperor*, 23 Cr. L. J. 9=64 I. C. 317=2 L. 803.

(4) *Ram Lal v. Hari Charan*, 37 C. 194; *Nga Po Han v. Emperor*, 21 I. C. 170=14 Cr. L. J. 570=1 U. B. R. 1919, 169; *Mangla v. Emperor*, 22 Cr. L. J. 656=61 I. C. 416=2 Pat. L. T. 616; *Dicarka v. Emperor*, 92 I. C. 855=27 Cr. L. J. 843=20 S. L. R. 82=A. I. R. 1926 S. 275=6 A. I. Cr. R. 38.

(5) *Mangla v. Emperor*, 22 Cr. L. J. 656=63 I. C. 416=2 P. L. T. 616.

(6) *Dalip Singh v. Emperor*, 23 Cr. L. J. 9=64 I. C. 377=23 P. L. R. 65; *Bhag v. Emperor*, 1 Rang. 301=75 I. C. 226=2 Bur. L. J. 101=1923 Rang. 185=24 Cr. L. J. 920; *Qadir Baksh v. Emperor*, 110 I. C. 449=29 Cr. L. J. 705=A. I. R. 1914 Lah. 63=10 A. I. Cr. R. 492; *Sanwant v. Empress*, 18 P. R. 1877 Cr.

(7) *Kaliram v. Emperor*, 107 I. C. 65=9 A. I. Cr. R. 557=29 Cr. L. J. 270.

practice the proper course is not to acquit the accused but to direct a retrial. It is only in special circumstances, as where the accused has been harassed by repeated trials or where the evidence is so clearly insufficient or incredible that no Jury could reasonably convict that an appellate court would be justified in acquitting the accused on the ground of misdirection(1). But once the verdict of a Jury is set aside under sub-sec. (2), there is no restriction on the powers of the appellate court to deal with the case of which it has complete seizin in any of the manners provided in this section. Its power is not restricted to directing a retrial, and it may also reverse the finding and sentence and acquit or discharge the accused or order him to be retried, or alter the finding and maintain the sentence, or without altering the finding reduce the sentence(2). As soon as the verdict of the Jury is reversed, the court has the same power to deal with the case that it has to deal with a case triable by Assessors as soon as the order of acquittal by the Judge is set aside; that is, the court may order a retrial or may find the accused guilty and pass sentence on him according to law(3). It is only to the High Court to direct, when ordering a new trial, that the accused be tried by a new Jury, when it is found that the verdict of Jury is tainted with prejudice and is based on rumours as to the prisoner's previous conduct(4). It is doubtful whether the High Court has the power to try the case in which it has set aside a conviction on the ground of misdirection. The accused is entitled in such a case to have the case retried before a Jury and as a matter of procedure and in justice to the accused, the course should be adopted(5).

Power to go into facts.—In appeal from the verdict of a Jury it is not open to the appellate court to substitute its own finding for that of the Jury, and to convict the accused of the offence of which the Jury have acquitted them or of some cognate offence substantiated by the evidence which was before the Jury, and in this respect an appeal under s. 418 must be distinguished from a reference under s. 307(6). It is not necessary that the High Court should go through the facts and find for itself whether the verdict is actually erroneous upon the facts(7). But in one case it has been held otherwise(8).

424. The rules contained in Chapter XXVI as to the judgment of a criminal court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any appellate court other than a High Court :

Judgment of subordinate appellate courts.

Provided that unless the appellate court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

(1) *Dhiraji v. Akasi*, 27 Cr L J. 785—*vs* I. C. 885; *Bani Madhab v. Emperor*, 46 C. 212.

(2) *Toju Pramanik v. Empress*, 25 C 711.

(3) *Emperor v. Smither*, 26 M 1.

(4) *In re Anchula*, 2 Weir. 494.

(5) *Sadhu v. Emperor*, 4 C. W. N. 516.

(6) *Emperor v. Ikramuddin*, 39 A. 348; *Wafadar v. Empress*, 21 C. 955; See *Empress v. McCarthy*, 9 A. 420.

(7) *Ali v. Empress*, 25 C. 230 (233).

(8) *Empress v. Smither*, 26 M. 1.

a few lines, making only some general observations evidence the judgment is perfunctory and not in a and should be set aside(1). A Criminal appeal must the lower courts judgment contains a confusion of, dismisses the defence evidence too cursorily(2). If ment is not in accordance with law, the High Court appeal for rehearing and delivery of a proper judgment.

Imputations as to motives of Magistrate.—If the motives of a Magistrate whose judgment is under find a place in the judgment of the appellate court(4).

425. (1) Whenever a case is decided

Order by High Court on appeal to be certified to lower court.

by the High Court under it shall certify its judgment to court by which the finding order appealed against was passed. If the finding, sentence or order or passed by a Magistrate other than the Magistrate, the certificate shall be sent through Magistrate.

(2) The court to which the High Court judgment or order shall thereupon make as are conformable to the judgment or order of Court; and, if necessary, the record shall be in accordance therewith.

426. (1) Pending any appeal by

Suspension of sentence pending appeal. Release of appellant on bail.

person, the appellate court shall order that the execution of the order appealed against be suspended.

also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an appellate court may be exercised also by the High Court in the case of any appeal by a convicted person to a court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

(1) *Sunehri v. Emperor*, 23 Cr. L. J 378—67 I. C. 367—56 P. L. R. 1922.

(2) *Nogi Reddy v. Emperor*, 3 Cr. L. J. 41.

(3) *Bhola Nath v. Emperor*, 7 C. W.

N. 30; *Ram Lal v. Hari*, 37 C. 194; *Crown v. Chanda Singa*, 43 P. W. R. 1912 Cr.; *Empress v. Gopala*, 1 Bom. L. R. 225.

(4) *In re Yakob Sahib*, 2 Welr. 535

by an appellate court in its judgment in order that the superior court may at once know the facts found and the reasons therefor without reference to the record and satisfy itself that the lower court has done its duty by an honest and careful consideration of the case. There must be sufficient material in the appellate judgment itself to show that the appeal has been properly tried and the judgment or order must bear marks of such intelligent appreciation on the part of the appellate court of the necessary facts and material as would warrant the superior court to infer that the conclusions were properly arrived at by the lower appellate court(1). A judgment of an appellate court which does not discuss the points urged in the memorandum of appeal and without giving any reasons holds that a conviction is correct is not a legal judgment under s. 424 read with section 367(2).

Judgment must discuss evidence.—A judgment of an appellate court which does not set out or discuss the evidence on which the conclusions are based is not a proper judgment and is liable to be set aside by the High Court in revision(3). A judgment of an appellate court which does not discuss the evidence in the case and from which it is not possible to find out what the occurrence was which is dealt with in the judgment is not a judgment which complies with the provisions of section 367 and must be set aside(4). It is the duty of the appellate court to look into the evidence for the defence, and after dealing with it to come to a decision thereon, notwithstanding that the counsel for the appellant has practically ignored it during his arguments(5). But the mere absence of an express finding on a special defence raised by the accused apart from a general finding that the prosecution case is true will not render a judgment illegal, where it is clear from the judgment that the Magistrate has duly considered the evidence adduced by the accused to support his special defence(6).

Judgment not in accordance with law.—See notes under s. 367.

Irregularity if curable.—Section 537 of the Code does not cure the defects in a judgment which is clearly at variance with the direction given in sections 367 and 424 and which materially prejudices the accused in the trial of their appeal(7), though there is authority to the contrary also(8). Where a District Magistrate disposes of an appeal against an order under s. 110, Cr. P. C., passed in a case in which 42 witnesses were examined for the prosecution and 106 for the defence, in

(1) *Mandil v. Emperor*, 81 I. C. 437.

(4) *Goharali v. Emperor*, 81 I. C. 437=25 Cr. L. J. 901=(1925) A. I. R. (C.) 266.

(5) *Fidoi Hossain v. Emperor*, 40 C. 376.

(6) *Lalhan Singh v. Emperor*, 119 I. C. 560=1929 Pat. 231=30 Cr. L. J. 1070=1nd Bul. (1929) Pat. 698.

C 138.

(2) *Kaliram v. Emperor*, 107 I. C. 665=9 A. I. Cr. R. 557=29 Cr. L. J. 270.

(3) *Dalip Singh v. Emperor*, 112 I. C. 350=10 Lah. L. J. 847=29 Cr. L. J. 1031; *Sardul Singh v. Crown*, 29 P. L. R. 461.

(7) *Kanhai Singh v. Emperor*, 17 I. C. 795=10 A. L. J. 435=13 Cr. L. J. 859; *Patilbura v. Emperor*, 6 A. I. Cr. R. 451.

(8) *Fakir Bux v. Emperor*, 95 I. C. 753=27 Cr. L. J. 833=A. I. R. (1926) Sind. 244.

a few lines, making only some general observations evidence the judgment is perfunctory and not in a and should be set aside(1). A Criminal appeal must the lower courts judgment contains a confusion or dismisses the defence evidence too cursorily(2). Judgment is not in accordance with law, the High Court appeal for rehearing and delivery of a proper judgment.

Imputations as to motives of Magistrate.—In the motives of a Magistrate whose judgment is under find a place in the judgment of the appellate court(4

425. (1) Whenever a case is decided by the High Court under shall certify its judgment court by which the finding order appealed against was

Order by High Court on appeal to be certified to lower court.

passed. If the finding, sentence or order or passed by a Magistrate other than the Magistrate, the certificate shall be sent through Magistrate.

(2) The court to which the High Court judgment or order shall thereupon make as are conformable to the judgment or order Court ; and, if necessary, the record shall in accordance therewith.

426. (1) Pending any appeal by person, the appellate court shall record by it in that the execution of the order appealed against be suspended

Suspension of sentence pending appeal. Release of appellant on bail.

also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an appellate court may be exercised also by the High Court in the case of any appeal by a convicted person to a court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

(1) *Sunehri v. Emperor*, 23 Cr. L. J 378—67 I. C 367—56 P. L. R. 1922.

(2) *Nogi Reddy v. Emperor*, 3 Cr. Law. Mad 41.

(3) *Bhola Nath v Emperor*, 7 C. W.

N. 30; *Ram Lal v. Hari*, 37 C. 194; *Crown v. Chanda Singa*, 43 P.W. R. 1912 Cr.; *Empress v Gopala*, 1 Bom. L. R. 225.

(4) *In re Yakooob Sahib*, 2 Welr. 635

"*Pending an appeal.*"—This section gives no power to the court of original jurisdiction, or to the court in which no appeal is pending to suspend the sentence. Where a Magistrate postponed the execution of a sentence of imprisonment for a stated period, at the request of the accused to allow the accused to appeal, it was held that the sentence was bad in law, and could not be carried into execution(1). A Sessions Judge has no authority to suspend a sentence in the absence of an appeal(2).

"*By a convicted person.*"—Under this section the existence of an appeal by a *convicted person* is a condition precedent to jurisdiction to grant bail, and that, therefore, an order of District Magistrate, releasing on bail pending appeal a person who has been called upon to give security under section 118 of the Code and he has appealed to him, is without jurisdiction(3).

"*Appellate court.*"—This section gives no power to the court of original jurisdiction or to the court in which no appeal is pending to suspend the sentence(4). The only courts which have power to suspend the execution of a sentence or order, are the courts to which an appeal lies and the High Court. A Sessions Judge has no power, therefore, to suspend the operation of the sentence passed on certain accused persons by a second class Magistrate under this section(5).

Sentence.—An order of detention passed by a District Magistrate under section 10 of the Reformatory Schools Act (VIII of 1897) is not a "sentence" within the meaning of this section, nor is it a punishment enumerated in section 53 of the Indian Penal Code. A Sessions Judge, therefore, has no power to suspend its operation under this section(6).

Release on bail.—The mere previous respectability of a man is *per se* no sufficient reason for granting bail after he has been convicted of a criminal offence. The question of grant of bail is not only to be dealt with from the point of view of there being likelihood or not of the accused person absconding(7).

Exclusion of time.—In the absence of very special cause, no order for a suspension of sentence should be passed, as the result of such an order is that if the appeal fails finally the convicted person only serves the original period of his sentence less the period of suspension(8). It is only when the convicted person has been released that the term during which the sentence is suspended shall be excluded(9).

Sub-section (2).—The High Court has power to grant bail even when it has been refused by the Sessions Judge. But the High Court will only interfere with the discretion of the Sessions Judge in refusing bail, if that discretion was manifestly wrong or is, in fact, no real

(1) *In re Kishen Soonder*, 12 W. R. Cr. 47.

(2) 5 M. H. C. R. App. 1.

(3) *Charan v Emperor*, 9 Pat. 131=11 P. L. T. 251=125 I. C. 791=A. I. R. 1930 Pat. 274=Ind. Rul. (1930) Pat. 568=31 Cr. L. J. 958=(1930) Cr. C. 455.

(4) *In re Kishen Soonder*, 12 W. R. Cr. 47 (body).

(5) *In re Kodu Moidin*, 2 Weir. 536.

(6) *Emperor v. Krishna Pandaram*, 16 Cr. L. J. 184=27 I. C. 198.

(7) *Sheikh Karim v. Emperor*, 27 Cr. L. J. 319=1926 Nag. 279=92 I. C. 703=5 A. I. Cr. R. 574.

(8) *Ibid.*

(9) *In re Kodu Moidin*, 2 Weir. 536.

discretion has been exercised(1).

427. When an appeal is presented under section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate court, and the court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail.

—In capital cases, where from an order of acquittal he prisoner's fate should be discussed while he remains at large and the Government should in that case apply for the arrest of the accused under this section(2). A warrant of arrest under this section is not an order to the prejudice of the accused within the meaning of section 439 (2) so as to necessitate a previous notice being given to him(3).

428. (1) In dealing with any appeal under this Chapter, the appellate court, if it thinks additional evidence to be necessary, shall record its reason, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the appellate court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate court, and such court shall thereupon proceed to dispose of the appeal.

(3) Unless the appellate court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of Jurors or Assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

Powers of civil and criminal appellate court to take additional evidence distinguished.—The powers of a criminal appellate court, under this section, are not analogous to those conferred on a civil appellate court under O. XLI, r. 27 of the Civil Procedure Code. A court of criminal appeal can take additional evidence at any time, only it must record its reason for so doing(4).

(1) *Sheikh Karim v. Emperor*, 27 Cr. L. J. 319=1926 N. 8 273=92 I. C. 703 =5 A. I. Cr. R. 371.

(2) *Emperor v. Gobardhan*, 9 A. 579, *per* Edge, C. J.

(3) *Emperor v. Nga E. Maung*, 9 L. B. R. 220.

(4) *In re Bhami Luxuman*, 6 I. C. 145=11 Cr. L. J. 571=8 M. L. T. 418=(1910) M. W. N. 819.

(9) *In re Kodu Moidin*, 2 Weir. 536.

evidence and the entire evidence falls short of sustaining the charge(1). This section does not empower the appellate court so to act in a case where there is no evidence legally capable of sustaining the charge but contemplates a further inquiry by taking additional evidence to be directed by the appellate court when the conviction by the lower court has been based upon some evidence which might legally support it, but which, in the opinion of the appellate court, is not quite satisfactory(2). The power to take additional evidence should not be exercised for the purpose of filling a gap in the prosecution case, when the necessary evidence was easily available to the prosecutor at the hearing and ought to have been then produced(3). Where the lower court has refused to examine certain witnesses for the defence and the accused has been prejudiced in his defence by such refusal, the appellate court may direct the lower court to take the evidence of such witnesses and to certify the same to it(4). Where a conviction on serious charge such as sedition, if otherwise sustainable, would have to be upset for want of formal proof of sanction, owing to a misconception as to the proper mode of proving it on the part of the prosecution, a misconception which was shared by the trial court the appellate court will admit additional evidence to supply the defect in formal proof of the sanction(5). This section permits the appellate court to order the taking of evidence in formal proof of the documents which have not been properly proved(6). It is the duty of the prosecution in a case under s. 368, I. P. C., to place the first report to the police before the court and if the prosecution does not do so and if the accused had not come to know of this report at an earlier stage, in the interest of justice it is necessary that additional evidence should be taken by the appellate court(7).

Necessity for taking additional evidence.—Additional evidence may be taken under this section only if the appellate court thinks it to be necessary and the necessity for taking such evidence must be apparent from something on the record, and cannot be derived from external information(8). The word "necessary" in this section does not import that it should be impossible to pronounce judgment without additional evidence. This section is not rendered inapplicable merely because it is not the court but the accused that considers such evidence to be necessary. Neither is the section confined in its operation to cases of absence of evidence on some formal point such as a sanction, nor only to evidence for the prosecution(9). The language seems to indicate cases where there being already evidence on the record, the appellate court considers it to be unsatisfactory, or where the evidence

(1) *Empress v. Fateh*, 5 A. 217 (121); *Jeremiah v. Vas*, 36 M. 457=22 M. L. J. 75=12 Cr. L. J. 685=12 I. C. 961=10 M. L. T. 506.

(2) *In re Woodoy Chand*, 18 W. B. Cr. 31=9 B. L. R. App. 31 at p. 32.

(3) *In re United Motor Finance Co.*, A. I. R. 1935 M. 325; *Jeremiah v. Vas*, 36 M. 457; *Emperor v. Bansilal*, 1928 B. 241=112 I. C. 110=29 Cr. L. J. 990=52 B. 686.

(4) *Empress v. Virasami*, 19 M. 375

=2 Weir. 680=6 M. L. J. 195

(5) *Varadarajulu v. Emperor*, 42 M. 885 B.

(6) *Mohammad Din v. Emperor*, A. I. R. 1934 Lab. 316.

(7) *Sarnam Singh v. Emperor*, A. I. R. 1935 A. 63.

(8) *Emperor v. Po Gyi*, 3 L. B. R. 114 (115).

(9) *In re Narayana Menon*, 25 Cr. L. J. 401=77 I. C. 481=A. I. R. 1925 M. 106.

Scope and object.—This section merely enables an appellate court, if it thinks it necessary, to call for additional evidence, which will explain or clear up or perhaps supplement within limitations, the evidence for the prosecution in support of a charge, which has resulted in a conviction and which conviction is the subject of an appeal. It does not enable the appellate court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence(1). The object of this section is the prevention of careless or ignorant proceedings an innocent person wrongfully ac the same carelessness or ignorance has omitted to record the circumstances essential to the elucidation of truth(2). The intention of the Legislature in enacting this section is to empower an appellate court to see that justice is done between the prosecutor and the person prosecuted, and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct finding it would be justified in taking action under this section(3). Additional evidence should not be taken without conforming to the provisions of this section(4).

Additional evidence when to be admitted.—Where in an appeal a Sessions Judge is of opinion that the evidence of witnesses, who were not examined in the lower court, is necessary, he should proceed under this section(5). The powers given by this section to an appellate court to take additional evidence are perfectly general and are subject only to the condition that the court should record its reasons(6). Under the provisions of this section an appellate court can admit additional evidence but the necessity for taking such additional evidence must be apparent from something on the record, and cannot be derived from external information(7). The subject has been discussed in *King Emperor v. Nga Naing*(8), where it was held that in an appeal from an acquittal, the fact that fresh evidence against the accused has been discovered subsequent to the acquittal is not a sufficient reason for setting aside the acquittal or ordering a new trial. The powers conferred by this section are not intended to be exercised in cases in which the prosecution having had ample opportunities to produce

(1) *Konda Reddi v. Mangala Babanna*, 51 M. 63=128 I. C 159=59 M. L. J. 459=32 L. W. 534=A. I. R. 1930 M. 854=1930 M. W. N. 1209=32 Cr. L. J. 109=(1930) Cr. C. 1149.

(2) *In re Woodoy Chand*, 18 W. R. Cr. 31; *Akhtar v. Emperor*, 6 Pat. L. T. 431=24 Cr. L. J. 1171=A. I. R. 1925 Pat. 516=3 Pat. L. R. Cr. 101=89 I. C. 595.

(3) *Dulla v. Emperor*, 7 Lah 148 (151)=27 Cr. L. J. 463=93 I. C. 255=A. I. R. (1926) Lah. 301 (1)=27 P. L. R. 131.

(4) *Wali Muhammad v. Emperor*, 83 I. C. 901=21 A. L. J. 869=9 O & A. L. R. 931=1921 A. 193=26 Cr. L. J.

200=L. R. 5 A 9 Cr ; *In re Chinthalapudi*, 8 I. C 943=8 M. L. T. 449=(1910) 1 M. W. N. 829=11 Cr. L. J. 734

(5) *Emperor v. Luchmun Singh*, 31 C. 710; *Ishwar v. Emperor*, 16 A. L. J. 325. (It cannot order a retrial on that ground.)

(6) *Varadarajulu v. Emperor*, 42 M 8=5 S. B.

(7) *Emperor v. Po Gyi*, 3 L. B. R. 114.

to be taken this section authorises a High Court to make such an order if it thinks additional evidence to be necessary(1).

Remand for additional evidence and finding illegal.—This section empowers a Magistrate to only call for evidence and not for a finding. Where he calls for a finding instead of merely calling for evidence, his order should be set aside and he should be directed to restore the case to his file and dispose of it according to law(2). The appellate court is not competent to act upon the finding by the subordinate Magistrate on the additional evidence(3). A remand of a case under this section can only be for the purpose of taking further evidence and certifying the result thereof to the appellate court, and not for the purpose of retrying the case upon such fresh evidence. After remand under this section, the appellate court can only try the case as an ordinary appeal(4). An order of the Sessions Judge remanding the case to the trial court with a direction that the applicant should be allowed an opportunity to cross-examine two of the prosecution witnesses and that the Magistrate should record further evidence and certify it to the Sessions Court, cannot be supported under this section(5).

Examination of accused after additional evidence recorded.—The provisions of section 342 of the Code, as regards examination of the accused, do not apply to additional evidence taken under this section. There might be cases where the accused could properly be questioned by the Magistrate in regard to additional evidence taken under the directions of the appellate court, but if he does not do so there is no omission of any thing required by law(6). Where the court has convicted the accused without examining them under s. 342, the appellate court should set aside the conviction and sentences and remand the case to the first court, and that court, after compliance with the provisions of section 342 of the Code and after giving the accused an opportunity of calling evidence, should deal with the case on its merits as if it were before that court for the first time(7).

Power of appellate court after taking additional evidence.—The appellate court cannot consider and determine a new case disclosed by additional evidence, except in so far as to confirm or modify or set aside the sentence under appeal, or to act as otherwise provided by s. 423 (b). The function of the appellate court is to dispose of the appeal, and s. 430 declares that save in certain cases, "judgments and orders passed by an appellate court on an appeal shall be final"(8). The High Court

(1) *Bal Kishun v. Emperor*, A. I. R. 1935 Pat 203

(2) *Emperor v. Karnan Benu*, 10 I. C. 290=9 M. L. T. 406=12 Cr. L. J. 240

(3) *Muthu Karuppan v. Vellaya*

(4) *Emperor v. Lakshman Ramshet*, 53 B. 578=121 I. C. 588=31 Bom. L. R. 593=A. I. R. 1929 B. 309=31 Cr. L. J.

309=Ind. Rul. (1930) Bom. 76.

(6) *Emperor v. Narayan Keshav*, 52 B. 699=30 Bom. L. R. 651=29 Cr. L. J. 972=112 I. C. 60; *Mohiuddin v. Emperor*, 4 Pat 489=26 Cr. L. J. 811=3 Pat. L. R. Cr. 110=86 I. C. 459=A. I. R. 1925 Pat 414=6 Pat. L. T. 154=1 P. H. C. C. 112

(7) *Abdul Samad v. Emperor*, 40 O. L. J. 319=26 Cr. L. J. 313=A. I. R. 1915 O. 172.

(8) *Empress v. Ishak*, 27 C. 372 overruling *Queen v. Mohesh Chunder*, 2 W. R. Cr. 13.

on record leave the court in such state of doubt that to enable it to decide the case it considers it necessary to have further evidence. The necessity must be determined on the particular facts of each case(1). There is nothing in the terms of this section to preclude an appellate court from endeavouring to ascertain the value of the statement made by a defence witness by further examining him as a court witness, or to limit the application of the section to the reception of merely formal evidence(2).

Recording reasons—This section in general terms, gives power to the appellate court to take additional evidence but before taking such evidence the court must record the reasons for so doing(3). But the failure to record reasons for ordering fresh evidence is an irregularity that is cured by s. 537(4).

Additional evidence in appeal under s. 476 B.—This section has no application to proceeding under section 476 (b) and an appellate court dealing with an order of the lower court under section 476 (b) has no jurisdiction to take additional evidence even though the reception of such evidence is not objected(5).

Appeal from order under s. 250—An appeal from an order under s. 250 of the Code is an appeal under and by virtue of sections 250 and 407 of the Code, and the court hearing the appeal has jurisdiction under this section to take additional evidence if it thinks it to be necessary, and failure to record its reasons required by this section will invalidate the proceedings, only if such omission has occasioned a failure of justice(6).

Orders under s. 125.—This section does not apply to orders passed under s. 125 as they are:

Court empowered to
court when dealing with an
to be taken or itself record
hearing an appeal, thinks that the evidence of some more witnesses who were not examined in the lower court is necessary he should proceed under this section, and not order retrial on that ground(9). Even if a Sessions Judge, were not entitled to direct additional evidence

(1) *Jeremiah v. Vas*, 36 M. 457=12 I. C. 961=(1911) 2 M. W. N. 576=10 M. L. T. 506=22 M. L. J. 73=12 Cr. L. J. 33.

(2) *Subramania Aiyar, In re*, 55 M. L. J. 676=1918 M. W. N. 777=113 I. C. 325=A. I. R. 1928 M. 1174=28 I. W. 255=20 Cr. L. J. 200.

(3) *Emperor v. Kurnan Benu*, 10 I. C. 290=9 M. L. T. 406=12 Cr. L. J. 240.

(4) *Sami Vannia v. Periancam*, 27 L. W. 255=108 I. O. 638=(1928)

M. W. N. 73=A. I. R. 1928 M. 891=10 A. I. C. R. 55=19 Cr. L. J. 445=51 Mad 603=55 M. L. J. 218; *Chorpat Rai v. Balak Ram*, 13 I. ab. 342=A. I. R. 1931 I. ab. 761=1931 Cr. O. 1065=135 I. C. 594.

(6) *Seeniah Naidu v. Abdul Wahab* 59 M. 688=3 M. Cr. O. 160=31 L. W. 524=123 I. O. 811=A. I. R. 1930 M. 481=1930 Cr. O. 507=58 M. L. J. 414=Ind. Ral. 1930 Mad 553=31 Cr. L. J. 602.

(7) *Nasiban v. Emperor*, 20 Cr. L. J. 421=49 I. C. 781=17 A. I. J. 146=1 U. P. L. R. (H. J.) 88.

(8) *Moni Mohan v. Iscar Chunder*, 6 C. L. J. 251=6 Cr. L. J. 357.

(9) *Emperor v. Luchmun Singh*, 31 C. 710.

laid before a third Judge under this section is the complete case in so far as the two Judges who first heard the appeal have differed as regards particular appellants but not the case of the other appellants as to whom they did not differ(1). But in one case it has been held that in a case referred under this section a third Judge would not differ upon a point on which both referring Judges were agreed unless there were strong grounds for doing so(2).

Difference of opinion as to question of sentence.—"If in any case of murder under s. 302, Penal Code one finds that two learned Judges of this court are in disagreement over the question of sentence one favouring the death penalty and other recommending that the transportation for life would meet the ends of justice that in itself is a sufficient ground for holding that the death penalty should not be inflicted. This is, however, not an inflexible rule that the third Judge to whom the matter is referred on a difference of opinion on the question of sentence should go into the case for himself and judge for himself whether the case before him is, or is not, a fit one for the infliction of the death penalty(3)".

Reference to Full Bench.—Cases governed by this section cannot be referred to a Full Bench(4). A third Judge to whom a reference is made under this section cannot make a reference to a Full Bench(5).

Difference of opinion in criminal revision case.—Where the Judges of a Division Bench differ in a criminal revision case, section 439 read with this section requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the court(6).

Case referred under s. 307.—Where the Judges of the Bombay High Court differed in opinion in a case referred by a Sessions Judge to the High Court, under s. 307, *supra* the court directed that the case should be laid before a third Judge; being of opinion that the Code overrules the provisions of cl. 36 of the Letters Patent 1865(7). On the construction of cl. 36 as it stood prior to its amendment in 1928 there have been some cases, but it is unnecessary to cite them here, as those cases have, in consequence of the alteration, now become obsolete(8).

(1) *Ahmed Sher v. Emperor*, 82 Cr. L. J. 868=121 C. 381=Ind Rul (1931) Lah. 573=A. I. R. 1931 Lah. 513=(1931) Cr. Cas. 787; following *Sarat Chandra v. Emperor*, 38 C. 202=7 I. C. 641=12 C. L. J. 294=11 Cr. L. J. 515.

(2) *W. v. W.*—*Consent*

Rul (1930) C. 529=31 Cr. L. J. 517=(1930) Cr. C. 225; see *Empress v. Bundu*, (1897) A. W. N. 125; *Empress v. Deringh*, (1886) A. W. N. 275.

(4) *Re Dudekula Lal Sahab*, 40 M. 976=33 M. L. J. 131.

(5) *Ishan v. Hirdey*, 29 C. W. N. 475=41 C. L. J. 357=26 Cr. L. J. 915=86 I. C. 979=1045 C. 1040.

(6) *Re Dudekula Lal Sahab*, 40 M. 976 (1986); *Lal Dhari v. Sukhdeo*, 27 C 892 (910); *Rehmatulla v. Rahmatulla Kandur*, 27 C 501 (505)

(7) *Emperor v. Dada Ana*, 15 B. 452.

(8) See *Bapu v. Bapu*, 39 M 750=11 M. L. J. 307=(1912) 1 M. W. N. 499=22 M. L. J. 419=14 I. C. 305 F. B.; *Motiram v. Mirjan*, 24 C. W. N. 97=21 C. L. J. 183=64 I. C. 162.

has power to direct the Sessions Judge to rehear an appeal after obtaining additional evidence(1).

Right of accused to appeal to High Court.—An appellant whose appeal is dismissed by an appellate court, after it has taken additional evidence, under this section, has no right of appeal to the High Court(2). Where an appellate court, under this section directs the first court to take additional evidence, no appeal lies to the High Court on the merits from such judgment(3). The contrary view taken in the following cases is no longer good law(4).

Sub-section (3).—It is only as an appellate court that a court can record additional evidence in the absence of Jury or Assessors. Accordingly where a Sessions Court in a trial for murder by Assessors relied on a statement by the deceased and the evidence necessary to prove that statement was not recorded until after the discharge of the Assessors it was held, that evidence was recorded *coram non judice*(5).

Power to direct prosecution.—When an appellate court directs further evidence to be taken by a subordinate court before which such evidence is given, if any offence against public justice as described under s. 195 is committed before such court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of s. 476(6).

Inquiry by police.—This section does not warrant an appellate court sending a case to the police for investigation when the case has been originally taken cognizance of on a complaint to the court(7).

Revision of order allowing additional evidence.—Where the appellate court has thought fit to admit additional evidence, to justify interference in revision the superior court must be satisfied that the appellate court committed an error of law which has prejudiced the accused on the merits(8).

429. When the Judges composing the court of appeal are equally divided in opinion, the

Procedure where Judges of court of appeal are equally divided.

case, with their opinions thereon, shall be laid before another Judge of the same court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Case.—A reference under this section where the point of difference does not necessarily involve conflicting decisions as to the disposal of the whole case is likely to lead to inconvenient results(9). The case

(1) *Mahomed v. Emperor*, 3 Pat. L. J. 632=19 Cr. L. J. 902.

(2) *Empress v. Ishaq*, 27 C 372 overruling *Queen v. Mohesh Chunder*, 2 W. R. Cr. 18.

(3) *Reg v. Nantamram*, 6 Bom. H. C. R. C. C. 64.

(4) *Queen v. Mohesh Chunder*, 2 W. R. Cr. 13.

(5) *Emperor v. Ram Lal*, 15 A. 136.

(6) *Queen v. Buktear Maifaras*, 16 W. R. Cr. 64.

(7) *Maheshri*, (1900) A. W. N. 130.

(8) *Akhtar Hussain v. Emperor*, 6 Pat. L. T. 431=A. I. R. (1915) Pat. 526=88 I. C. 595=26 Cr. L. J. 1171.

(9) *Sejmal v. Emperor*, 100 I. C. 981=29 Bom. L. R. 170=7 A. I. Cr. R. 505.

laid before a third Judge under this section is the complete case in so far as the two Judges who first heard the appeal have differed as regards particular appellants but not the case of the other appellants as to whom they did not differ(1). But in one case it has been held that in a case referred under this section a third Judge would not differ upon a point on which both referring Judges were agreed unless there were strong grounds for doing so(2).

Difference of opinion as to question of sentence.—"If in any case of murder under s. 302, Penal Code one finds that two learned Judges of this court are in disagreement over the question of sentence one favouring the death penalty and other recommending that the transportation for life would meet the ends of justice that in itself is a sufficient ground for holding that the death penalty should not be inflicted. This is, however, not an inflexible rule that the third Judge to whom the matter is referred on a difference of opinion on the question of sentence should go into the case for himself and judge for himself whether the case before him is, or is not, a fit one for the infliction of the death penalty(3)".

Reference to Full Bench.—Cases governed by this section cannot be referred to a Full Bench(4). A third Judge to whom a reference is made under this section cannot make a reference to a Full Bench(5).

Difference of opinion in criminal revision case.—Where the Judges of a Division Bench differ in a criminal revision case, section 439 read with this section requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the court(6).

Case referred under s. 307.—Where the Judges of the Bombay High Court differed in opinion in a case referred by a Sessions Judge to the High Court, under s. 307, *supra* the court directed that the case should be laid before a third Judge; being of opinion that the Code overrules the provisions of cl. 36 of the Letters Patent 1865(7). On the construction of cl. 36 as it stood prior to its amendment in 1928 there have been some cases, but it is unnecessary to cite them here, as those cases have, in consequence of the alteration, now become obsolete(8).

(1) *Ahmed Sher v. Emperor*, 82 Cr. L. J. 863=121 C. 381=Ind Rul (1931) Lah. 513=A. I. R. 1931 Lah. 513=(1931) Cr. Cas. 737; following *Sarat Chandra v. Emperor*, 38 O. 202=7 I. C. 641=12 O. L. J. 294=11 Cr. L. J. 515.

(2) *Venkataramnam v. Corporation of Calcutta*, 22 O. W. N. 745=19 Cr. L. J. 759=46 I. C. 593.

(3) Per C. C. Ghose, J., in *Emperor v. Dukri Chandra*, 125 I. C. 305=33 O. W. N. 1216=A. I. R. 1930 C. 193=Ind Rul (1930) C. 529=31 Cr. L. J. 517=(1930) Cr. O. 225; see *Empress v. Bundu*, (1887) A. W. N. 125; *Empress v. Deringham*, (1886) A. W. N. 275.

(4) *Re Dudekula Lal Sahab*, 40 M. 976=33 M. L. J. 121.

(5) *Ishan v. Hirdey*, 29 O. W. N. 475=41 O. L. J. 357=25 Cr. L. J. 916=86 I. C. 979=1915 C. 1040.

(6) *Re Dudekula Lal Sahab*, 40 M. 976 (986); *Lal Dhari v. Sukhdeo*, 27 O. 892 (910); *Rehmatulla v. Rahmatulla Kandu*, 27 O. 501 (505).

(7) *Emperor v. Dada Ana*, 15 B. 452.

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430. Judgments and orders passed by an appellate court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII

Finality of orders on appeal.

Finality of orders on appeal—This section declares that save in certain cases judgments and orders passed by an appellate court shall be final(1). An order of summary rejection of appeal under s. 421 is final. Such an order is not open to review and it is immaterial whether such order is made before or after the papers have been called for(2). In *Anonymous*(3) a ruling is, however, given to the effect that when a criminal appeal has been rejected without hearing the appellant's pleader under the corresponding section 421 of the Code and it appears that an adequate excuse has been made for the pleader's non appearance, it is open to the appellate court to rehear the appeal on its merits. This view receives support from another case of the same court(4). A Sessions Judge who, after receiving a criminal appeal, records a written order of rejection on the ground that it is barred by limitation, cannot, on a later representation by the prison, admit the appeal, and at the hearing acquit the accused(5). A Sessions Judge, having refused to revoke a sanction has no jurisdiction to review his order and revoke it(6). When an accused has sent his petition of appeal through jail and it has been dismissed by the High Court it is not competent to entertain a subsequent appeal filed through the counsel(7).

Exception.—In accordance with the exception provided for by this section the High Court could exercise the power of enhancement notwithstanding the fact that the jail appeal has been decided, and in exercising the power of enhancement the court is not in any way violating the provisions of section 369 of the Code because the provisions of section 369 must be read subject to the provisions of this section(8). When an appeal has been presented and dismissed either after hearing or summarily, it is not open to the accused in showing cause why his sentence should not be enhanced, to go again into the merits(9).

Appeal under S. 417 from judgment of acquittal of graver offence after disposal of appeal by accused against conviction in respect of minor offence.—An appeal under s. 417 can be preferred although an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. A judgment which acquits the accused of a graver charge but convicts him of a minor offence can be attacked by filing two distinct appeals(10).

(1) *Empress v. Ishaq*, 27 C. 372= (376)=4 C. W. N. 497.

(2) *Empress v. Mohammad Yasin*, 4 B. 101; *Empress v. Bhumappa*, 19 B. 731; *Nehala v. Empress*, 24 P. R. 1837 Cr.

(3) 7 M. H. C. R. App. 29.

(4) *In re Kunhammad*, 46 M. 882 (103); See also *Ratan Chand v. Emperor*, 5 N. L. R. 76.

(5) *Empress v. Bhumappa*, 19 B. 732.

(6) *Empress v. Ganesh*, 23 B. 50.

(7) *Ram Autar v. Emperor*, 11 O. L. J. 536=82 I. C. 545=10 C. & A. L. R. 739=25 Cr. L. J. 1313=1914 O. 445.

(8) *Emperor v. Abdul Qayum*, 55 A. 715=A. L. R. 1933 A. 485=140 I. C. 167=34 Cr. L. J. 1205.

(9) *Emperor v. Koya Partab*, 32 Bom. L. R. 1286=1930 B. 593; *Emperor v. Jorabhai*, 50 B. 783=28 Bom. L. R. 1051.

(10) *Mohammadi Gul v. Emperor*, A. L. R. 1932 Nag. 141.

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Exception.—In accordance with the exception provided for by this section the High Court could exercise the power of enhancement notwithstanding the fact that the jail appeal has been decided, and in exercising the power of enhancement the court is not in any way violating the provisions of section 369 of the Code because the provisions of section 369 must be read subject to the provisions of this section(8). When an appeal has been presented and dismissed either after hearing or summarily, it is not open to the accused in showing cause why his sentence should not be enhanced, to go again into the merits(9).

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(3) 7 M. H. C. R. App. 29.

(4) *In re Kunhammad*, 46 M. 382 (403); See also *Itan Chand v. Emperor*, 5 N. L. R. 76.

(5) *Empress v. Bhimappa*, 19 B. 732.

(6) *Empress v. Ganesh*, 29 B. 50.

(7) *Ram Autar v. Emperor*, 11 O. L. J. 536=82 I. C. 545=10 O. & A. L. R. 739=25 Cr. L. J. 1318=1914 O. 425.

(8) *Emperor v. Abdul Qayum*, 55 A. 715=A. I. R. 1933 A. 485=190 I. C. 167=34 Cr. L. J. 1205.

(9) *Emperor v. Koya Parlab*, 32 Bom. L. R. 1486=1930 B. 593; *Emperor v. Jorabhas*, 50 B. 783=28 Bom. L. R. 1051.

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(7) *Ram Autar v. Emperor*, 11 O. L. J. 536 = 82 L. C. 545 = 10 O. & A. L. R. 739 = 25 Cr. L. J. 1318 = 1911 O. 445.

(8) *Emperor v. Abdul Qayum*, 55 A. 715 = A. I. R. 1933 A. 480 = 120 L. C. 167 = 34 Cr. L. J. 1205.

(9) *Emperor v. Koya Partab*, 32 Bom. L. R. 1486 = 1930 B. 593, *Emperor v. Jorabhas*, 50 B. 783 = 23 Bom. L. R. 1051.

(10) *Mohammadi Gul v. Emperor*, A. I. R. 1931 Nag. 121.

Finality of judgments in revision.—The principle of finality of judgments laid down in this section must apply to judgments in revision applications also(1).

431. Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Abatement of appeal on death of appellant.—The Code has not made any provision for the continuance of the appeal either by the heir, or devisee, or executor of the deceased convict or by any other person. The appeal abates upon the appellant's death. But the High Court has the right to call for the record, and make such order thereon as it may deem to be due to justice(2). One of the two accused convicted of a criminal breach of trust died after the filing of the appeal from the conviction. The High Court, on appeal, quashed the conviction of the surviving appellant. A nephew of the deceased appellant applied to the High Court to reverse the conviction and sentence passed upon the deceased. It was held that the appeal of the deceased abated, and that the case should not be taken up by the High Court under its revisional powers, as it depended on appreciation of evidence; the only remedy open to the representative was to apply to the Governor-in-Council(3).

Abatement of appeal from a sentence of fine.—This section has been amended by the addition of the words "except an appeal from a sentence of fine"(4).

Revision against sentence of imprisonment and fine.—The principle of this section is applicable to revisions and that consequently no revision can be entertained against a sentence where the accused has since died, except a sentence of fine(5). Hence a petition for the revision of an order directing the petitioner to pay compensation under section 250 of the Code does not abate on the death of the petitioner(6).

(1) *Emperor v. Inderchand*, A. I. R. 1934 B. 471—36 Bom. L. R. 954.

(2) *Imperialrix v. Dongaji Andaji*, 2 B. 554.

(3) *In re Nabishah*, 19 B. 714.

(4) *Daulat Ram v. Crown*, 8 P. R.

1919 Cr. at p. 22.

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(6) *In re Nabishah*, 19 B. 714.

CHAPTER XXXII.

OF REFERENCE AND REVISION.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

Reference by Presidency Magistrate to High Court. Application of the section.—This section only applies to Presidency Magistrates. And it has been held that the High Court will not take action on a report by a District Magistrate under s. 348 in cases where the District Magistrate has jurisdiction to dispose of the matter pending before him, see the ruling of the Madras High Court, namely, *In re Palani Gowdan*(1).

Reference by District Magistrate to High Court—A District Magistrate has no power under this section to refer a case to the High Court as this section only applies to the Presidency Magistrates, and though the Court has jurisdiction under s. 439 to exercise its powers of revision, whatever the sources of its knowledge, a High Court would not, as a rule, exercise those powers in a case where the Magistrate making the report has jurisdiction to dispose of the matter himself(2).

Any question of law.—A reference to the High Court under this section must be on a question of law and not on a question of fact(3). Upon a reference under this section the High Court deals only with the particular points of law stated for its opinion, but not with the facts of the case nor any other objection to the validity of the proceedings referred(4). It is not open to a Presidency Magistrate to refer a point of law which is covered by an authority binding on him(5).

Which arises in the hearing of any case pending before him.—The power of reference conferred upon the Presidency Magistrate by this section is confined to questions of law, which the Magistrate is required to decide, in order to perform his duty in disposing of the case before him, and the Magistrate ought not to refer to the High Court questions of law, unless they are matters upon which he has a duty to

(1) 24 I C 352=15 Cr. L. J. 472.

(2) *Emperor v. Rahimddino*, 28 Cr. L. J. 978=10 I C. 802=1 Cr. Law. 20=
A I. R. 1928 8 69.

(3) *Empress v. Ibrahim*, Bat. Un. Cr.

Cas. 838.

(4) *Emperor v. Fazla Karim*, 33 C. 193=3 Cr. L. J. 865.

(5) *Emperor v. Ismail*, 3 Cr. Law Bom. 34.

make up his mind(1). A Presidency Magistrate is not entitled to make a reference to the High Court on a question of law, under this section, where the accused has been merely placed before him and the hearing of the case not begun(2).

433. (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

(2) The High Court may direct by whom the costs of such reference shall be paid.

Right to begin in reference by Presidency Magistrate—On a reference by a Presidency Magistrate to the High Court, under this section, as to whether, on the fact stated any offence has been committed by an accused person, the prosecution has to make out that an offence has been committed and under the circumstances the prosecution must begin(3).

Review of order.—The High Court sitting in appeal cannot review an order made by itself under this section(4).

434. (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction been convicted of an offence, the Judge, if he thinks fit, may reverse and refer for the decision of a court consisting of two or more Judges of such court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail; and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the court of original jurisdiction,

(1) *Emperor v. Girish Chandra*, 57 C. 1042=34 C. W. N. 13=50 C. L. J. 403=A. I. R. 1929 Cal. 756 F. B.

(2) *Empress v. Nantu*, 1 Bom. L. R. 621

(3) *Empress v. Haradhan*, 19 C. 350.

(4) *Empress v. Confi*, Rat. Un. Cr. O 638.

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(1) 24 I C 352=15 Cr. L J. 472.

(2) *Emperor v Rahimdino*, 28 Cr L J 978=10 I. C. 602=1 Cr. Law, 20=A I. R. 1928 S 60.

(3) *Empress v. Ibrahim*, Rat. Un. Cr.

Cas. 838.

(4) *Emperor v Fazla Karim*, 33 C 193=3 Cr L J. 865.

(5) *Emperor v. Ismail*, 3 Cr. Law Bom. 34.

counsel has the right to begin(1).

435. (1) The High Court or any Sessions Judge or District Magistrate or any sub-Divisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of any proceeding before any inferior criminal court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior court, and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.

(2) If any sub-Divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record with such remarks thereon as he thinks fit, to the District Magistrate.

(3) Omitted.

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

Amendment.—The italicised words at the end of sub-section (1) have been inserted by s. 116 of the Criminal Procedure Code Amendment Act, XVIII of 1923. Explanation has been added by the same provision. Sub-section (3) has now been omitted. By the removal of sub-section (3) proceedings under Chapter XII have become liable to revision in the same manner as other proceedings(2).

Scope and object.—The powers of a court to call for records under this section are at all times to be exercised and such powers may

(1) *Empress v. Appa Subhana*, 8 B. 200.
(2) *Chinnappa Reddi v. Mala Dasari*, (1929) M. W. N. 708-120 I. O. 895-A. I. R. 1929 M. 847-31 L. W. 104; *Muthuswami v. Thangammal*,

121 I. O. 833-31 I. W. 16-(1930) M. W. N. 82-58 M. L. J. 148-A I. R. 1930 Mad 242-58 M. 320; *Raj Nandan v. Cheddi*, 18 Pat. L. T. 178-A. I. R. 1932 Pat. 185; *Thakin Ba v. Emperor*, 12 Rang. 283-A. I. R. 1934 Rang. 124.

and to pass such judgment or order as the High Court thinks fit.

Judge may reserve points of law.—It is in the discretion of the Judge, who presides at a criminal trial, whether or not he will reserve a point of law for the opinion of the High Court, and such discretion will not be reviewed by the High Court sitting as a court of review, under cl. 26 of the Letters Patent(1). The High Court, on a point of law, as to the admissibility of rejected evidence reserved under clause 25 of the Letters Patent has power to review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial; and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial(2).

Review in cases reserved.—The power exercised by a High Court sitting as a court to decide questions of law reserved in criminal cases under this section is the power of review, and the court is a court of reference and revision(3). When a point or points of law have been reserved under clauses 25 and 26, and the High Court on review holds on the point of law in favour of the accused, it is competent to it to consider the whole case and affirm or quash the conviction(4). The provisions of s. 369 of the Code, so far as they affect a High Court, apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of this section and the corresponding sections of the Letters Patent(5). But though the points of law may be reserved by a single Judge, the powers of a single Judge in a matter with which he has jurisdiction to deal, are the powers of the court, and cannot in any way be controlled, by a bench or Full Bench of the court(6). The High Court under s. 369, *supra*, has no powers to review an order dismissing an application by an accused person for revision and the only remedy is by an appeal to the prerogative of the Crown, as exercised by the Local Government(7).

Reference to Full Bench before prisoner is called upon to plead.—The Judge presiding at the Sessions has no power, under the Charter Act, to refer to a Full Bench a point of law raised before the accused was called upon to plead(8).

Right to begin.—Where a question of law is reserved the prisoner's

(1) *Reg. v. Pestanji*, 10 Bom. H. C. R. 75.

(2) *Empress v. Patambar Jina*, 2 B. 61; see *In re Huribole* 1 C. 207; *Empress v. O'hara*, 17 C. 642.

(3) *Empress v. Appa Subhiana*, 8 B. 200.

(4) *Fateh Chand v. Emperor*, 44 C. 477=38 I. C. 945=21 C. L. J. 400=21 C. W. N. 33=18 (r. L. J. 385; cf. *Muthukumarasami v. Emperor*, 12 M. L. T. 1; *Emperor v. Nilakanta*, 22 M. J. J. 490.

(5) *Empress v. Durga Charan*, 7 A. 672 (674); *Empress v. Fow*, 10 B.

176; *Empress v. Ganesh Ramkrishna*, 23 B. 50; *Emperor v. Nagangouda*, 19 Bom. L. R. 695 per Prodhush J., see *Reg. v. Godai Raout*, 5 W. R. Cr. 61.

(6) *Hale v. Emperor*, 9 Cr. L. J. 306=1 F. R. 1903 Cr.; *Emperor v. Narayan*, 32 B. 111.

(7) *Empress v. Durga Charan*, 7 A. 672; *Empress v. Fow*, 10 B. 176 F. B.; see *Empress v. Bhimappa*, 19 B. 732; *Ganesh v. Ganesh Krishna*, 23 B. 60.

(8) *Empress v. Dolegobind*, 28 C. =5 C. W. N. 169.

of High Court in the matter of applications for revision on the criminal side is concerned, an application to the lower court should be considered an essential step in the procedure, and that should be so whether the District Magistrate or the Sessions Judge has power to grant the relief or not(1). In a case, *Emperor v. Abdus Sobhan*(2), the Calcutta High Court has no doubt held that an application for revision should not be entertained in cases where the Sessions Judge or the District Magistrate had concurrent jurisdiction, but they thought that there was no such general rule where the position of the Sessions Judge or District Magistrate, was such that he could not grant the relief applied for. It is obviously advisable that a person dissatisfied with any order or proceeding in a court of inferior jurisdiction to that of the Sessions Judge or of the District Magistrate should, in the first instance, obtain the opinion of the Sessions Judge, or of the District Magistrate, on the matter in question, before invoking the jurisdiction of the High Court. Such a procedure tends to prevent the time of the High Court from being wasted over frivolous or unsustainable application; it also ensures the further advantage that, if the matter eventually comes before the High Court, it comes upon a record containing an expression of opinion by a court of superior jurisdiction, such as that of the Sessions Judge or of the District Magistrate(3). The mere fact that the case is one in which the Sessions Judge has no power to pass final orders but will have to refer the case to the High Court for such orders, should he see cause to do so, does not furnish any sufficient reason for departing from this rule of practice(4). Ordinarily a person about and looking to see if possibly under a fair record therein lies some trace of possible error. In the absence of some well founded suspicion, it is inexpedient to scrutinize order which upon the face of them bear token of a careful consideration and appear good and lawful(5). There is nothing to prevent the High Court from interfering with interlocutory order, though ordinarily it will refuse to do so(6). In this

Khan, 45 A. 656, 661, 662; *Sharif Ahmad v. Qabul*, 43 A. 497; *Empress v. Reolah*, 14 C. 887; *Empress v. Abdus Sobhan*, 36 C. 643; *Rash Behari v. Pham Bhusnam*, 22 Cr. L. J. 650—63 I. C. 410—48 C.

=18 L. W. 651=(1923) M. W. N. 837=(1924) M. 228=25 Cr. L. J. 310; *Sat Narain v. Emperor*, 71 I. C. 995=25 O. C. 87=24 Cr. L. J. 257=9 O. L. J. 280=1922 O. 147; *Empress v. Reolah*, 14 C. 887; *Bajirao v. Dadibhai*, 91 I. C. 247=27 Cr. L. J. 71=1926 Nag. 285; *Rash Behari v. Pham Bhusnam*, 22 Cr. L. J. 650—63 I. C. 410—48 C.

Wahid Ahmad, 30 A. 110; *Durga Behari v. Emperor*, 3 Pat. L. J. 302; *Gopobandhu v. Venkatesam*, (1923) M. W. N. 837; *Yalavarty v. Pillalameri*, 18 L. W. 236; *Sat Narain v. Emperor*, 25 O. C. 87.

(1) *Sharif Ahmad v. Qabul Singh*, 43 A. 497; *Emperor v. Muhammad Hashim*, 55 A. 261; *Chinai v. Emperor*, 109 I. C. 810=29 Cr. L. J. 618=10 A. I. Cr. R. 333=A. I. R. 1929 Nag. 13; *Gopobandhu v. Venkatesam*, 76 I. C. 1030

(2) *Emperor v. Abdus Sobhan*, 36 C. 643; (3) *Sat Narain v. Emperor*, 71 I. C. 995=25 O. C. 87=24 Cr. L. J. 257=9 O. L. J. 280=1922 O. 147; (4) *Bajirao v. Dadibhai*, 91 I. C. 247=27 Cr. L. J. 71; (5) *Sharif Ahmad v. Qabul Singh*, 43 A. 497; (6) *Durga Behari v. Emperor*, 3 Pat. L. J. 302.

(1) *Bajirao v. Dadibhai*, 91 I. C. 247=27 Cr. L. J. 71; *Sharif Ahmad v. Qabul Singh*, 43 A. 497.

(2) *Durga Behari v. Emperor*, 3 Pat. L. J. 302.

(3) *Durga Behari v. Emperor*, 3 Pat. L. J. 302.

be put in force not merely on matters coming before the Judge or Magistrate in court, but also on matters coming to his knowledge on reliable information(1). The scope of this section is very wide and the powers under it are not confined to calling for the records of judicial proceedings alone(2). Under this section every finding, sentence or order is liable to review, not only on the ground of irregularity, but also on the ground of incorrectness; i.e., on the ground that it was wrong on the merits(3). S. 439 *infra* must be read with this section. Under ss. 435 and 439, the High Court can, in the exercise of its revisional jurisdiction, examine the records of cases for the purpose of satisfying itself as to the correctness or propriety as well as the legality of any finding, sentence or order; and where there are very exceptional grounds for its interference, it will, in the interest of justice, exercise the power of a court of appeal(4). The object of the Legislature in enacting this section was to secure the setting right of a patent error or defect. In the absence of a well-founded suspicion or error it is inexpedient to scrutinise order of discharge or other orders, which upon the face of them bear token of careful consideration, and appear to be good and lawful. This section does not give the High Court a roving commission either in the direction of questioning about and looking to see if possibly under a fair record, there was some trace of possible error(5).

Concurrent jurisdiction vested in District Magistrate, Sessions Judge and High Court—Under this section concurrent revisional jurisdiction are vested in the District Magistrate and the Sessions Judge as well as in the High Court(6), but the general power of revision in all cases in the High Court. It is by way of special exception that this section confers upon the Sessions Judge and the District Magistrate some power enabling them directly to correct the errors of court inferior to them. In other cases they can only report for the orders of the High Court under s. 438(7).

To whom application should be made.—A person invoking the revisional jurisdiction of the court is bound, to apply first to the Sessions Judge or District Magistrate. If the latter considers that a case for revision is made out, he reports the matter to the High Court, under section 438, with a view to the High Court exercising its revisional powers under section 439. If the Sessions Judge or District Magistrate considers that the application should not be entertained, he rejects it, leaving the aggrieved party to apply to the High Court direct(8). It has been repeatedly held that a High Court will not entertain an application for revision in circumstances where the District Magistrate and Sessions Judge have concurrent revisional jurisdiction with the High Court, unless some special grounds are shown(9). So far as the practice

(1) *In re Ramaswami*, 2 Weir 538.

(2) *Rat. Un. Cr. C.* 123

(3) *Hari Dass v Saritulla*, 15 C. 609
F. B.; *Lakshminarasappa v. Mekala Venkatappa* 18 M. L. J. 57=3 M. L. T. 230

(4) *Empress v. Chagan*, 11 B. 331
(336)

(5) (1899) A. W. N. 135.

(6) *Krishna Datta v. Badri*, 135 I. C. 701=8 O. W. N. 1027=t. I R. 1931
O. 418=(1931) Cr. Cas. 1053=33 Cr. L. J.
195=Ind. Rul (1932) O. 61.

(7) *Abdul Wahid v. Abdullah Khan*, 45 A. 656, 661, 662.

(8) *Ibid*

(9) *Krishna Datta v. Badri*, 135 I. C. 701; *Abdul Wahid v. Abdullah*

case the High Court interfered in revision during the hearing of a case where the Magistrate had refused to allow any cross-examination of the prosecution witnesses until the examination-in-chief of all the witnesses had been completed and a charge framed. This course was held to be illegal. Where a District Magistrate had ordered a witness to show cause why he should not be prosecuted for perjury, the High Court reversed the order in revision on the ground that the statement complained of had been made by the witness only as to his recollection and belief(1). No hard and fast rule can be laid down on this subject since it is impossible as well as undesirable to do so(2). But one safe practical test would be this, namely, that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that it is a fit one for its interference at an intermediate stage(3). It is competent to the High Court to call for the record of any proceeding in an inferior criminal court, and, revise the same whether it is of a preliminary or final nature(4). But it is inadvisable for a High Court to interfere in revision in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress(5). Ordinarily a person who has been convicted and whose appeal has been dismissed by a Magistrate of the first class, empowered under section 407 (2) of the Code, should, in the first instance, move the Sessions Judge to report the case under s. 438, but when the High Court has once issued a rule it will not be discharged on such grounds only, but must be heard on the merits(6). Where an order of discharge, coupled with one for compensation, is made by the Magistrate of the first class and the complainant wants to apply in revision for further inquiry, the application should be made to the District Magistrate, or the Sessions Judge in the first instance and not to the High Court. The fact that the order for compensation is revisable by the High Court only does not alter the procedure(7).

Sub-Divisional Magistrates—The present section gives power to the Sub-Divisional Magistrate (subject to their being empowered by the Local Government in this Chapter) to call for and examine records of a court inferior to them and within their jurisdiction. If the Sub-Divisional Magistrate finds that the order is wrong, he will forward the

(1) *Chadha v. Emperor*, 14 A. L. J. 851.

(2) *Kuppuswami v. Emperor*, 29 I. C. 109-28 M. L. J. 135=2 L. W. 463=17 M. T. 398=16 Cr. L. J. 477-39 M. 561; *Ramanathan v. Subrahmanya*, 47 M. 722; *Chandi Pershad v. Abdul Rahman*, 22 C. 131; *Choa Lal v. Anant Pershad*, 25 C. 233. *Jagat Chandra v. Empress*, 26 C. 786=3 C. W. N. 491; *Krishnarao v. Emperor*, 73 I. C. 335=6 N. L. J. 119=24 Cr. L. J. 591; *Empress v. Nageshappa*, 20 B. 543; *Empress v. Jagan Singh*, (1892) A. W. N. 102; *Chadha v. Emperor*, 14 A. L. J. 851; *Jai Narain v. Emperor*, 16 A. L. J. 458; *a v. Kushen v. Kalla*, 21 Cr. L. J.

379=55 I. C. 859=2 U. P. L. R. A. 75; *Nripendra v. Gobinda*, 25 Cr. L. J. 1258=82 I. C. 256=39 C. L. J. 236=1921 Cal. 1018.

(3) *Choa Lal v. Anant Pershad*, 25 C. 233.

(4) *Empress v. Jagan Singh*, 1892 A. W. N. 102.

(5) *Krishna Rao v. Emperor*, 73 I. C. 335=6 N. L. J. 119=24 Cr. L. J. 591; *Jagat Chandra v. Empress*, 26 C. 786=3 C. W. N. 491.

(6) *Abdul Matlab v. Nund Lal*, 50 C. 423.

(7) *Gopobandhu v. Venkatesam*, 18 L. W. 651; *Gulley v. Bakar*, 28 A. 368.

record with his remarks to the District Magistrate who may pass orders or report for order to the High Court, according to the nature of the case(1).

May call for and examine records.—The powers of a High Court under ss. 435 and 439 are wide and it can proceed *suo motu* and interfere with any order if it considers just and proper by calling for and examining the record of any proceedings and it can interfere with an order which is improper even though it is not illegal(2). The court may call for the records merely for the purpose of satisfying itself even when no special allegation is made and there is no prayer for any special order(3). But the High Court will interfere with the proceedings in the lower court at an interlocutory stage only when the accused is not guilty on the face of the proceedings and in order to prevent his further harassment(4). The language of this section shows that the object of the Legislature was to secure the setting right of a patent error or defect and not to give the High Court a roving commission either in the direction of stamping with approval the proceeding of a lower Court or in the direction of questioning. But the main idea underlying section 439 or section 435 is that the High Court should be in a position to rectify cases of injustice or illegality in cases where the person affected is unable to appeal. A High Court can, therefore, as a court of revision in exercise of the powers conferred upon it by the Code, interfere with the order of a Magistrate charging an accused with an offence, although no appeal lies in respect of the order(5).

Power of Sessions Judge to call for and examine the record.—

Under ss. 435 and 438, the powers of a Sessions Judge to call for and examine the record of any proceedings before any inferior court situate within the local limits of his jurisdiction and (if he thinks fit) to submit a report of the result of his examination to the High Court, are very wide and can be exercised even in cases in which the convict has not moved the Sessions Judge(6). The powers of a Sessions Judge to take action under this section is not limited to cases in which he happens to have personal knowledge leading him to suspect an irregularity, nor to cases in which the persons directly interested as complainants or accused, move him to call for records. Directly the Sessions Judge has any reasonable cause of suspicion that an irregularity has occurred he should call for the records irrespective of the source of his information(7). A Sessions Judge can take up at the instance of a private person any revision of a Magistrate's order under

(1) *Cl. Empress v. Kuppu*, 7 M. 560.

(2) *Saji v. Dhimi*, 121 I. C. 651—A. I. R. 1930 Nag 61.

(3) *Empress v. Tresham*, (1898) A. W. N. 105.

(4) *In re Shripad*, 52 B. 151—30 Bom. L. R. 70—29 Cr. L. J. 317—109 I. C. 27—9 A. I. Cr. R. 563; *Chand Pershad v. Abdur Rahman*, 21 C. 131 at p. 139; *Choa Lal v. Anant Pershad*, 25 C. 233; *Hari Charan v. Girish Chandra*, 39 C. 68 at p. 74; *Empress v. Nageshappa*, 20 B. 543;

Re Kuppaswami Aiyar, 39 M. 561; *Ramanathan v. Subrahmanya Aiyar*, 47 M. 722.

(5) *Crown v. Bishen Das*, 33 P. R. 1910 Cr.—8 I. C. 1161—33 P. L. R. 1911.

(6) *Pars Ram v. Emperor*, A. I. R. 1931 Lah. 145—32 Cr. L. J. 700—131 I. C. 353—1931 Cr. O. 257—32 P. L. R. 71.

(7) *Roshan Lal v. Emperor*, 32 Cr. L. J. 653—12 Lah. 471—A. I. R. 1931 Lah. 107—32 P. L. R. 130—1931 Cr. O. 171.

case the High Court interfered in revision during the hearing of a case where the Magistrate had refused to allow any cross-examination of the prosecution witnesses until the examination in chief of all the witnesses had been completed and a charge framed. This course was held to be illegal. Where a District Magistrate had ordered a witness to show cause why he should not be prosecuted for perjury, the High Court reversed the order in revision on the ground that the statement complained of had been made by the witness only as to his recollection and belief(1). No hard and fast rule can be laid down on this subject since it is impossible as well as undesirable to do so(2). But one safe practical test would be this, namely, that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that it is a fit one for its interference at an intermediate stage(3). It is competent to the High Court to call for the record of any proceeding in an inferior criminal court, and, revise the same whether it is of a preliminary or final nature(4). But it is inadvisable for a High Court to interfere in revision in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress(5). Ordinarily a person who has been convicted and whose appeal has been dismissed by a Magistrate of the first class, empowered under section 407 (2) of the Code, should, in the first instance, move the Sessions Judge to report the case under s. 438, but when the High Court has once issued a rule it will not be discharged on such grounds only, but must be heard on the merits(6). Where an order of discharge, coupled with one for compensation, is made by the Magistrate of the first class and the complainant wants to apply in revision for further inquiry, the application should be made to the District Magistrate, or the Sessions Judge in the first instance and not to the High Court. The fact that the order for compensation is revisable by the High Court only does not alter the procedure(7).

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379=55 I. C. 859=2 U. P. L. R. A. 75; *Nripendra v. Gobinda*, 25 Cr. L. J. 1258=42 I. C. 266=39 C. L. J. 236=1924 Cal. 1018.

(3) *Choa Lal v. Anant Pershad*, 25 C. 233.

(4) *Empress v. Jagan Singh*, 1892 A. W. N. 102.

(5) *Krishna Rao v. Emperor*, 73 I. C. 835=6 N. L. J. 119=24 Cr. L. J. 591; *Jagat Chandra v. Empress*, 26 C. 786=3 C. W. N. 491.

(6) *Abdul Mallab v. Nund Lal*, 50 C. 423.

(7) *Gopobandhu v. Venkatesam*, 18 L. W. 651; *Gullay v. Bakar*, 28 A. 568.

record with his remarks to the District Magistrate who may pass orders or report for order to the High Court, according to the nature of the case(1).

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Power of Sessions Judge to call for and examine the record.—Under ss. 435 and 438, the powers of a Sessions Judge to call for and examine the record of any proceedings before any inferior court situate within the local limits of his jurisdiction and (if he thinks fit) to submit a report of the result of his examination to the High Court, are very wide and can be exercised even in cases in which the convict has not moved the Sessions Judge(6). The powers of a Sessions Judge to take action under this section is not limited to cases in which he happens to have personal knowledge leading him to suspect an irregularity, nor to cases in which the persons directly interested as complainants or accused, move him to call for records. Directly the Sessions Judge has any reasonable cause of suspicion that an irregularity has occurred he should call for the records irrespective of the source of his information(7). A Sessions Judge can take up at the instance of a private person any revision of a Magistrate's order under

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(4) *In re Shripad*, 52 B. 151=30 Bom. L. R. 70=29 Cr. L. J. 317=108 I. C. 27=9 A. I. Cr. R. 563; *Chandi Pershad v. Abdur Rahman*, 21 C. 131 at p. 198; *Choa Lal v. Anant Pershad*, 25 C. 233; *Hari Charan v. Giruh Chandra*, 33 C. 68 at p. 74; *Empress v. Nageshappa*, 20 B. 543;

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(5) *Crown v. Bishen Das*, 33 P. R. 1910 Cr.=8 I. C. 1161=33 P. L. R. 1911.

(6) *Pars Ram v. Emperor*, A. I. R. 1931 Lah. 145=32 Cr. L. J. 700=131 I. C. 353=1931 Cr. C. 257=32 P. L. R. 71.

(7) *Roshan Lal v. Emperor*, 32 Cr. L. J. 653=12 Lah. 471=A. I. R. 1931 Lah. 107=32 P. L. B. 130=1931 Cr. C. 171.

section 476(1). A Sessions Judge has power, under this section, to call for the record of proceedings under section 110 before an inferior criminal court within his jurisdiction, and refer the matter to the High Court(2).

The Sessions Judge has power to direct further inquiry by a subordinate Magistrate when, in his opinion, an accused has been discharged by such Magistrate in consequence of an improper appreciation of evidence(3). A further inquiry may be ordered only in cases where a Magistrate has not taken sufficient trouble or has come to a perverse decision. A court of revision cannot order such inquiry merely for the reason of disagreement with the conclusion arrived at by the Magistrate(4). A Sessions Judge has no power to pass any orders setting aside an order passed by a Magistrate under section 577, Cr. P. Code, when no appeal against the conviction or sentence is pending before the Sessions Judge(5). Nor can a Sessions Judge acting under sections 435 and 436 direct committal to the Sessions Court of an accused who has been discharged by a Sub Divisional Magistrate in a preliminary inquiry into offences under sections 193 and 471(6).

District Magistrate to call for and examine record.—A Magistrate of a district is competent under this section to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district(7). He is empowered either to reject the application in revision or to take action under section 438. His power under that section is limited to report for orders to the High Court the result of an examination of the proceedings made under this section. He cannot set aside the order of the Magistrate himself(8). A District Magistrate has power under s. 436 to order further inquiry into a case of any accused person who has been discharged without reporting to the High Court under s. 434(9). But he has not an absolute right to order further inquiry in any case under s. 437. If he finds no illegality, impropriety or irregularity and nothing incorrect in the proceeding of the court below, he is not empowered to set aside an order of discharge upon other grounds, or upon no ground at all(10). Where an order of discharge is supported by valid reasons further inquiry cannot be ordered merely because a higher court disagrees with the trial court's estimate of the evidence(11). District Magistrates should not place difficulties in the way of persons entitled to appeal by calling for proceedings and taking action upon them within the period allowed for appeal(12).

(1) *Pearey Lal v. Sagar Mal*, 1927 A. 28=7 I. R. A. Cr. 176=27 I. C. 650=25 A. L. J. 42=27 Cr. L. J. 1130=49 A. 230.

(2) *Ashiq Ali v. Emperor*, 73 I. C. 337=21 A. L. J. 513=24 Cr. L. J. 593=A. I. R. 1923 A. 596.

(3) *Venkata Subba v. Ayyalu Reddy*, 81 M. 214.

(4) *Kundan Lal v. Manohar Lal*, 117 I. C. 345=30 Cr. L. J. 755=A. I. R. 1929 A. 589.

(5) *Maung Mya Tun v. Ma Kra Pru*, 6 Rang. 259=111 I. C. 878=A. I. R. 1928 Rang. 240=29 Cr. L. J. 958.

(6) *Chenchiah v. Emperor*, 42 M. 661.

(7) *Opendro Nath v. Dukhini*, 12 C. 473.

(8) *Hira Lal v. Emperor*, 25 Cr. L. J. 440=77 I. C. 728.

(9) *Badli v. Mati*, 28 C. 102.

Emperor v. Munshi, 9 P. R. 1902 Cr.

(10) *Emperor v. Munshi*, 9 P. R. 1902 Cr. 124=10 Bur. L. T. 167.

"Any proceeding."—Under the Code of 1872 the words were 'judicial proceedings' and it was held that the Magistrate's proceedings under s. 8 of the Reformatory Schools Act were in judicial proceedings and open to revision(1). The Magistrate's proceedings under s. 113, Railways Act is open to revision under this section(2). Though the word judicial is no longer retained and therefore a discussion is thereby avoided as to what constitutes judicial proceedings, this does not mean that the High Court can interfere with executive acts(3). This section refers to any proceeding before any criminal court, e. g., an order by a Magistrate under section 517(4). An order under s. 88 of the Code refusing to release certain property from attachment is a proceeding within the meaning of this section and is subject to the revisional jurisdiction of the High Court(5). Proceedings in which it is or has been determined whether bail from the accused person should be taken or not fall within the definition of "any proceedings" under section 439 and the High Court has powers under that section to interfere and thus to control the propriety as well as the regularity of orders in such proceedings(6). The High Court has power to revise proceedings under section 476 of the Code when such proceedings are null and void for want of jurisdiction(7). It is competent to the High Court to call for the record of any proceeding in an inferior criminal court, and revise the same, whether it is of a preliminary or final nature(8). Calling up for the records of a case from a subordinate Magistrate under this section, will not constitute it a "judicial proceeding" within the meaning of s. 476(9). Mutation proceedings are, however, judicial proceedings within the meaning of the Code(10).

Power of revision after prior refusal.—An accused person has no right to come in revision more than once. At any rate he would come with little hope of success. The mere fact that he had failed on his first application to raise the point which he relied upon in his second, would give a discretionary power not to entertain the second application at all(11). Where the District Magistrate had already dealt with a case in revision and decided there was no cause for interfering with the order of discharge of the accused he cannot subsequently order further inquiry under section 437 (now s. 436) of the Code. Such

(1) *Emperor v. Manaji*, 14 B 381.

(2) *A. Grey v. A-W Rly* 13 P.R. 1891 Cr.

(3) *Satan v. Emperor*, 23 Cr. J. J 89=64 I. C. 663=15 S. L. R. 126=(1922) A. I. R. (S) 21; *Gulli v. Emperor*, 42 C. 793; *Dhormibai v. Emperor*, 19 Cr. L. J. 588=45 I. C. 296=11 S. L. R. 118; *Damma v. Emperor*, 29 A. 563; *Pandurang v. Emperor*, 12 Bom. L. R. 1029; *Chinnasaway v. Emperor*, 11 Cr. L. J. 69=4 I. C. 876=19 M. L. J. 566; *Imam Buz v. Emperor*, 15 Cr. L. J. 544=24 I. C. 952=7 S. L. R. 203.

(4) 2 Welr 538.

(5) *Santa Singh v. Emperor*, 76 I. C. 18=25 Cr. L. J. 82; *Ilam Din v. Emperor*, 2 P. R. 1903 Cr.

(6) *Local Government v. Ghulam Jilani*, 82 I. C. 755

(7) *Suryanarayana v. Emperor*, 29 M 100.

(8) *Queen-Empress v. Jagan Singh*, 1892 A. W. N. 102.

(9) *Ganesh v. Emperor*, 11 N. Y. R.

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C. 154.

(11) *Emperor v. Kohna Ram*, 45 A. 11 (12)=23 Cr. L. J. 496=68 I. C. 32=20 A. L. J. 775=A. I. R. (1922) A. 502=4 P. P. L. R. A. 162.

section 476(1). A Sessions Judge has power, under this section, to call for the record of proceedings under section 110 before an inferior criminal court within his jurisdiction, and refer the matter to the High Court(2).

The Sessions Judge has power to direct further inquiry by a subordinate Magistrate when, in his opinion, an accused has been discharged by such Magistrate in consequence of an improper appreciation of evidence(3). A further inquiry may be ordered only in cases where a Magistrate has not taken sufficient trouble or has come to a perverse decision. A court of revision cannot order such inquiry merely for the reason of disagreement with the conclusion arrived at by the Magistrate(4). A Sessions Judge has no power to pass any orders setting aside an order passed by a Magistrate under section 577, Cr. P. Code, when no appeal against the conviction or sentence is pending before the Sessions Judge(5). Nor can a Sessions Judge acting under sections 435 and 436 direct committal to the Sessions Court of an accused who has been discharged by a Sub Divisional Magistrate in a preliminary inquiry into offences under sections 193 and 471(6).

District Magistrate to call for and examine record.—A Magistrate of a district is competent under this section to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district(7). He is empowered either to reject the application in revision or to take action under section 438. His power under that section is limited to report for orders to the High Court the result of an examination of the proceedings made under this section. He cannot set aside the order of the Magistrate himself(8). A District Magistrate has power under s. 436 to order further inquiry into a case of any accused person who has been discharged without reporting to the High Court under s. 434(9). But he has not an absolute right to order further inquiry in any case under s. 437. If he finds no illegality, impropriety or irregularity and nothing incorrect in the proceeding of the court below, he is not empowered to set aside an order of discharge upon other grounds, or upon no ground at all(10). Where an order of discharge is supported by valid reasons further inquiry cannot be ordered merely because a higher court disagrees with the trial court's estimate of the evidence(11). District Magistrate in the way of persons entitled taking action upon them within

(1) *Pearey Lal v. Sagar Mal*, 1927 A. 98=7 I. R. A. Cr. 176=97 I. C. 650=25 A. L. J. 42=27 Cr. L. J. 1180=49 A. 230.

(2) *Ashiq Ali v. Emperor*, 73 I. C. 337=21 A. L. J. 513=24 Cr. L. J. 593=A. I. R. 1923 A. 596.

(3) *Venkata Subba v. Ayyalu Reddy*, 81 M. 214.

(4) *Kundan Lal v. Manohar Lal*, 117 I. C. 345=30 Cr. L. J. 755=A. I. R. 1929 A. 588.

(5) *Maung Mra Tun v. Ma Kra Pru*, 6 Rang. 269=111 I. C. 878=A. I. R. 1928 Rang. 240=29 Cr. L. J. 958.

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(6) *Chenchiah v. Emperor*, 42 M. 661.

(7) *Opendro Nath v. Dukhini*, 12 C. 473.

(8) *Hira Lal v. Emperor*, 25 Cr. L. J. 440=77 I. C. 738.

(9) *Badlu v. Mati*, 28 C. 102.

"Any proceeding."—Under the Code of 1872 the words were 'judicial proceedings' and it was held that the Magistrate's proceedings under s. 8 of the Reformatory Schools Act were in judicial proceedings and open to revision(1). The Magistrate's proceedings under s. 113, Railways Act is open to revision under this section(2). Though the word judicial is no longer retained and therefore a discussion is thereby avoided as to what constitutes judicial proceedings, this does not mean that the High Court can interfere with executive acts(3). This section refers to any proceeding before any criminal court, *e. g.* an order by a Magistrate under section 517(4). An order under s. 88 of the Code refusing to release certain property from attachment is a proceeding within the meaning of this section and is subject to the revisorial jurisdiction of the High Court(5). Proceedings in which it is or has been determined whether bail from the accused person should be taken or not fall within the definition of "any proceedings" under section 439 and the High Court has powers under that section to interfere and thus to control the propriety as well as the regularity of orders in such proceedings(6). The High Court has power to revise proceedings under section 476 of the Code when such proceedings are null and void for want of jurisdiction(7). It is competent to the High Court to call for the record of any proceeding in an inferior criminal court, and revise the same, whether it is of a preliminary or final nature(8). Calling up for the records of a case from a subordinate Magistrate under this section, will not constitute it a "judicial proceeding" within the meaning of s. 476(9). Mutation proceedings are, however, judicial proceedings within the meaning of the Code(10).

Power of revision after prior refusal.—An accused person has no right to come in revision more than once. At any rate he would come with little hope of success. The mere fact that he had failed on his first application to raise the point which he relied upon in his second, would give a discretionary power not to entertain the second application at all(11). Where the District Magistrate had already dealt with a case in revision and decided there was no cause for interfering with the order of discharge of the accused he cannot subsequently order further inquiry under section 437 (now s. 436) of the Code. Such

(1) *Emperor v. Manaji*, 14 B 381.

(2) *A. Grey v. A-W Rly* 13 P.R. 1891 Cr.

(3) *Satan v. Emperor*, 23 Cr. L. J. 59=64 I. C. 663=15 S. L. R. 126=(1922) A. I. R. (S) 21; *Gulli v. Emperor*, 42 C. 793; *Dharmibai v. Emperor*, 19 Cr. L. J. 568=45 I. C. 396=11 S. L. R. 113; *Damma v. Emperor*, 29 A. 563; *Pandurang v. Emperor*, 12 Bom. L. R. 1029; *Chinnasaway v. Emperor*, 11 Cr. L. J. 69=4 I. C. 876=19 M. L. J. 222; *Imam Bur v. Emperor*, 15 Cr. L. J. 544=24 I. C. 952=7 S. L. R. 203.

(4) 2 Welr 538.

(5) *Santa Singh v. Emperor*, 76 I. C. 18=25 Cr. L. J. 82; *Ilam Din v. Emperor*, 9 P. R. 1905 Cr.

(6) *Local Government v. Ghulam Jilani*, 82 I. C. 755.

(7) *Suryanarayana v. Emperor*, 29 M. 100.

(8) *Queen-Empress v. Jagan Singh*, 1892 A. W. N. 102.

(9) *Gani v. Emperor*, 11 Cr. L. J. 100.

(10) *Emperor v. ...*

(11) *Emperor v. Kohna Ram*, 45 A. 11(12)=23 Cr. L. J. 496=68 I. C. 32=20 A. L. J. 775=A. I. R. (1922) A. 502=4 U. P. L. R. A. 162.

an order must be an order, reviewing the earlier one and is prohibited by section 369 of the Code(1). The High Court cannot and will not entertain a petition on a matter already disposed of, when the order disposing of it, is still in force and has not been set aside. A revision petition dismissed for default cannot be restored(2). But in one case it has been held that where a case is disposed of merely of default of appearance, or an order is passed to the prejudice of the accused, and by mistake or inadvertence no opportunity was given him to be heard, the High Court may review the same(3). In any case the mere fact that a reference has been made to the High Court by a Sessions Judge for enhancement of sentence, has not the effect of depriving of the accused of the right to apply to the High Court in revision(4). Ordinarily, a Judge disposing of a revision petition filed by a convicted person or his pleader against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence(5). A Sessions Judge of his own motion called for proceedings in which a Magistrate had discharged four persons accused of theft, but finding on the record no cause for interference returned the proceedings to the Magistrate without taking further action. On the day he returned them, A, the complainant, applied to him to have the case reopened and the Sessions Judge, holding himself to be barred from taking further action, returned the application to be presented to the Chief Court. It was held that the Sessions Judge was not barred from dealing with the application himself(6).

Inferior criminal court—Inferior.—The words "inferior criminal court" in this section mean, inferior so far as regards the particular matter in respect to which the superior court is asked to exercise its revisional jurisdiction(7). The term "subordinate" in s. 437 is comprised in the term "inferior" in this section. The reason for the employment of the latter term in ss. 435 and 436, was that in both those sections, the Court of Sessions and the District Magistrate are combined, and the Magistrates other than the District Magistrate, though subordinate to him are not generally so to the Court of Sessions. It was necessary therefore in ss. 435 and 436, to employ a term applicable to the relation of the Magistracy both to the supervising authority and the appellate tribunal. In s. 437, in which the District Magistrate is dealt with separately from the Court of Session, the use of the term "inferior" is no longer necessary and therefore the term "subordinate" is used(8).

Power of District Magistrate to call for records of the Subordinate Magistrate.—The Court of a Magistrate of the first class is inferior to that of the District Magistrate within the meaning of this section, s. 17 distinctly providing that all Magistrates, of whatever

(1) *Nga Than v. Emperor*, 5 Bur L. T. 37.

(2) *Nora Araya v. Darsi Venkat-ayaya*, 44 M. L. J. 27=A. I. R. 1923 M. 276.

(3) *Rajab Ali v. Emperor*, 46 C. 60.

(4) *Emperor v. Kohna Ram*, 45 A. 11 (19)—28 Cr. L. J. 496,

(5) *In re Anis Sahib*, 85 I. C. 727=26 Cr. L. J. 588.

(6) *Tun Myaing v. Kauk San*, 8 L. B. R. 377.

(7) *Nobin Kristo v. Russick Lall*, 10 C. 268.

(8) *In re Padmanabha*, 6 M. 18=2 Weir 540.

class, are subordinate to the District Magistrate(1). A Magistrate of the district is, therefore, competent under this section, to call for and deal with the record of any proceeding before any Magistrate of whatever class in his district(2). He has power to call for the proceedings held by a Magistrate of the first class(3). An Additional District Magistrate being only a first class Magistrate, is inferior to the Magistrate of the District, within the terms of this section(4). The contrary view taken in the undermentioned case(5) is no longer tenable. Under new sub-sec. (3) of section 10 the Additional District Magistrate is deemed to be inferior to the District Magistrate. A District Magistrate can set aside an order of discharge passed by a first class Magistrate and order further inquiry(6).

Power of District Magistrate to refer the proceedings of a Sessions Judge.—A Sessions Judge is not a court inferior to the District Magistrate and the latter is therefore not empowered by law to make a reference, under the provisions of s. 438 to the High Court(7). A District Magistrate is inferior as a court to the Sessions Judge, and it is no business of a District Magistrate on the Judicial side to criticise the propriety of the view taken by the Sessions Court. It is his imperative duty to abide by the conclusion of that court loyally and faithfully. If however he considers that there is room for reconsideration he may on the administrative side approach the Local Government or the Government Advocate with the request that the High Court should be moved by means of a revision to consider the propriety of the sentence. The District Magistrate cannot be allowed to sit in judgment over the Sessions Judge and criticize the views of the Sessions Judge and bring his own views to the notice of the High Court(8).

District Magistrate as a court inferior to Sessions Judge.—A District Magistrate when exercising appellate jurisdiction is an inferior criminal court to the Sessions Judge within the meaning of this section. A Sessions Judge has therefore power under section 438 to refer to the High Court the judgment of a District Magistrate

(1) *Empress v. Pirya Gopal*, 9 B. 100; *Shams-ud-Din v. Ala Jawaya*, 38 P. R. 1885 Cr.

(2) *Opendra Nath v. Dukhini*, 12 C. 473 F. B.; *Inder Singh v. Crown*, 30 P. L. R. 418=15 I. C. 539; *Waryam v. Amira*, 10 P. R. 1894 Cr.; *Empress v. Laskari*, (1885) A. W. N. 257=7 A. 853.

(3) See the cases cited in the last note and *Empress v. Pirya Gopal*, 9 B. 100, *In re Padamanabha*, 8 M. 16 F. B.=2 Weir. 510.

(4) *Crown v. Abdul Karim*, 25 P. R. 1908 Cr.

(5) *Parlash Chander*, 31 C. 918=6 Cr. L. J. 860.

(6) *Shams-ud-Din v. Pir Ala*, 38 P. R. 1885 Cr.

(7) *Emperor v. Lobo*, 41 B. 47 ;

Emperor v. Baldeo, 46 A. 851 (855); *Emperor v. Jamnatai*, 28 A. 91 ; *Emperor v. Ganga*, 36 A. 378 ; *Empress v. Zor Singh*, 10 A. 146 ; *Empress v. Sher*, 9 A. 362 ; *Hiraman v. Ram Kumar*, 18 C. 186 ; *In re David*, 6 C. L. R. 215 ; *Empress v. Karamdi*, 23 C. 250 ; *Emperor v. Mahabirpuri*, 2 N. L. R. 149.

(8) *Emperor v. Patra Khan*, A. L. R. 1922 A. 124=187 I. C. 525=33 Cr. L. J. 474=1932 Cr. O. 149 ; *Emperor v. Daulat*, 92 I. C. 743=24 A. L. J. 224=27 Cr. L. J. 827 ; *Empress v. Sher Singh*, 9 A. 362 ; *Empress v. Prithi*, 12 A. 431=1 S. L. R. 40 ; *In re Angamuthu*, (1912) M. W. N. 812 ; *Emperor v. Krishna Ji*, 6 Bom. L. R. 1099 ; *Ganga v. Velayada*, 8 M. L. T. 88 ;

made in the exercise of his appellate jurisdiction(1). Even when a District Magistrate passes an order as a court of original jurisdiction that court is subordinate to the Court of Sessions Judge which can exercise revisional powers(2). This is now made clear by the explanation newly added. It is thus settled that a District Magistrate exercising original or appellate jurisdiction is inferior to the Sessions Judge, within the meaning of this section and the latter has, therefore, jurisdiction to call for the record of a case decided by the District Magistrate on appeal and make a reference to the High Court(3). A District Magistrate exercising his enhanced powers of trial and sentence under s 30 is thereby not constituted a Court of Session or a court of co-ordinate jurisdiction with that of the Sessions Judge, and he is not exempt from the revisional jurisdiction of the Sessions Judge *quoad* such cases(4). The Court of a District Magistrate is a court inferior to that of the Sessions Judge within the meaning of this section except with reference to those special cases where their powers are declared equal by the Code. The District Magistrate has concurrent jurisdiction with the Sessions Judge in matters of revision(5). The explanation further makes it clear that for the purposes of this section a Magistrate exercising appellate jurisdiction is inferior to the Court of Session. The point was previously open to doubt(6).

Subordination of special Magistrate appointed under the Emergency Power and Ordinance—Although the court of a special Magistrate appointed under the Emergency Powers Ordinance (II of 1932) is a criminal court inferior to the Court of the Sessions Judge within the meaning of this section, the Sessions Judge has no jurisdiction to call for and examine the records of a case tried by such special Magistrate and to refer it for orders to the High Court(7).

Subordination of Presidency Magistrate.—This section enables the High Court to call for the record of any proceeding of any subordinate criminal court and it is beyond doubt that the Court of a Presidency Magistrate is such a court(8). The High Court has, therefore, power to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so(9).

(1) *Kallu v. Crown*, 3 Lah. 23=23 Cr. L. J. 577=68 I. C. 609; *Shib Das v. Crown*, 385 P. L. R. 1913; *Jalloo v. Crown*, 15 P. R. 1904 Cr.; *Empress v. Karamali*, 23 C. 253; *Opendra Nath v. Dukhini*, 12 C. 473; *Empress v. Laskari* 7 A. 853 F. B.; *Mobin Kristo v. Ruzuck Lal*, 10 C. 268; *Empress v. Jahanda*, 23 C. 249; but see *Khamir v. Emperor*, 14 C. W. N. 100.

(2) *Emperor v. Balwant*, 73 I. C. 501=24 C. L. J. 616; *Harkern v. Harnam*, 19 O. C. 108; *Opendra Nath v. Dukhini*, 12 C. 473; (1889) A. W. N. 100.

(3) *Darbari Lal v. Emperor*, 80 I.

(1925) A. 591=23 A. L. J. 891=26 Cr. L. J. 1282; *Kallu v. Crown*, 3 Lah. 23=23 Cr. L. J. 577=68 I. C. 609.

(4) *Jallu v. Crown*, 15 P. R. 1904 Cr.

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(6) Statement of Objects and Reasons (1914).

(7) *Manmatha Nath v. Emperor*, 60 O. 851.

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(8) *Emperor v. Patra Khan*, A. I. R. 1932 A. 124=137 I. C. 525=33 Cr. L. J. 474=1932 Cr. O. 149; *Emperor v. Daulat*, 92 I. C. 743=24 A. L. J. 224=27 Cr. L. J. 327; *Emperess v. Sher Singh*, 9 A. 362; *Emperess v. Pirthi*, 12 A. 431=1 B. L. R. 40; *In re Angamuthu*, (1912) M. W. N. 812; *Emperor v. Krishna Ji*, 6 Bom. L. R. 1099; *Ganga v. Velayada*, 8 M. L. T. 88.

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(3) *Darbari Lal v. Emperor*, 89 I. C. 146=L. R. 6 A. 185 Cr.=A. I. R.

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(11) *Emperor v. Balwant*, 73 I. O. 501=24 C. L. J 616.

(12) *Emperor v. Balwant*, 73 I. O. 501=24 C. L. J 616.

(13) *Emperor v. Balwant*, 73 I. O. 501=24 C. L. J 616.

(14) *Emperor v. Balwant*, 73 I. O. 501=24 C. L. J 616.

(15) *Emperor v. Balwant*, 73 I. O. 501=24 C. L. J 616.

The Municipal Magistrate is a Presidency Magistrate and an inferior criminal court within sections 435 and 439 in respect of the High Court(1).

Judgment of single Judge not open to revision.—A High Court has no power to interfere with orders or sentences passed by a Judge of that Court(2).

Criminal Court.—A High Court acting as a Criminal Court has no power to call a record except under the provisions of this section, and under this section, it can call for the record only of an inferior criminal court(3). A High Court as a Criminal Court cannot send for the record of a Civil or of a Revenue Court(4). A proceeding under section 467 may possibly be considered to be one of a quasi criminal nature. But a Civil or Revenue Court making an inquiry under that section preliminary to a prosecution does not become a criminal court by virtue of such inquiry(5). A Magistrate hearing an appeal under s. 86 of the Bombay District Municipal Act is merely an appellate authority having jurisdiction given by the Act to deal with questions of civil liability. He is not an inferior criminal court, and, therefore, his order cannot be revised by a High Court under this section(6). But a Magistrate acting under s. 221, Madras Local Boards Act, acts in the capacity of a Magistrate and his orders are subject to the provisions of ss. 435 and 439. The District Magistrate, therefore, has power to call for the records of the case and may proceed in accordance with the provisions of ss. 435 and 439 if the facts of the case warrant such action(7). But a District Magistrate hearing an appeal from the order of the Octroi Superintendent, acts only under the Municipalities Act, and not under the Code, as an inferior criminal court. Hence, his order is not open to revision by the High Court(8). But the court making an order under section 3 of the Eastern Bengal and Assam Disorderly Houses Act, 1907, is a criminal court, and, therefore, the High Court has jurisdiction to act under sections 435 and 439 of the Code in respect of such an order(9). But a Secretary to the Local Government who issues a warrant under the Bengal Goondas Act is not an "inferior criminal court" within the meaning of this section, so as to make him subject to the revisional jurisdiction of the High Court(10). A collector as such not being subject to the revisional jurisdiction of the High Court in criminal matters, that court, in the exercise of such jurisdiction, is not competent to deal with

(1) *Ram Gopal v. Corporation of Calcutta*, 52 C. 962=29 C. W. N. 898=26 Cr. L. J. 1533=90 I. C. 317.

(2) *Press v. Emperor*, 4 P. R. 1909 Cr.; See *Hira v. Emperor*, 8 P. R. 1909 Cr.

(3) *Thakar Das v. Emperor*, 22 I. C. 1001=17 O. C. 25=15 Cr. L. J. 217; followed in *Nawab Ali v. Madhuri Saran*, 99 I. C. 48; *In re Chennanogoud*, 26 M. 129.

(4) See the cases cited in the last note.

(5) *Thakar Das v. Emperor*, 22 I. C. 1001=17 O. C. 25=15 Cr. L. J. 217.

(6) *In re Dalsukhran*, 9 Bom. L. R. 137=6 Cr. L. J. 425; *Karachi Muni-*

cipality v. Jafferji, 1927 S. 23=97 I. O. 517.

(7) *Rangesa Rao v. Swaminatha*, 108 I. C. 414=27 L. W. 320=A. I. R. 1928 M. 495=29 Cr. L. J. 389=10 A. I. Cr. R. 53.

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(2) *Emperor v. Balucent*, 73 I. C. 501=21 C. L. J 616; *Harkern v. Harnam*, 19 O. C. 108; *Opendra Nath v. Dukhini*, 12 C. 473; (1889) A. W. N. 100

(3) *Darbari Lal v. Emperor*, 89 I. C. 146=L. R. 6 A. 135 Cr.=A. I. R

(1925) A 591=23 A L. J 894=26 Cr. L. J. 1282; *Kallu v. Crown*, 3 Lah. 23=23 Cr. L. J 577=68 I C. 609

(4) *Jallu v. Crown*, 15 P. R. 1904 Cr.

(5) See the case cited in the last note and *Emperor v. Balucent*, 21 Cr. L. J. 616

(6) Statement of Objects and Reasons (1914)

(7) *Manmatha Nath v. Emperor*, 60 C. 851.

(8) *Manmatha Nath v. Emperor*, 60 C. 851.

(9) *Manmatha Nath v. Emperor*, 60 C. 851.

(10) *Manmatha Nath v. Emperor*, 60 C. 851.

(11) *Manmatha Nath v. Emperor*, 60 C. 851.

(12) *Manmatha Nath v. Emperor*, 60 C. 851.

(13) *Manmatha Nath v. Emperor*, 60 C. 851.

High Court. The proper course for the pleader, who has been refused appearance in a particular case by a Magistrate in pursuance of such circular, is to apply for the revision of the illegal or improper order of the Magistrate refusing to allow him to appear(1). The order of a Magistrate acting under s. 144, Cr. P. Code, is merely administrative in character and is not the order of a court and is, therefore, not liable to be revised by the High Court under this section(2). An order passed by a District Magistrate under s. 44 of the Bombay District Police Act, 1890, being a mere executive police order cannot be interfered with by the High Court under its criminal revisional jurisdiction(3). Nor is it competent to the High Court to interfere with an order passed by a subordinate court under section 36 of the Legal Practitioners Act(4). A Magistrate's order directing the observance of municipal bye-laws which prohibit the slaughter of votive animals in private houses cannot be made the subject of revision under this section(5). An order directing the surrender of a person in compliance with a warrant issued by a Political Agent is an executive act and the High Court cannot interfere with it in revision(6). An order under section 3 of the Sind Frontier Regulation Act cannot be the subject of revision(7). Nor can an order passed by a District Magistrate forbidding certain petition-writers to practice within the precincts of his court(8). Nor can an order passed by a District Magistrate under s. 195 (5) of the Code(9).

Orders which are open to revision.—An order passed by a Magistrate under section 161 (2) of the Bombay District Municipalities Act (1901), can be revised by the High Court(10); as also an order passed by a Magistrate in the investigation of a claim by a third party to the property of an absconding offender attached under s. 88 of the Code(11); as also an order refusing to furnish a copy of the record made under sub sections (1) and (3) of s. 165 of the Code in respect of a search by the police(12); as also an order of a Magistrate calling upon a witness to show cause why his prosecution under s. 193 of the Code should not be directed(13); as also an order by a Magistrate under section 94 of the Code, refusing to order the production of certain documents(14); as also an order passed by a Magistrate under section 2 of the Workmen Breach of Contract Act directing either the return of the advance or specific performance of the contract(15); as also an order inflicting a

(1) *Chinnaswamy Iyer v. Emperor*, 4 L. C. 876 = 19 M. L. J. 566 = 11 Cr. L. J. 69.

(2) *Vedappan Servai v. Perianan Sercai*, 113 L. C. 279 = 28 L. W. 506 = (1929) M. W. N. 779 = A. I. R. 1928 M. 1103 = 55 M. L. J. 621 = 30 Cr. L. J. 119 = 52 M. 69.

(3) *In re Pandurang*, 12 Bom. L. R. 1019 = 15 S. L. R. 126.

(4) *Man Singh v. Emperor*, 11 P. R. 1909 Cr.

(5) *Abdullah v. Nanah Chand*, (1895) A. W. N. 258.

(6) *Gulli v. Emperor*, 43 C. 793.

(7) *Imperator v. Garo*, 5 S. L. R. 54.

(8) (1902) A. W. N. 175

(9) *Madusudan v. Emperor*, 28 A. L. J. 216.

(10) *In re Dinhai*, 43 B. 861.

(11) *Ilam Din v. Emperor*, 9 P. R. 1908 Cr. = 81 P. W. R. 1908 = 8 Cr. L. J. 260.

(12) *Churamani v. Emperor*, 9 A. I. Cr. R. 536 = A. I. R. 1928 A. 402 = 46 A. L. J. 703 = 9 L. R. A. Cr. 84 = 110 I. C. 215 = 29 Cr. L. J. 663.

(13) *Chada v. Emperor*, 18 Cr. L. J. 46 = 36 C. 878 = 14 A. L. J. 851.

(14) *In re Jacob*, 19 C. 82.

(15) *Emperor v. Devappa*, 43 B. 607.

an alleged illegal order made under the Indian Penal Code by a Collector(1). A District Registrar is not an inferior Criminal Court within the meaning of this section(2). An order passed by a civil court, directing the prosecution of certain persons, under section 476 cannot be revised by a High Court under section 439(3). But when action under section 476 is taken by a Criminal Court, subordinate to the High Court, its proceedings are open to revision under section 439(4). A Revenue Court acting under section 48 of the U. P. Law Revenue Act is not subordinate to District Magistrate and, consequently, the latter cannot interfere with order passed by the former under section 428(5). Nor is a District Munsif acting under section 478 an inferior criminal court and the Sessions Judge has no jurisdiction to revise his proceedings under this section(6). An order of the District Magistrate denying jurisdiction to hear an appeal from an order of a Returning Officer directing the prosecution of a person for having given false information in connection with the preparation of a electoral roll is not open to revision by the High Court inasmuch as, when exercising jurisdiction under the Election Rules of the District Board, the District Magistrate does not act as a criminal court but acts as an authority to whom the Returning Officer is subordinate(7). Under this section the High Court has no jurisdiction to revise an order of a civil court refusing to make a complaint for the prosecution of a person for perjury under the provisions of Ch. XXXV of the Code(8).

Orders which are not open to revision.—The High Court cannot revise an executive or extra-judicial order passed by a Magistrate(9). Hence an order passed by a District Magistrate under the rules framed by Government under section 45 (3) of the Code is an executive order and no subject to the revisional powers of the High Court(10). An order under s. 17 of the Police Act (V of 1861) appointing certain persons as special constables is of an executive nature and not an order made in a criminal proceeding, and cannot be made the subject of revision under this section(11). A circular by a District Magistrate prohibiting uncertificated pleaders from practising in the criminal courts in his district is not open to revision by the

(1) *In re Dianut Hosen*, 10 C. L. R. 14.

(2) *In Ardeshir*, 14 Bom. L. R. 970=13 Cr. L. J. 815=17 I. C. 717.

(3) *Thakar Dass v. Emperor*, 23 I. C. 1001=17 O. C. 25=15 Cr. L. J. 217; 17 Cr. L. J. 217=15 Cr. L. J. 217.

(4) 14 Cr. L. J. 47; 30 Cr. L. J. 47.

(5) 30 Cr. L. J. 47; 30 Cr. L. J. 47.

(6) 30 Cr. L. J. 47; 30 Cr. L. J. 47.

(7) 30 Cr. L. J. 47; 30 Cr. L. J. 47.

(8) 30 Cr. L. J. 47; 30 Cr. L. J. 47.

(9) 30 Cr. L. J. 47; 30 Cr. L. J. 47.

(10) 30 Cr. L. J. 47; 30 Cr. L. J. 47.

(11) 30 Cr. L. J. 47; 30 Cr. L. J. 47.

(7) *Madhusudan v. Emperor*, 120 I. C. 128=A. I. R. 1929 A. 931=30 Cr. L. J. 1159=Ind. Rul. (1930) All. 16=(1930) A. L. J. 216.

(8) *Nawab Ali v. Madhuri Saran*, 99 I. C. 48=3 O. W. N. 905=A. I. R. 1927 Oudh 14=38 Cr. L. J. 16; following *Thakar Das v. Emperor*, 17 O. C. 25 at p. 31=21 I. C. 1001=15 Cr. L. J. 217 and *Har Prasad v. Emperor*, 40 C. 477=19 I. C. 197=17 Cr. L. J. 215=14 Cr. L. J. 197=17 C. W. N. 647.

(9) *Empress v. Shere*, (1893) A. W. N. 25.

(10) *In re Damma*, 29 All. 563=1907 A. W. N. 168=5 Cr. L. J. 476.

(11) *Parmeshwar Das v. Emperor*, 18 Cr. L. J. 900=42 I. C. 132=20 O. C. 229.

incorrect or illegal but also when it is improper as violating the principles of natural justice(1). The infliction of an inadequate punishment is undoubtedly an impropriety which the jurisdiction in revision is intended to remedy(2). The High Court acting in revision, under this section, is bound to accept the finding of the lower court unless there is any error of law or procedure vitiating that finding or unless there are any special circumstances apparent on the record to show that in arriving at its conclusion of fact the lower court has misapprehended the evidence(3). The High Court can interfere on facts to prevent miscarriage of justice and to correct manifest errors(4). A High Court is not competent under this section to order the discontinuance of proceedings instituted in a Magistrate's court where no finding, sentence or order has been passed by the Magistrate and his proceedings are not irregular, on the mere ground that the offence with which the accused is charged is not a criminal offence(5). A Sessions Judge is empowered under this section to call for the record of an order of discharge passed by a Magistrate in a case instituted under section 476, and, if he is dissatisfied with the correctness, legality or propriety of the finding, to order a further inquiry under section 436, and there is nothing to prevent a Sessions Judge from exercising this jurisdiction at the instance of a private person(6). No restriction is placed by this section upon the grounds on which the Sessions Judge may order further inquiry. If misappreciation of evidence has led to the passing of an incorrect or improper order of the discharge such an order can undoubtedly be revised under this section(7).

Regularity of any proceeding of such inferior court.—See notes above under the head "proceedings." An order by the Presiding Magistrate requiring security from the keeper of press, even if in excess of his powers, is not capable of being revised by the High Court, either by means of a writ of *certiorari* issued under sections 106 and 107 of the Government of India Act or by the exercise of revisional powers as provided by this section(8). A High Court cannot revise an order under s. 195, *supra*, as that section is self contained(9).

May direct suspension of sentence and release on bail.—Power is now expressly given in sub-section (1) to superior courts when sending for record in any case to suspend the execution of sentence and also to release the accused on bail if he is in confinement, pending revision(10).

Explanation to sub-section (1).—The explanation makes a

(1) *Venkatarama v. Krishna Ayir*, 38 M. 1031.

(2) *Empress v. Abdul Rahiman*, 16 B. 530 (.83).

(3) *Emperor v. Narayan*, 7 Cr. L. J. 21—9 B.M. L. R. 1385.

(4) *Ram Prasad v. Emperor*, 17 C. W. N. 379; *Emperor v. Surda*, 92 C. 180, *In re Hari Das* 15 C. 608 F. B.; *The National Bank of India v. Kothanarama*, 14 M. L. T. 200; *Lakshminarasappa v. Mekala*, 18 M. L. J. 57; *Emperor v. Bankat*, 29 B. 533.

(5) *Sheo Saran v. Jitendra Nath*, 104 I. C. 254—1 Luck Cas. 217—28 Cr. L. J. 814.

(6) *Piari Lal v. Sagar Mal*, 49 A. 230.

(7) *Venkata Subba v. Ayyalu*, 32 M. 214 (215); following *Empress v. Balasannanantambi*, 14 M. 334.

(8) *In re Annie Besant*, 39 M. 1164 F. B.

(9) *Budhu v. Chattu*, 44 C. 816.

(10) Statement of Objects and Reasons (1914).

fine under section 263 of the Cantonment Code, 1899, for breach of the conditions of a license(1); as also an order passed by a Magistrate under section 449 of the Calcutta Municipal Act(2); as also an order passed by a Magistrate under the Upper Burma Ruby Regulation 1887(3); as also an order passed by a Magistrate under sections 514 and 515 of the Code(4). When an illegal order is passed and action taken which involves matters coming within the purview of law and justice and within the scope of the authority of the courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a judicial officer, more particularly when no authority other than that of a judicial nature for his action is cited(5).

Situate within the local limits of its or his jurisdiction.—Under this section the Sessions Judge may call for and examine the records of any inferior criminal court "situate" within the local limits of his jurisdiction. The word "situate" means fixed or located; when applied to a court it must be taken to refer to the place where the court ordinarily sits(6).

For the purpose of satisfying itself.—This section gives powers to the High Court, the Sessions Judge and the District Magistrate to call and examine records of a court inferior to them and within their jurisdiction for the purpose of satisfying it or them as to the correctness, legality or propriety of its proceedings. It does not confer power to correct the error, etc., which power is expressly given by the succeeding sections. Nor does the Code empower a District Magistrate to record evidence of his own motion in a case which comes before him under this section(7).

Correctness, legality or propriety of any finding, sentence or order.—This section permits interference on the ground not merely of illegality but also on the ground of the impropriety of a finding(8). The legality and propriety would both include questions of law as to whether a finding, sentence or order is legal or proper having regard to the evidence. The word "correctness," does not mean that the High Court may inquire whether the finding was acceptable to it on a balance of the evidence recorded in the trial court. The correctness of the finding, sentence or order also implies a legal defence such as the finding being based on the entire want of evidence, or being incorrect in the sense that the witnesses may have said for instance, that no theft was committed, and the court may have recorded a finding that theft was committed(9). This section applies not only when the order is

(1) *Mangi Ram v. Emperor*, 9 P. R. 1909 Cr.

(2) *Abdul Samad v. Corporation of Calcutta*, 31 C. 287; *Chunt Lal v. Corporation of Calcutta*, 34 C. 341.

(3) *Maung Po Lone v. Emperor*, 2 Rang. 321 (323).

(4) *Masta v. Emperor*, 15 P. R. 1905 Cr.

(5) *S. N. v. Emperor*, 4 P. R. 1908 Cr. at page 9.

(6) *Valia Ambu v. Emperor*, 30 M. 116 (197).

(7) *Emperor v. Ibrahim*, 3 Bom. L.

R. 677.

(8) *Ashrafial v. Emperor*, 105 I. C. 679 = L. R. 8 A. 193 = A. I. R. 1917 A. 647 = 25 A. L. J. 978 = 28 F. L. J. 967; *Sudan an v. Emperor*, 25 A. L. J. 379; *Daroga Singh v. Emperor*, 5 Pat. L. T. 639; *Shankarshet v. Emperor*, 58 R. 40 where the accused was convicted on the strength of tainted evidence.

(9) *Shankar Singh v. Emperor*, 27 A.

entertain an application, the object of which is that he should call for the record of a case in which an application has been made to a District Magistrate under this section and refer the District Magistrate's order to the High Court, the prohibition contained in this sub-section being as applicable to such an application as to an application, the object of which is that the Sessions Judge should revise the order passed by the District Magistrate in revision(1). The meaning of sub-section (4) is that where either the Sessions Judge or District Magistrate has had before him an application in revision, in the same matter, moved by either party, the other judicial officer would have no jurisdiction to hear a further application in the same matter, *i. e.*, in respect of the order in question of the original criminal court(2).

Application made but not entertained and decided.—Where an application is made to the District Magistrate under sub-section (4), and he declines to go into the merits on the ground that in the circumstances the more convenient course would be to represent the application to the Sessions Judge, it is open to the applicant to represent the application to the Sessions Judge. 'Made' in sub-section (4) means 'entertained and decided'(3). Where, therefore, an application for revision preferred to the Sessions Judge has been dismissed for want of prosecution, the District Magistrate is competent to entertain a second application for revision and exercise the powers under this section(4). A Sessions Judge, who himself calls for the records of a case in which the accused has been discharged, and returns the same with the remark that in his opinion there is no cause for interference, is not precluded but on the other hand is bound to entertain an application for re-opening the case, presented by the complainant. He cannot reject such application on the ground of his previous non-interference on his own motion(5).

Stay of proceedings.—As a general rule the High Court should avoid except under exceptional circumstances, staying proceedings in a criminal case merely because the same question forms the subject in a pending civil litigation. The decision of the question by either court will not bind the other(6). A Magistrate's order declining to stay proceedings in his court is an order covered by this section(7).

(1) See the case cited in the last note.
orders two of District authorities having

1931 Cr. C. 1028=32 Cr. J. 1278=
134 I. C. 930=Ind. Hul. 1931 M. 878.

(4) *Debi Din v. Emperor*, 4 O. C. 119.

(5) *Mga Tun Myaing v. Nga Kauk San*, 8 Bur. L. T. 243=8 I. B. R. 377=
16 Cr. L. J. 711=30 I. C. 993.

(6) *Gannasiqamani v. Vedamuthu*,
25 L. W. 62; See *Raj Kumari v. Bana Sundari*, 43 C. 610; *Re Nana Maharaj*, 16 B. 729; *Re Deoji*, 18 B. 581.

(7) *Louis Philip v. Mahadev Barik*
A. I. R. 1933 B. 485=25 Bom. L. R.
1054=1933 Cr. C. 1667=28 Bom. 49.

(3) *In re Appachi Goundan*, 54
M. 812=A. I. R. 1931 M. 772=34 L. W.
44=(1931) M. W. N. 771=61 M. L. J. 12=

District Magistrate exercising original or appellate jurisdiction is inferior to the Sessions Judge, who has therefore jurisdiction to call for the record and make a reference to the High Court(1).

Sub-section (2).—A Sub Divisional Magistrate may call for record if he is specially empowered by the Local Government in this behalf. If he finds that the order is wrong he will forward the record with his remarks to the District Magistrate, who may pass orders or report for order to the High Court, according to the nature of the case(2).

Sub section (3).—By the removal now of sub-section (3) of this section proceedings under Chap XII of the Code have become liable to revision in the same manner as other proceedings(3). It is unnecessary to discuss a considerable number of somewhat discordant cases which dealt with this sub section.

Sub section (4).—The intention of the Legislature in enacting this clause is to prevent the Sessions Judge and the District Magistrate from simultaneously exercising their powers of revision and from exercising them in such a way as would amount to one of them, as it were, hearing an appeal from, or reviewing an order passed by the order of them(4). Concurrent jurisdiction is conferred by this section on the Sessions Judges and the District Magistrates in regard to revision. If, therefore, an application is made to either of them no further application shall be entertained by the other of them(5). Where an application under this section is entertained by a Sessions Judge, the District Magistrate cannot deal with the matter *suo motu* nor can his order invalidate the order passed by the Sessions Judge(6). Similarly, where an application for revision has been made to the District Magistrate, no further application can be entertained by the Sessions Judge even though the Sessions Judge is not asked to revise the order passed by the District Magistrate in revision but only to call for the record and report the Magistrate's order to the High Court(7). The prohibition contained in this sub-section, extends to all cases in which either a District Magistrate or a Sessions Judge has taken action or refused to take action under sections 435, 436, 437, or 438 of the Code, and that consequently a Sessions Judge is not competent under section 438 to report to the High Court the order of a District Magistrate ordering further inquiry by a subordinate criminal court into the case of an accused person, who has been discharged by that subordinate criminal court(8). A Sessions Judge cannot

(1) *Darbari Lal v. Emperor*, 23 A. L. J. 844=2 Cr. L. J. 1282=89 I. C. 146 =L. R. 6 A. 185 Cr.=A. I. R. 1925 A. 591.

(2) See Cr. L. Rev. 359

(3) *Chinnappa Reddi v. Mola Dasari*, (1929) M. W. N. 708 (700); *Muthuswami v. Thangammal*, 191 I. C. 833=31 L. W. 16=31 Cr. L. J. 324 =Ind. Rul. (1930) M. 241=A. I. R. 1930 M. 242=58 M. L. J. 148=59 M. 320= (1930) M. W. N. 82; *Raj Nandan v. Cheddi*, 13 Pat. L. T. 178=A. I. R. 1932 Pat. 185=1932 Cr. G. 418; *Thakur Ba v. Emperor*, 12 Rang. 283.

(4) *Debi Das v. Emperor*, 4 O. O. 119.

(5) See *Debi Das v. Emperor*, 4 O. O. 119.

(6) See *Debi Das v. Emperor*, 4 O. O. 119.

(7) *In re Karpurasundaram*, 17 M. L. J. 153.

(8) *Crown v. Waryam*, 10 P. R. 1912 Cr.=18 I. C. 856=117 P. L. E. 1913=14 Cr. L. J. 134.

where an application under s. 145 is repeated(1); or in a case under s. 133(2) or in cases under s. 488(3). Further inquiry with regard to proceedings under s. 144 is incompetent(4). No further inquiry can be directed when no complaint was made against a person and no regular process was issued against him(5). Where proceedings have been stopped under s. 249, Cr. P. C. and accused released, there can be no further inquiry(6). Where an application under section 107, Cr. P. C., has been dismissed a District Magistrate has no jurisdiction to order further inquiry(7). No further inquiry can be directed when accused is acquitted(8). A District Magistrate, has no jurisdiction to order a retrial of a case; he can, under this section, order a further inquiry, on proper grounds(9).

Order of discharge by Presidency Magistrate.—The High Court cannot interfere with an order of discharge made by a Presidency Magistrate(10). Where a Presidency Magistrate dismisses a complaint under s. 203, the High Court cannot direct a further inquiry under this section, nor can they interfere under s. 439, although the order of the Magistrate, dismissing the complaint, might not be quite proper(11). But in some cases it has been held that the High Court exercises such power under section 439(12).

Interference with order of discharge in a case instituted under section 476.—A Sessions Judge can take up at the instance of private person a revision of a Magistrate's order of discharge in a case instituted under section 476, and, if he is dissatisfied with the correctness, legality or propriety of the finding, order a further inquiry under this section(13).

Who can direct further inquiry.—The Legislature has provided that the three high tribunals, the High Court, the Sessions Judge and the District Magistrate, have the same powers with regard to the matter dealt with in the section(14), but as a matter of procedure as has been held in many cases(15), the application should at first be made either to

(1) *Maungsan v. Maung Mye Du*, 117 I. O. 59=1928 Rang 238; *Rash Bihari v. Emperor*, 1 Pat. L. W. 258=89 I. C. 928=181 r. L. J. 488.

(2) *Prithipal v. Emperor*, 88 I. C. 995=2 O. W. N. 549=26 Cr. L. J. 1251=A. I. R. 1925 O. 786.

(3) *Tokee Bisee v. Abdool Khan*, 5 O. 686.

(4) *Har Kishore v. Jugal Chunder*, 27 C. 658.

(5) *Ambar Ali v. Anjab Ali*, 39 C. 238.

(6) *Achhru v. Crown*, 9 P. R. 1918 Cr.

(7) *Kirpa Ram v. Durga Das*, 31 P. L. R. 350.

(8) *Bay Nath v. Gouri Kanta*, 20 C. 638; *Queen-Empress v. Annamreddi*, 8 M. 496; *Jaliram v. Itaj Humar*, 5 C. W. N. 72; *Sriramulu v. Veerasalingam*, 26 M. 585.

(9) *Muhammad Husain v. Nanhi*, 82 A. 257=29 A. L. J. 521=186 I. O. 253

=A. I. R. 1930 A. 257=31 Cr. L. J. 995=1920 Cr. O. 869. A District Magistrate cannot direct a retrial by himself, *Bindeshri v. Emperor*, 22 Cr. L. J. 49=59 I. O. 193=18 A. L. J. 1185=2 U. P. L. R. (A) 374.

(10) *Kedar Nath v. Khetranath*, 6 O. L. J. 705.

(11) *Id. v. Id.*, 7 C. 1007.

(12) *Id. v. Id.*, 7 C. 1007.

(13) *Peary Lal v. Sagar Mal*, 49 A. 280=25 A. L. J. 42=27 Cr. L. J. 1180.

(14) *Hari Das v. Saritulla*, 15 C. 608 F. B.; *Narayanasaamy Naidu v. Emperor*, 32 M. 220.

(15) *Gulley v. Balar Husain*, 28 A. 268; *Emperor v. Kalicharan*, (1904) A. W. N. 232; *Empress v. Itahim Ali*, 7 P. R. 1668 Cr.

436. On examining any record under section 435

Power to order or otherwise, the High Court or the inquiry. Sessions Judge may direct the District

Magistrate by himself or by any of the Magistrate subordinate to him to make, and the District Magistrate may himself make or direct any subordinate Magistrate to make further inquiry into any complaint which has been dismissed under section 203 of sub-section (3) or section 204, or into the case of any person accused of an offence who has been discharged :

provided that no court shall make any direction under this section for inquiry into the case of any person who has been discharged, unless such person has had an opportunity of shewing cause why such direction should not be made.

Amendment.—This section was formerly s. 437 and s. 437 was s. 436. By the Amending Act XVIII of 1923 these sections have been interchanged. The words "persons accused of an offence" have been substituted for the words "accused person" to meet the conflicting decisions as to the exact meaning and scope of the terms "accused persons"(1). The proviso makes it obligatory on a court not to pass an order under the section until the person discharged has had an opportunity of showing cause(2).

Scope.—The powers of revision vested in the High Court, Sessions Judges, and District Magistrates are co-extensive and are in no way limited by this section. They are empowered to direct further inquiry into the case of any person accused of an offence, who has been discharged(3). The provisions of this section are meant to apply to the cases where there has been some misinterpretation of the law or principle of law, or there has otherwise been miscarriage of justice. The mere fact that on the evidence a revising authority comes to a different conclusion from that arrived at by the court that heard the evidence does not justify an order for further inquiry(4).

Cases in which s 436 is inapplicable.—An order under this section cannot be made in a case where a person has been discharged under s. 119 in a proceeding under Chapter VIII of the Code(5); or

(1) Statement of Objects and Reasons (1914).

(2) *Chhailin v. Behari* A. I. R. 1917

(3) *In re Narayanaswami*, 19 M. L. J. 157=9 Cr. L. J. 191=1 I. C. 228=21 Mad 220=5 M. L. T. 233.

(4) *Zabar Singh v. Ram Sarup*, 85 I. C. 726=L. R. 6 A. 47 Cr=26 Cr. L. J. 582.

(5) *Emperor v. Roshan Singh*, 46 A. 235, *Muhammad Yusuf v. Abdul*

Majid, 53 A 148=A. I. R. 1931 A. 53=32 Cr. L. J. 690=12 L. R. A. Cr. 18=131 I. C. 216=1931 Cr. O. 127=15 A. I. Cr. R. 112=28 A. L. J. 1485, *Maung Than v. Emperor*, 2 Rang. 80=81 I. C. 970=2 Bur. L. J. 385=1924 Rang. 207=25 Cr. L. J. 1146; *Neur v. Emperor*, 10 A. I. Cr. R. 488=27 A. L. J. 146=30 Cr. L. J. 63=113 I. C. 79=A. I. R. 1928 A. 755=51 A. 408; *Ram Lal v. Bankateshar*, 23 O. C. 41; *Velu Tayi Ammal v. Chidambara Velu*, 23 M. 85; *Empress v. Iman Mandal*, 27 C. 662, *Daya Nath v. Emperor*, 33 C. 8

where an application under s. 145 is repeated(1); or in a case under s. 133(2) or in cases under s. 488(3). Further inquiry with regard to proceedings under s. 144 is incompetent(4). No further inquiry can be directed when no complaint was made against a person and no regular process was issued against him(5). Where proceedings have been stopped under s. 249, Cr. P. C. and accused released, there can be no further inquiry(6). Where an application under section 107, Cr. P. C., has been dismissed a District Magistrate has no jurisdiction to order further inquiry(7). No further inquiry can be directed when accused is acquitted(8). A District Magistrate, has no jurisdiction to order a retrial of a case; he can, under this section, order a further inquiry, on proper grounds(9).

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(1) *Maungsan v. Maung Mye Du*, 117 I. O. 59 = 1928 Rang. 253; *Kash Bihari v. Emperor*, 1 Pat. L. W. 258 = 39 I. C. 328 = 18 Cr. L. J. 488.

(2) *Prithpal v. Emperor*, 68 I. C. 995 = 2 O. W. N. 549 = 26 Cr. L. J. 1251 = A. I. R. 1925 O. 736.

(3) *Tokes Bibee v. Abdool Khan*, 5 O. 636.

(4) *Har Kishore v. Jugal Chunder*, 27 C. 658.

(5) *Ambar Ali v. Anjab Ali*, 39 C. 238.

(6) *Achhru v. Crown*, 9 P. R. 1913 Cr.

(7) *Kirpa Ram v. Durga Das*, 31 P. L. R. 350.

(8) *Bay Nath v. Gouri Kanta*, 20 C. 633, *Queen-Empress v. Aramreddi*, 8 M. 296; *Jalram v. Raj Kumar*, 5 O. W. N. 72, *Sriramulu v. Veerasalingam*, 28 M. 585.

(9) *Muhammad Husain v. Nanhi*, 52 A. 257 = 28 A. L. J. 621 = 196 I. O. 253

= A. I. R. 1930 A. 257 = 31 Cr. L. J. 995 = 1930 Cr. O. 369. A District Magistrate cannot direct a retrial by himself, *Bindeshri v. Emperor*, 22 Cr. L. J. 49 = 69 I. O. 193 = 18 A. L. J. 1135 = 2 U. P. L. R. (A) 374.

(10) *Kedar Nath v. Khetranath*, 6 C. L. J. 705.

(11) *Dela Buz v. Jutmul*, 33 C. 1282;

(12) *Peary Lal v. Sagar Mal*, 49 A. 280 = 25 A. L. J. 42 = 27 Cr. L. J. 1180.

(13) *Hari Das v. Saritulla*, 15 C. 608 F. B.; *Narayanasaamy Naidu v. Emperor*, 32 M. 220.

(14) *Gulay v. Bakar Husain*, 28 A. 268; *Emperor v. Kalicharan*, (1904) A. W. N. 232; *Emperor v. Rahim Ali*, 7 P. R. 1868 Cr.

the District Magistrate or the Sessions Judge(1). Thus, where the District Magistrate dismisses a complaint under the provisions of section 203 of the Code, the High Court will not entertain an application by the complainant asking for further inquiry under this section, when no application for this object has been made to the Sessions Judge(2). It being competent to the District Magistrate himself, under this section, to direct a subordinate Magistrate to make further inquiry in the case of a person who has been improperly discharged by a Magistrate of the 2nd Class, it is more convenient that an order of the kind should be made in the District Magistrate's Court than in the High Court(3). A District Magistrate can make or can direct a subordinate Magistrate to make, further inquiry into a case in which an order of dismissal or discharge may have been passed by himself or by a Subordinate Magistrate(4).

Although both the Sessions Judge and the District Magistrate are competent, under this section, to order a further inquiry, neither has jurisdiction to review an order made by the other(5). So where a complaint having been dismissed by a Deputy Magistrate under s. 203 a fresh complaint was made before the District Magistrate, who again dismissed the complaint the Court held that it was not open to the Sessions Judge to order further inquiry in the complaint(6). Where the Sessions Judge is of opinion that the order of the District Magistrate is wrong it is open to him under s. 438 to refer the matter to the High Court(7). Similarly, a District Magistrate may report to the High Court in the case of an order made by the Session Judge, not directly but through the medium of the Public Prosecutor(8).

A Deputy Magistrate placed in charge of the current duties of the District Magistrate's office is not thereby vested with jurisdiction under this section(9). But Additional Sessions Judge can order further inquiry in the exercise of powers conferred upon him under s. 438(2).

Further inquiry after prior refusal.—Where a District Magistrate has already dealt with a case in revision and decided there is no cause for interfering with the order of discharge of the accused, he cannot subsequently order further inquiry under this section. Such an order must be an order reviewing the earlier one and is prohibited by section 369 of the Code(10). And where a District Magistrate has refused to direct a further inquiry, it is not competent to a successor in office, in the face of his predecessor's order to direct a further inquiry. In such a case the Sessions Judge is the proper officer to do so(11). But in one case it has been held that it is competent to a District Magistrate, under

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this section, to order further inquiry in a case, though he may have declined to do so on a previous occasion in the same matter(1).

Who can be directed to make further inquiry.—The High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make the further inquiry thus leaving the discretion to the District Magistrate(2). The District Magistrate will exercise his discretion as to the selection of any Magistrate subordinate to him. It is not competent to a Sessions Judge making an order for further inquiry under this section to direct that the case be inquired into by a particular Magistrate(3). The District Magistrate may be directed to make further inquiry even though he exercises power under s. 30(4).

The District Magistrate may direct a subordinate Magistrate to make further inquiry(5). The further inquiry allowed under this section should ordinarily be conducted by the Magistrate who first inquired into the case(6). Where the further inquiry is into the effect of the evidence already on the record or the testimony of the witnesses already examined, it will usually be desirable that that the fresh consideration of the complaint should be entrusted to a different Magistrate from the one who has already formed an opinion on the case(7). When the further inquiry involves the taking and weighing of additional evidence, the function will generally be best performed by the same Magistrate who made the previous inquiry; though peculiar or prejudiced views, or even the possibility of them, may make it more desirable to bring a fresh mind to bear on the facts(8). Where the subordinate Magistrate had dealt with the case in an unsatisfactory way, further inquiry by another Magistrate may be ordered; and such Magistrate may, if necessary, retake the evidence taken before the first Magistrate(9).

But the District Magistrate cannot direct a Junior Magistrate to make a further inquiry into a case which was originally heard by a Senior Magistrate. Where a Magistrate, empowered under section 30 to try a case of attempted murder, has discharged the accused, after due hearing and consideration of all the prosecution evidence, it is not proper for a District Magistrate, (even if it be legal), to order a further inquiry into the case by another subordinate Magistrate who is not invested with powers under section 30, and in doing so to write a judgment embodying his own opinion on the merits of the case(10).

Power of Sub Divisional Magistrate to withdraw case.—A Sub-

(1) *Empress v. Krishnaji*, Rat. Un. Cr. Cas 522

(2) *Ramaswami Thevar v. Subban*, 32 L. W. 782—(1930) M. W. N. 911—3 Mad. Cr. Cas. 366—129 I. C. 79—1930 Cr. C. 1199—32 Cr. L. J. 226; *Chandi v. Balkrishna*, Rat. Un. Cr. Cas. 328; and see *Tun Win v. Emperor*, 4 L. B. R. 233.

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(4) *Kallo v. Emperor*, 15 P. R. 1904 Cr. cited with approval in *Yado v. Emperor*, 12 N. L. R. 94.

(5) *In re Padmanabha*, 8 M. 18—2

Wair 510. *Emperor v. Subban*, 32 L. W. 782

36 A. 53.

(7) *Empress v. Balkrishna*, Rat. Un. Cr. Cas 328

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(9) *Ramanund v. Koylash*, 11 C.

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Divisional Magistrate cannot properly withdraw a case specifically referred by his superior, the District Magistrate, nor can the latter properly insist on repeated further inquiries without fresh evidence(1). But a Sub-Divisional Magistrate who has been directed to make a further inquiry may send the case to a second class Magistrate for the purpose of making further inquiry(2).

Cases where further inquiry may be ordered.—It may be made into a complaint which has been dismissed under s. 203 or under s. 204 (3)(3), or into the case of a person accused of an offence who has been discharged(4). A District Magistrate has jurisdiction under this section to order a further inquiry in the case of persons discharged under section 494 of the Code(5). But an order under s. 249 is neither one of dismissal of a complaint nor is it an order of discharge, and therefore, this section has no application to such an order. Hence the District Magistrate has no jurisdiction to quash an order under s. 249 and direct further inquiry into the case(6). An order under section 209 (2) on the ground that the Magistrate has no jurisdiction to entertain the complaint does not amount to an order of discharge and it cannot be revised by the Sessions Judge under this section(7). Further inquiry under this section means an inquiry of the same nature as was previously held under s. 202(8), but it is not confined to further inquiry under that section(9). No further inquiry can be directed when no complaint was made against a person and no regular process was issued against him(10). A Magistrate's order directing a case reported to him by the police, under s. 173 of the Code, to be struck off, is not a judicial order dismissing a complaint which can be reviewed by the Sessions Judge(11). This section contemplates that where a complaint has been dismissed under section 203 the revisional jurisdiction of the District Magistrate can be invoked irrespective of the consideration whether the dismissal is legal or illegal(12). Where a complaint which contained several charges was dismissed in respect of one of the charges, and the complaint was dismissed merely on the report of the President of a Panchayat without giving the complainant any opportunity to substantiate his case, it was held that there should be

(1) *Empress v. Santaram*, Rat. Un. Cr. O. 315.

(2) 2 Weir 563

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(8) *Ramchandra v. Satyabhama*, 108 I. O. 328=10 A. I. Cr. R. 25=29 Cr. L. J. 872=9 P. L. T. 459.

(9) *Ramji v. Emperor*, A. I. R. 1931 Pat. 50=130 I. C. 529=32 Cr. L. J. 548=12 P. L. T. 729; *Hana Singh v. Emperor*, A. I. R. 1929 Pat. 64=126 I. C. 146=31 Cr. L. J. 961=9 P. 155.

(10) *Ambar Ali v. Ajab Ali*, 39 C. 238.

(11) *Empress v. Kamsu*, Rat. Un. Cr. O. 521; cf. *Ram Singh v. Rizvi*, A. I. B. 1935 Pat. 52.

(12) *Sadhu Charan v. Balei*, 3 Pat. L. J. 346.

(6) *Emperor v. Shri Pal*, A. I. R. 1934 A. 17=1934 Cr. O. 45=1934 A. L. R. 341=147 I. C. 1023=1934 A. L. J. 360=35 Cr. L. J. 564.

(7) *Subramania v. Swamikaunu*, Cr. P.O.—97

a further inquiry into the complaint(1). But if a complaint was made in respect of an offence and the accused was convicted, further inquiry cannot be directed in respect of another offence for which no charge was made in the complaint(2). The powers of a District Magistrate directing further inquiry into any complaint are limited to the cases mentioned under this section and an order passed under section 247 of the Code does not fall within the purview of the section(3).

Discharge of accused.—The rule of law is firmly established that generally speaking further inquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete(4). An order under this section cannot be made where the District Magistrate who has not seen the witnesses takes a different view of the evidence from that formed by the trial court(5), or where the order of discharge was passed by the trial court after a full and complete inquiry(6) and there is no further evidence(7), or where the nature of the case is such that the courts are liable to take different views of the evidence and of the probabilities(8), or where the Magistrate has dealt at length with the evidence and recorded what appear as sound reasons for the discharge(9). If the order of discharge is not perverse and there is no suggestion of further evidence for the coming further inquiry should not be directed(10). Further inquiry should not be ordered unless there is palpable error in the order of the lower court(11). Misappreciation of evidence is no ground for further inquiry(12), nor can it be ordered on the bare chance of an

(1) *P. v. Chandra*, 4 Cr. L. J. 100.

(2) *C. v. C.*

(3) *Bindra v. Bhagwant*, 77 I. C. 295=25 Cr. L. J. 959.

(5) *Zabar Singh v. Ram Sarup*, 85 I. C. 726=L. R. 6 A. 47 Cr.=26 Cr. L. J. 582; *Emperor v. Udai Raj*, 44 A. 691; *Hakam Ali v. Crown*, 4 Lah. L. J. 411; *Umrao Khan v. Emperor*, 21 A. L. J. 194; *In re Narainah*, 19 Bom. L. R. 350.

(6) *Faiz Muhammad v. Crown*, 7 Lah. L. J. 216=26 P. L. R. 193=26 Cr. L. J. 1328=89 I. C. 272=A. I. R. 1925 L. 895; *Khan Zaman v. Emperor*, 26 Cr. L. J. 1357; *Cl. Durgah Prasad v. Emperor*, 1925 L. R. 1925.

(7) *J. v. J.*
1 A.
18

(9) *Bhago v. Emperor*, 394 P. L. R. 1000 Cr. L. J. 1000.

(10) *Emperor v. Alam*, 49 A. 879.

(11) *Sulav v. Emperor*, 31 Cr. L. J. 475=1929 C. 755=123 I. C. 246=60 Cr. L. J. 284.

(12) *Bageshwar v. Emperor*, 31 Cr. L. J. 417=1930 Nag. 101; *Lakshmi v. Mekala*, 31 M. 133; but see *Kallu v. Crown*, 4 Lah. L. J. 411 and *Begraj v. Crown*, 10 S. L. R. 69.

Lah. L. J. 252=90 I. C. 292=A. I. R. 1925 L. 439; *Kishen Chand v. Emperor*, 21 Cr. L. J. 571; *Sheocharan v. Emperor*, 21 N. L. R. 88; *Kallu v. Crown*, 4 Lah. L. J. 411; *Nazir Ahmad v. Emperor*, A. I. R. 1934 A. 944.

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1934 Pesh. 52; but see *Peary Lal v. Sagar Mal*, 49 A. 230=27 Cr. L. J. 1180=97 I. C. 650=L. R. 7 A. 176 Cr.=25 A. L. J. 42=A. I. R. 1927 A. 38.

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(12) *Sadhu Charan v. Balei*, 3 Pat. L. J. 316.

(6) *Emperor v. Shri Pal*, A. I. R. 1934 A. 17=1934 Cr. O. 45=1934 A. L. R. 341=147 I. C. 1028=1934 A. L. J. 860=35 Cr. L. J. 564.

(7) *Subramania v. Swamijakunt*,

Where after the issue of warrants against certain persons the Magistrate does not think it necessary to proceed further, the termination of the proceedings against them is in effect an order of discharge(1). The discharge must be such in law, substance and effect. No formal order is necessary to enable the revising authority to direct further inquiry(2).

No further inquiry where accused acquitted.—It is only, when an accused person has been discharged by the Magistrate, that the revising authority has jurisdiction to interfere under this section. But, if the Magistrate acquits the accused, the revising authority has no such power(3). Since an order under section 247 of the Code is one of acquittal, and not one of discharge, no further inquiry can be directed under this section(4). Even if an order of acquittal was passed in a warrant-case without any charge having been framed and evidence for the defence taken, still it cannot be a subject of revision under this section(5). It is certainly hard on an accused to be denied the advantage of an acquittal after full inquiry merely because the case was not considered strong enough even to justify a charge(6). A Sessions Judge has no jurisdiction to order further inquiry, under this section, in case in which an order of discharge amounting in effect to one of acquittal was passed(7).

Order directing the withdrawal of prosecution and of process against accused.—Where on the acquittal of a co-accused, the other accused, against whom process of arrest had been issued, surrendered before the Deputy Magistrate, and he passed an order directing that the accused should not be proceeded against and that the warrant and other processes issued against him be withdrawn, held, that the order was not one either under s. 203, of dismissal of a complaint or an order of discharge of the accused, and that the District Magistrate had, therefore no jurisdiction under s. 437 (now this section) to set aside the order and direct the retrial of the accused(8).

No further inquiry where no accusation of "offence".—This section (formerly s. 437) now contains the words "any person accused of an offence," instead of "any accused person," and hence does not include persons against whom proceedings are taken under Chapter VIII(9). The following decisions which held the opinion that under

(1) *Moul Singh v. Mahabir Singh*, 4 C. W. N. 242

(2) *Nagendra Nath v. Korb* 8 C. W. N. 456; *Sheonarain v. Radha* 42 A. 128; *Moul Singh v. Mahabir Singh*, 4 C. W. N. 242, *Saharulla v. Kendra*, 42 I. C. 729

(3) *Baijaulla v. Gaisi Kaula*, 20 C. 633; *Panchu v. Umor*, 4 C. W. N. 316; *Jah Ram v. Raj*, 5 C. W. N. 72; *Bishun v. Emperor*, 7 C. W. N. 493.

(4) *Hindra v. Bhagwanta*, 25 Cr. L. J. 359.

(5) *Saiyad Khan v. Emperor*, 1 A. L. J. 415.

(6) *Dad v. Empress*, 1900 P.L.R. Cr. p. 31 (32).

(7) *In re Pothuri Venkataramayya*,

17 Cr. L. J. 95=23 I. C. 687; *Tanguturi*

4 C. W. N. 242

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offence coming to light(1), when there is no prospect of public advantage by re opening case(2); nor should it be ordered unless there is possibly only one conclusion, viz, that the accused is guilty(3).

Grounds held good—Where it appeared to the High Court that the Magistrate who had discharged the accused had wrongly omitted to take into consideration the admission made by the accused the High Court considered that the inquiry was necessarily incomplete and imperfect, and directed a further inquiry(4). Further inquiry will be ordered where the evidence has not been properly appreciated(5), or where the order is manifestly perverse or foolish or is based upon a record of evidence which was obviously incomplete(6). A mistake of law or irregularity in the proceedings is a sufficient ground for directing further inquiry(7).

Improper discharge.—Where a Deputy Magistrate discharged a person accused of an offence on the ground that the evidence was insufficient for a conviction, the Magistrate of the District recorded an order stating that in his opinion the accused had been improperly discharged, and directing under s. 437 (now this section) that further inquiry should be made, and the accused called upon to enter upon his defence. He was tried by the Magistrate of the District convicted and sentenced; but the witnesses for the prosecution were not recalled. It was held that the subsequent proceedings of the District Magistrate were bad inasmuch as the conviction was based practically upon evidence not recorded in the course of a "further inquiry" before him, but upon evidence recorded by the District Magistrate(8). Where a person has been improperly discharged no reference to the High Court is necessary, the District Magistrate can himself order a fresh inquiry(9). The intention seems to be to give revisional jurisdiction to the Sessions Judge or District Magistrate in cases of improper discharge concurrently with that of the High Court, and thereby to obviate the expense and inconvenience which the necessity to record to the High Court might in some cases entail(10).

Order of discharge in substance though not in form—Where an order by a Magistrate is an order of discharge in substance though not in form, it is open to the Sessions Judge upon a motion being made to him by the complainant to make an order for further inquiry(11).

(1) *Arumuga v. Emperor*, 1923 M. 59 = 23 Cr. L. J. 592 = 69 I. O. 624.

(2) *In re Krishna Pillai*, 1923 M. W. N. 16.

(3) *Karuppa v. Palanisamy*, 10 L. W. 630; *Dani v. Crown*, 3 Lah. L. J. 97.

(4) *Dhanias v. Clifford*, 13 B. 376.

(5) *Kallu v. Crown*, 4 Lah. L. J. 411 = 69 I. O. 373; but see *Bageshwar v. Emperor*, 31 Cr. L. J. 417 = 1930 Nag. 108; *Lokshmi v. Afkatala*, 31 M. 193.

(6) *Harnani v. Emperor*, 94 I. O. 709; *Atma v. Emperor*, 1948 I. 42 = 101 I. C. 336; *Karamchand v. Mathra*, 72 I. O. 869; *Shamra v. Emperor*, 1929 Lah. 28; see also *Piari v. Sagar*, 49 A. 230.

(7) *Emperor v. Debidas*, 14 C. P. L. R. 161; *Frankhang v. Emperor*, 16 C. W. N. 1078. The power is not limited to a point of law; *Durga Prasad v. Emperor*, A. I. R. 1935 A. 439.

(8) *Empress v. Hasnu*, 6 A. 367.

(9) *In re Raola*, Rat. Un. Cr. C. 213; *Empress v. Husein Saheb*, Rat. Un. Cr. C. 988.

(10) *Empress v. Balasannatambi*, 14 M. 344 (318). Contra *Empress v. Amir Khan*, 9 M. 336.

(11) *Nagendra Nath v. Kort*, 8 C. W. N. 456; *Sheenarain v. Radha*, 42 A. 123; *Moul Singh v. Mahabir Singh*, 4 C. W. N. 242.

held that further inquiry in this section, implies the taking of additional evidence and not a mere rehearing(1). There are, however, cases in which a further inquiry directed under this section may be a mere reconsideration of the evidence already taken, e.g., where the order of a discharge is manifestly perverse or foolish, and not in all cases, of taking additional evidence(2). But in cases where the trying Magistrate has discussed the evidence carefully and has given sufficient reason for the discharge of the accused, and no fresh evidence is likely to be produced on further inquiry the superior court should hesitate before, exercising its powers under this section to order further inquiry, unless there are palpable errors in the decision of the lower court(3). In the further inquiry ordered under this section, the accused may meet the case for the prosecution by producing rebutting evidence. The Magistrate may also take the evidence which he has omitted to take(4). The further inquiry, which the District Magistrate may order is an additional investigation of the fact, or a re-consideration of the evidence by the Magistrate, whose order is set aside, or a new inquiry before another Magistrate. But there is no authority in the Code for a different Magistrate from the one, who originally made the inquiry, taking the record of evidence recorded by the latter, treating as recorded by himself, taking a different view of truthfulness of the witnesses whose evidence had been recorded, and then proceeding to try and convict the accused on that evidence(5).

Interference with order of discharge when justified—An order of discharge can be set aside by the District Magistrate only if there is any irregularity or illegality in the proceedings(6). A District Magistrate cannot set aside an order of discharge and direct further inquiry, if he finds no irregularity, illegality or impropriety in the proceedings(7). In considering whether a person has been improperly discharged by a Magistrate, the High Court is not restricted to an error of law only, but may order a further inquiry where *prima facie* the evidence establishes a case against the accused to which he should be required to enter in his defence(8). But Sessions Judges and District Magistrates should use the powers under this section sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact(9). The Judge should not lightly set aside the order of dismissal of complaint but should only do so when it is clear that there has been a miscarriage of justice(10)

1537; *Begraj v. Emperor*, 10 S. L. R 68.

(1) *Harbhaj v. Jouala*, 63 P. R. 1887 Cr.; *Empress v. Amir Khan*, 8 M 335

(2) *Dulla v. Empress*, 32 P. L. R 1901 at p. 101=2 P. R 1901; *Karheley v. Juggan Nath*, 87 I. C. 111=10 O. & A. L. R 576=11 O. L. J. 611=A. I. R (1925) O. 180=1 O. W. N. 302=26 Cr. L. J. 959; *Dissan Singh v. Emperor*, A. I. R 1933 Lah 561

(3) *Abdul Rashid v. Momtaz*, 38 C. L. J. 206; *Dad v. Emperor*, 1900 P. L. R. p. 31 Cr.

(4) *Dhanja v. Clifford*, 13 B. 376(384).

(5) 6 O. P. L. R. 11 Cr.

(6) *Bageshwar v. Emperor*, 123 I. O 434=Ind. Rul (1930) Nag. 162=31 Cr. L. J. 417=A. I. R. 1930 Nag 108; following *Chandan v. Kalla*, 8 A. L. J. 45=12 Cr. L. J. 45=9 I. O. 274.

(7) *Pran Khand v. Emperor*, 16 C. W. N. 1078=13 Cr. L. J. 764=17 I. C. 76.

(8) *Empress v. Papadu*, 7 M. 455.

(9) *Empress v. Chotu*, 9 A. 52=(1886) A. W. N. 281.

(10) *Jangal Singh v. Radha Krishun*, 26 Cr. L. J. 806=A. I. R. 1925 Pat. 447=3 Pat. L. R. Cr. 33=86 I. C. 602.

order further inquiry, under this section, himself frame the charge or order the subordinate Magistrate to frame the charge and try the accused. The District Magistrate may, under the other part of the section make the further inquiry himself and frame the charge in the course of such inquiry(1).

Powers of Magistrate making inquiry—Where a further inquiry is ordered under this section into a complaint which has been dismissed under s. 202, the Magistrate directed to make the further inquiry has power forthwith to issue process against the accused persons after holding the inquiry, and to commit them to the Sessions Court if the offence to be tried is triable by that court. In such a case the Magistrate has power to dispense with a preliminary inquiry under section 202(2). But in some cases it has been held that a Magistrate directed to conduct a further inquiry must not issue process until he has conducted a preliminary inquiry under section 202 and exercised his judgment that it was a fit case in which the accused should be summoned(3). Even if he is bound to conduct such a preliminary inquiry, summoning the accused before making such an inquiry is a mere irregularity which will not vitiate the commitment unless the accused has been prejudiced thereby(4). Ordinarily, when further inquiry is ordered into a complaint dismissed under s. 203, the Magistrate cannot again act under s. 203, but must proceed under s. 204 and inquire into and try the case(5). But it has also been held that a Magistrate holding a further inquiry into a complaint which has been once dismissed under s. 203 can again dismiss the complaint under s. 203(6). If the inquiry is directed to be held by a Magistrate other than the officer who held the first inquiry, he should take the evidence *de novo* and cannot proceed on the evidence already taken(7). But the Officer who held the first inquiry may take the evidence which he has omitted to take(8). A Magistrate who conducts the inquiry which has been directed and comes to the conclusion that a *prima facie* case of an offence triable by him has been made out has jurisdiction to try it and convict or acquit the accused(9). The Magistrate who is directed to make further inquiry cannot question the propriety of the order(10). A prosecution lawfully revived, must be dealt with in accordance with

(1) *Narayanaswamy Naidu v. Emperor*, 82 M. 220.

(2) *Hema Singh v. Emperor*, 9 Pat. 155=126 I.C. 146=A. I. R. 129 Pat. 644=81 Cr. L. J. 961=Ind. Bul. (1930) Pat. 578. Court of revision has got no power to direct a Magistrate to summon the accused person; when in the opinion of the Magistrate there is no sufficient evidence against the accused; *Incant Husain v. Emperor*, 10 A. I. R. 99=2 Cr. Law 31=A. I. R. 1928 A. 681=9 L. R. A. Cr. 68.

(3) *Radha Prasad v. Emperor*, 101 I. C. 673=9 Pat. L. T. 12=28 Cr. L. J. 857=A. I. R. 1928 Pat. 12=9 A. I. Cr. M. 61; *Sita Ram v. Kavilla*, 109 I. C. 506=10 A. I. R. 826=29 Cr. L. J. 572.

(4) *Hema Singh v. Emperor*, 9 Pat. 155 (164); *Janakdhar v. Emperor*, 8 Pat. 537=10 Pat. L. T. 725=120 I. C. 532=1929 Pat. 469.

(5) *Brij Kishore v. Gopal Rai*, 11 C. W. N. 316; *Thakarsingh v. Kirpal Singh*, 10 P. W. R. 1018 Cr.

(6) *Niharau v. Sitato* 25 C. W. N. 312.

(7) *Ram Dial v. Emperor* 9 A. L. J. 810; *Empress v. Sahun*, 6 A. 367; *Tun Wiu v. Emperor*, 4 L. B. R. 233.

(8) *Dhanias v. Clifford*, 13 B. 376 (384).

(9) *Ram Barai v. Ram Partop*, 5 Pat. L. J. 47.

(10) *Emperor v. Doralji*, 10 B. 131.

or there is possibly only one conclusion that accused is guilty(1). Further inquiry should be directed in special cases and for cogent reasons(2). It cannot be ordered on the bare chance of an offence coming to light(3), when there is no prospect of public advantage by re opening the case(4). The District Magistrate is not authorized to order further inquiry under this section in a case where the lower court has found that the essence of the matter was of a civil nature and that the question was in reality one to be fought out in a civil court(5). Mere lapse of time is not sufficient ground for refusal to order further inquiry, if the court feels that an offence has been committed which should be inquired into(6). But if the accused had been subjected to material inquiry three times, he should not be harassed a fourth time(7).

Powers of courts directing further inquiry—When ordering a further inquiry in respect of a complaint which has been dismissed under section 203, the Sessions Judge cannot direct that the accused be summoned, but his power is restricted to making an order for a further inquiry of the same action as that which has been already made, i.e., a further inquiry under section 202(8). This section does not authorize a Sessions Judge or District Magistrate to take evidence or to direct evidence to be taken supplementing the evidence given in the lower court. He is authorized to direct a further inquiry, but not to take evidence or direct evidence to be taken(9). All that a District Magistrate can do under this section is to direct further inquiry, leaving it entirely to the inquiring Magistrate to determine whether or not the evidence justified the accused being charged and put on his trial(10). An order for retrial should not be made in the guise of an order for further inquiry(11). The District Magistrate has no legal authority to fetter the Subordinate Magistrate in the exercise of his judicial discretion and to suggest a committal to the Sessions(12). The District Magistrate is wholly wrong in directing a Magistrate subordinate to him that the latter should pass such and such order in a case pending judicially before him(13). It is improper for the superior Magistrate to write a judgment which is practically a mandate to the subordinate Magistrate(14). The Sessions Judge or District Magistrate cannot in the exercise of the power to

(1) *Karuppa Chekkil v. Palani samy*, 10 L. W. 630; *Dain v. Crown*, 3 Lah. L. J. 97.

(2) *Mami v. Emperor*, 27 P. L. R. 897=24 L. C. 133=2 L. C. 234=27 Cr. L. J. 565; *Zahur v. Niadar*, 1927 Lah. 775=9 L. L. J. 114=28 Cr. L. J. 238=99 L. C. 1039.

(3) *In re Arumaga*, 43 M. L. J. 564=1923 M. 69=23 Cr. L. J. 592=1922 M. W. N. 801=16 L. W. 491=31 M. L. T. 254=68 L. C. 621.

(4) *In re Krishna Pillai*, (1923) M. W. N. 56.

(5) *Empress v. Vithu*, 1 Bom. L. R. 852.

(6) *Brijbhukhan v. Janrao*, 23 Cr.

L. J. 745=69 I. C. 638.

(7) *Empress v. Balkrishna*, Rat. Un Cr. Cas. 323.

(8) *Bachoo Mia v. Anwar*, 30 C. W. N. 312=26 Cr. L. J. 305=84 L. C. 449.

(9) *Moni v. Iswar*, 6 C. L. J. 251.

(10) *Empress v. Gajan Khan*, 2 Bom. L. R. 586; *Khuda Baksh v. Emperor*, 1905 P. L. R. p. 65.

(11) 2 Q. P. L. R. 82.

(12) *Empress v. Muntams*, 15 M. 39=2 Weir. 542.

(13) *Thakar Singh v. Kirpal Singh*, 10 P. W. R. 1918 Cr.

(14) *Yado v. Emperor*, 12 N. L. R. 91 (99).

order further inquiry, under this section, himself frame the charge or order the subordinate Magistrate to frame the charge and try the accused. The District Magistrate may, under the other part of the section make the further inquiry himself and frame the charge in the course of such inquiry(1).

Powers of Magistrate making inquiry—Where a further inquiry is ordered under this section into a complaint which has been dismissed under s. 202, the Magistrate directed to make the further inquiry has power forthwith to issue process against the accused persons after holding the inquiry, and to commit them to the Sessions Court if the offence to be tried is triable by that court. In such a case the Magistrate has power to dispense with a preliminary inquiry under section 202(2). But in some cases it has been held that a Magistrate directed to conduct a further inquiry must not issue process until he has conducted a preliminary inquiry under section 202 and exercised his judgment that it was a fit case in which the accused should be summoned(3). Even if he is bound to conduct such a preliminary inquiry, summoning the accused before making such an inquiry is a mere irregularity which will not vitiate the commitment unless the accused has been prejudiced thereby(4). Ordinarily, when further inquiry is ordered into a complaint dismissed under s. 203, the Magistrate cannot again act under s. 203, but must proceed under s. 204 and inquire into and try the case(5). But it has also been held that a Magistrate holding a further inquiry into a complaint which has been once dismissed under s. 203 can again dismiss the complaint under s. 203(6). If the inquiry is directed to be held by a Magistrate other than the officer who held the first inquiry, he should take the evidence *de novo* and cannot proceed on the evidence already taken(7). But the Officer who held the first inquiry may take the evidence which he has omitted to take(8). A Magistrate who conducts the inquiry which has been directed and comes to the conclusion that a *prima facie* case of an offence triable by him has been made out has jurisdiction to try it and convict or acquit the accused(9). The Magistrate who is directed to make further inquiry cannot question the propriety of the order(10). A prosecution lawfully revived, must be dealt with in accordance with

(1) *Narayanasmmy Naidu v. Emperor*, 82 M. 220.

(2) *Hema Singh v. Emperor*, 9 Pat. 165=126 I. O. 146=A. I. R. 1929 Pat. 644=81 Cr. L. J. 961=Ind. Lul (1930) Pat. 678. Court of revision has got no power to direct a Magistrate to summon the accused person; when in the opinion of the Magistrate there is no sufficient evidence against the accused; *Inayat Husain v. Emperor*, 10 A. I. Cr. R. 99=2 Cr. Law 31=A. I. R. 1928 A. C. 81=9 L. R. A. Cr. 88.

(3) *Radha Prasad v. Emperor*, 104 I. O. 633=9 Pat. L. T. 12=28 Cr. L. J. 857=A. I. R. 1928 Pat. 12=9 A. I. Cr. R. 61; *Sita Ram v. Kausilla*, 109 I. O. 560=10 A. I. Cr. R. 226=29 Cr. L. J. 572.

(4) *Hema Singh v. Emperor*, 9 Pat. 165, 164; *Janakdhari v. Emperor*, 6 Pat. 637=10 Pat. L. T. 725=120 I. C. 602=1929 Pat. 469.

(5) *Brij Kishore v. Gopal Rai*, 11 C. W. N. 816; *Thakarsingh v. Kirpal Singh*, 10 P. W. R. 1918 Cr.

(6) *Niharau v. Sitalo* 25 C. W. N. 312.

(7) *Ram Dial v. Emperor* 9 A. L. J. 810; *Empress v. Sahun*, 6 A. 367; *Tun Win v. Emperor*, 4 L. B. R. 233.

(8) *Dhanias v. Clifford*, 13 B. 376 (884).

(9) *Ram Barai v. Ram Partop*, 5 Pat. L. J. 47.

(10) *Emperor v. Doralji*, 10 D. 131.

law in the same manner in which a prosecution originally instituted is dealt with(1).

Notice to accused.—Although there was nothing in s. 437 of the Code rendering it incumbent to give notice before directing a further inquiry, a court, it was held, would not be exercising a proper discretion if, before ordering a further inquiry, it did not give notice to the accused to show cause against that order(2). Under the old section it was held that when a complaint was dismissed under section 203, it was not necessary to issue notice to the accused person(3). Section 437 of the old Code, however, has been amended under the new Code and a proviso to the following effect has been added: 'provided that no court shall make any direction in this section for inquiry into the case of any person who has been discharged unless such person had an opportunity of showing cause why such direction should not be made'. It is clear, however, that this proviso cannot apply to a dismissal of a complaint under section 203; it only applies to the case where an accused person has been discharged(4). Where a complaint has been dismissed under s. 203 or s. 204, in contradiction to an accused person being discharged, no notice to the person against whom the complaint was made is necessary before further inquiry into the case can be ordered(5). But where a complaint is dismissed under s. 203 after giving the accused an opportunity of being heard, an order directing further inquiry into the case under this section should not be made without giving notice to the accused(6). Where a man has been discharged after full inquiry by a competent court a revisional court will exercise a proper discretion in allowing him an opportunity of showing cause before ordering a further inquiry or before directing re-opening of the case. It is a principle of British criminal law that an order to a man's prejudice should not be made without due notice to him(7). The proviso makes it obligatory on

(1) *Empress v. Papadu*, 7 M. 451; *Emperor v. Hem Kirang*, 4 L. B. R. 42 (43).

(2) *Hari Das v. Sritulla*, 15 C. 609; *Jaijai v. Suphal*, 2 C. W. N. 196; *Dulla v. Emperor*, 2 P. R. 1901 Cr; *Nabi v. Crown*, 1 Lab. 216; *Kallu v. Crown*, 4 Lab. L. J. 411; *In re Itango*, 6 B. L. R. 877; *Fazal v. Empress*, 17 P. R. 1895 Cr; *In re Paramani*, 6 Bom. L. R. 479; *Emperor v. Muland*, 8 Bom. L. R. 691; *Emperor v. Abhran*, 19 Bom. L. R. 508; *Benkatesulu In re*, 2 West 245; *Jay Gopal v. Emperor*, 11 C. W. N. 173; *Brij v. Gopal*, 11 C. W. N. 316; *Emperor v. Abdul*, 40 A. 416; *Umrav v. Emperor*, 21 A. L. J. 194; *Ganapatji v. Emperor*, 19 A. L. J. 71; *Jivan v. Emperor*, 19 A. L. J. 985; *Empress v. Hasnu*, 6 A. 367; *Empress v. Ajudhia*, 20 A. 239; *Emperor v. Chotu*, 9 A. 52; 1898 A. W. N. 60; *Bandeshri v. Emperor*, 18 A. L. J. 1135; *Pilhnath v. Emperor*, 24 O. C. 142.

(3) *Haridas v. Sritulla*, 15 C. 609; *Grish v. Emperor*, 29 C. 457; *Wahed*

v. Emperor, 32 C. 1000; *Angan v. Ram Pirbhan*; 85 A. 78; *Emperor v. Liaqat Hussain*, 40 A. 138; *Emperor v. Ajudhia*, 20 A. 239; *Taharak v. Emperor*, 80 A. 52; *Emperor v. Goja Khan*, 2 Bom. L. R. 586.

(4) *Emperor Gajraj Singh* 47 A. 722(723)=68 I. C. 600=23 A. L. J. 451=L. R. 6 A. 119 Cr.=A. I. R. (1925) A. 537=26 Cr. L. J. 1176.

(5) See the case cited in the last note and *Appa Rao v. Janaki Ammal*, 49 M. 918=31 M. L. J. 605=21 L. W. 613=1927 M. 19; *Emperor v. Dhondu Bapu*, 29. Bom. L. R. 713=102 I. C. 511=1927 B. 436; *Mamrup v. Sahdeo*, 119 I. C. 559=1929 Pat. 230=10 Pat. L. J. 231; *Nau-sher Ali v. Hazratulla*, 49 O. L. J. 422=1929 C. 503=119 I. C. 876.

(6) *Jogesh Chandra v. Nilunja*, 76 I. C. 236=25 Cr. L. J. 140=A. I. R. 1923 C. 651=37 C. W. N. 552

(7) *Vaidyanath v. Emperor*, 8 Bur. L. T. 133; *Emperor v. Chakar Ghulam*, A. I. R. 1933 S. 299.

a court not to pass an order under the section until the person discharged has had an opportunity of showing cause(1). An order directing further inquiry without notice to the accused is illegal(2). It was not so under the old law(3). Such notice and an opportunity to show cause why the order should not be made, can be given without impropriety after such person has been arrested and brought before the court(4). But a notice of this kind is for the benefit of the accused who is under no obligation to avail himself of the opportunity and if he does not, the District Magistrate is competent to pass an order for further inquiry in the absence of the accused person(5).

Recording reasons—It is the duty of a revisional authority to record its reasons for setting aside an order of discharge and to show that the order of discharge is improper(6) and such revisional jurisdiction cannot be said to have been properly exercised without assigning solid and sufficient reasons for doing so(7) inasmuch as the High Court, cannot in the absence of such reasons, exercise supervision over the proceedings of Magistrates and Judges and also because it is fair to the person whose liberty is going to be affected by such order, that he should have notice of the grounds on what the further inquiry is going to be made(8). An order of a Sessions Judge setting aside an order of discharge without solid and sufficient reasons is bad in law(9). If an order for further inquiry does not specify reasons it is liable to be set aside(10). It is not ordinarily desirable that a District Magistrate, in ordering a further inquiry, under this section, should make a detailed examination of the evidence and give elaborate reasons, because that might prejudice the trial afterwards; but it is desirable that he should give enough in the shape of reasons to show that his order is proper(11). In a Burma case the words used were: 'I have translated and considered the whole of the evidence on the record, and the conclusion to which I have come is that there must be further inquiry'. It was held that these words showed ample reasons for the order, and that it would have been improper for the Sessions Judge to comment on the evidence in detail(12).

Interference by the High Court.—A person aggrieved by an order passed by a District Magistrate in revision, may apply to the High

(1) *Chhajju v. Behari*, A. I. R. 1933 Lah. 1018(2)=35 P. L. R. 149.

(2) *Sagar v. Emperor*, 1923 A. 122=23 Cr. L. J. 70; *Emperor v. Bhagwan Das*, 56 A. 285; *Emperor v. Nga Kyaung*, A. I. R. 1934 Rang. 181.

(3) *Empress v. Hasnu*, 6 A. 367; U. B. R. (1897-1901) 100.

(4) *Girdhari v. Emperor*, 12 C. W. N. 822; *Sahib Kour v. Kasim*, 14 P. R. 1891 Cr.; *Wahed Ali v. Emperor*, 32 C. 1090; *Fazal v. Empress*, 17 P. R. 1895 Cr.

(5) *Kanwar Singh v. Emperor*, 15 P. R. 1893 Cr.

(6) *Danaji v. Emperor*, 95 I. C. 56=27 Cr. L. J. 728=1926 Nag. 374; *Abinash Chandra v. Emperor*, 13 C. W. N. 76=9 Cr. L. J. 803=1 I. C. 415.

(7) *Danaji v. Emperor*, 95 I. C. 56; *Haridas v. Saritulla*, 15 C. 608 at p. 621.

(8) *Danaji v. Emperor*, 95 I. C. 56=27 Cr. L. J. 728=1926 Nag. 374; *Wahed Ali v. Emperor*, 32 C. 1090=3 C. L. J. 43=3 Cr. L. J. 120; U. B. R. (1917) 2nd Qr. 16.

(9) *Haridas Sanyal v. Saritulla*, 15 C. 608; *Abinash Chandra v. Emperor*, 13 C. W. N. 76=9 Cr. L. J. 803=1 I. C. 415.

(10) *Nagendra Nath v. Korb*, 8 C. W. N. 456=1 Cr. L. J. 355; 3 S. L. R. 7.

(11) *Wahed Ali v. Emperor*, 32 C. 1090 (1922).

(12) *Tun Win v. Emperor*, 4 L. B. R. 233.

Court in revision without first making an application to the Sessions Judge(1). Where either the Session Judge or the District Magistrate has had an application in revision in the same matter before them, moved by either party, the other local district court would have no jurisdiction to hear a further application in the same matter(2). An order of a Sessions Judge or a District Magistrate setting aside an order of discharge is liable to be reviewed by the High Court as a court of revision. If, in any case, the High Court were to find that the lower court had set aside an order of discharge on insufficient grounds, or that while there were good grounds for setting it aside, the lower court has made an order inappropriate to the facts of the case, the High Court would be acting properly in revising the order(3). Where the order of the Sessions Judge for further inquiry does not state any proper grounds it is liable to be set aside by the High Court(4). But the High Court will not interfere in revision where the Sessions Judge orders further inquiry after going carefully through the evidence and coming to the conclusion that the finding of trying Magistrate is either perverse or in all probability wrong or manifestly at variance with the evidence which he has recorded(5).

437. When, on examining the record of any case ^{Power to order commitment.} under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged.

Provided as follows:—

- (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made ;
- (b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior court to inquire into such offence.

The old sections 436 and 437 have been transposed and re numbered as s. 437 and 436, respectively. Section 437 differs in important

(1) *Nagendra Nath v. Mr. Korb*, 80 W. N. 456.

(5) *Karhley v. Jagannath*, 11 C. L. J. 611=1 O. W. N. 802=24 Cr. L. J. 959=87 I. C. 111=10 O. & A. L. R. 576=A. I. R. 1925 Oudh 180.

(2) *Ibid.*

(3) *Haridas v. Saritulla*, 15 C. 609

particulars from s. 436. S. 437 is mainly intended to meet the case where a Magistrate wrongly considers that he has jurisdiction to try certain case and proceeds to try that case, and where the Sessions Judge or the District Magistrate considers that the facts alleged show a case triable exclusively by the Court of Session and that the inferior court has improperly discharged an accused person(1).

On examining the record.—An order under this section must be passed on the examination of the record of any case as it stands when a Session Judge takes it up for consideration(2). This section refers to an examination by the Sessions Judge or the District Magistrate. The High Court in revision can also direct commitment of an accused to the Court of Session(3).

"Or otherwise."—These words mean not "in other way whatsoever" but in any other way provided by the Code(4). The reason for exercising the powers under this section must arise upon materials to be found on the record, and not upon extraneous matter(5).

Sessions Judge or District Magistrate.—In a case triable only by the Sessions Court, to which this section applies, if the Sessions Judge or District Magistrate is satisfied that, on the evidence there is clear case for a committal, and that there is no reason for desiring a further consideration by the Magistrate it would be, ordinarily his duty to direct a committal under this section and not to order further inquiry under the last section. In a case not triable only by the Court of Sessions, it would ordinarily, be his duty under the above circumstances to refer the case to the High Court, which can make a suitable order, and not to direct further inquiry by a Magistrate(6). Under this section, the Sessions Judge and the District Magistrate have co-ordinate powers, in a case exclusively triable by a Court of Session, either to order commitment upon the evidence already taken or to direct a fresh inquiry, if the Magistrate has improperly discharged the accused(7). An order of a District Magistrate refusing to call for the records and commit to the Sessions an accused person while the charge against him is still under inquiry before an inferior Magistrate is not an order refusing to revise an order of discharge and a Sessions Judge may order committal of the accused to the Sessions Court after his discharge by the inferior Magistrate(8). A Sessions Judge may, under this section, after a Magistrate has discharged an accused person, order the Magistrate to commit the accused person to the Session(9). Whether he will do so or not is within the discretion with the exercise of which the High Court will not interfere(10). When an application is presented to a Court of

(1) *Alopi Din v. Emperor*, A. I. R. 1935 A. 266

(2) *In re Bhogi Reddi*, 142 I. C. 188 = A. I. R. 1933 M. 247 = (1932) M. W. N. 1162 = 5 Mad. Cr. C. 373 = Ind. Bul. 1933 Mad. 199 = 34 Cr. L. J. 278 = (1933) Cr. Cas. 874 = 65 M. L. J. G.

(3) *Nishi Kanta v. Crown*, 20 C. W. N. 732; *Empress v. Ram Lal*, 6 A. 40 = (1893) A. W. N. 186.

(4) *Nobin v. Russick*, 10 C. 268 (272)

(5) *Empress v. Lokhia*, 1890 A. W. N.

147; *Hari Das v. Saritulla*, 15 C. 608.

(6) *Hari Das v. Saritulla*, 15 C. 608 F. B.

(7) *Empress v. Surendra Nath*, 28 C. 897 = 5 C. W. N. 674; *Empress v. Kulu Sandu*, Rat. Un. Cr. C. 837.

(8) *Gandi Appa Razu v. Emperor*, 43 M. 320.

(9) *In re Musmud Ali*, 7 W. R. Cr. 83.

(10) *Queen v. Sectaram*, 2 W. R. Cr. 41.

Sessions, it has no power to refer the application to a District Magistrate whose Court is one, not of inferior, but of concurrent jurisdiction with the Court of Session for the purposes of this Chapter(1). The District Magistrate may act of his own motion, quite independent of an order from the Court of Session(2). The word 'District Magistrate' in this section includes a District Magistrate specially empowered under s. 30 of the Code(3). A Sessions Judge is competent to order a further inquiry into the case of an accused person who has been discharged by a District Magistrate empowered under that section(4). And a District Magistrate has power to revise an order of discharge made by a Magistrate having powers under section 30 in a case triable only by a Court of Session(5).

Powers of Joint or Additional Sessions Judge.—The Joint Sessions Judge cannot exercise the powers of the Sessions Judge under this Chapter. His order directing a committal to Sessions in a case discharged by a Magistrate was set aside by the High Court, leaving it to the Sessions Judge, if a proper case be made out to order a committal as to give such other direction disposing of the application as he shall think just an expedient(6).

Presidency Magistrates.—This section does not apply to Presidency Magistrates(7).

Exclusively triable by a Court of Sessions.—These words means an offence shown so triable in the eighth column of the second Schedule to the Code(8). As an offence under section 307, I. P. C., is triable exclusively by a Court of Session, the Sessions Judge has jurisdiction under this section to direct that the accused who have been discharged of that offence should be committed for trial(9). A Sessions Judge has got no power to order commitment to Sessions in cases which are not exclusively triable by Court of Sessions(10). A Sessions Judge, acting under ss. 435 and 436 cannot direct committal to the Sessions Court of an accused who has been discharged by a Sub-Magistrate in a preliminary inquiry into offences under section 193 and 471 of the Indian Penal Code for forgery of a promissory note not being a Government of India Promissory note, as such offences are not exclusively triable by a Court of Sessions(11). A Sessions Judge cannot order a Magistrate to commit an accused to Court of Sessions in cases falling under ss. 457 and 380 or s. 411 of the Indian Penal Code. In

(1) *Empress v. Tajibhai*, Bat. Un. Cr. Cas. 525.

(2) *Queen v. Tilkoo*, 8 W. R. Cr. 61.

(3) *Arjan Singh v. Emperor*, 60 P. L. R. 1901.

(4) *Jalloo v. Emperor*, 15 P. R. 1901 Cr.

(5) *Yado v. Emperor*, 12 N. L. R. 91.

(6) *In re Musa*, 9 B. 164.

(7) *In re Opoorba Kumar*, 1 C. W. N. 49.

(8) *Arjan Singh v. Emperor*, 60 P. L. R. 1901; See also *Empress v. Kanchan Singh*, 1 A. 413; *Empress*

v. Tara Chand, 7 C. L. R. 168.

(9) *Emperor v. Sukhlal*, 56 A. 539 —A. I. R. (1931) All. 141—1934 Cr. C. 193—145 I. C. 999—35 Cr. L. J. 865—(1934) A. I. J. 478.

(10) *Subba Nair v. Emperor*, 9 Cr. Law. Mad. 22; *Reg. v. Ram Chand*, Bat. Un. Cr. C. 42; *Empress v. Muhammad Baksh*, (1842) A. W. N. 105; *Empress v. Kanchan Singh*, 1 A. 413; *Nalluri v. Emperor*, 42 M. 561; *Khairuddin v. Abdul Baki*, 3 D. L. R. 65.

(11) *Chenchiah v. Emperor*, 42 M. 561.

such cases he can only order further inquiry(1). Where a Subordinate Magistrate discharged an accused under section 209, Cr. P. C., the Sessions Judge ordered the committal of the accused to the Sessions after setting aside the discharge. It was held that section 437 under which alone a revisional court can order committal relates only to cases triable exclusively by the Sessions Court and that in other cases the proper procedure would be to order further inquiry under section 436(2).

Committal for offence not exclusively triable but intimately connected.—Where an accused is discharged of an offence exclusively triable by a Court of Sessions, a Sessions Judge can commit him on a charge not exclusively triable by a Sessions Court if it is intimately connected with a charge exclusively triable by the Sessions Court and forms part of the same transaction, but, he has no power to commit for such an offence where it is of a totally different category of offences(3). Where an accused is discharged of an offence, under s. 436, Penal Code, he may be committed by the Sessions Judge for trial for an offence under s. 427, but not for one under s. 380(4). Where a Magistrate of the first class, after holding an inquiry into offences under sections 408 and 477-A of the Indian Penal Code, discharged the accused and the District Magistrate, acting under this section, committed the accused to the Court of Sessions on the same charges and the accused applied to the High Court contending that the order of the District Magistrate was without jurisdiction, as primarily the case against him was under s. 408 which was not triable exclusively by the Court of Sessions, it was held that the District Magistrate was competent to commit the accused as in this case the charge of falsification of accounts was one of the substantial things against the accused; also that the District Magistrate could add a charge under section 408 if it was so intimately connected with the charge under section 477-A as to form part of the same transaction(5).

Discharge on conviction or acquittal for minor offence—The language of this section requires that the case should be triable exclusively by the Court of Session, but it does not go on to state that an accused person has been improperly discharged on such a charge. On the contrary the section merely says that it requires that an accused person has been improperly discharged by the inferior court. These words are general and cover a discharge on any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Session(6). Where in a case the Magistrate being of opinion that there is no evidence to warrant a charge for an offence exclusively triable by a Court of Session, tries the accused of a minor offence and acquits him, a Sessions Judge has jurisdiction to make an

(1) *Subba Naikar v. Emperor*, 3 Cr. Law Mad 21=192 I. C. 788=(1929) M. W. N. 709=A. I. R. 1930 M. 103; *Reg. v. Ramchand*, Rat. Un. Cr. Cas. 42.

(2) *Re Subba Naikar*, 2 Mad. Cr. Cas. 221.

(3) *Bijoy Gopal v. Iswar Chandra*,

53 C. 615=27 I. C. 659=27 Cr. L. J. 1189=1926 C. 1090.

(4) *Ibid.*

(5) *Gendhal Chimanbhai v. Emperor*, 151 r L. J. 292=16 Bom. L. R. 80=23 Ind. Cas. 500.

(6) *Aloji Din v. Emperor*, A. I. R. 1935 A. 366.

order under this section directing a further inquiry, to be made and a commitment to the Sessions (1), though there is authority to the contrary also (2). Where an accused appears to have committed culpable homicide, his conviction by a Magistrate for a minor offence does not prevent his trial for murder, etc. The Sessions Judge, if he thinks there is a *prima facie* case, may call on the accused to show cause why a commitment should not be ordered and may, thereafter, order his commitment under this section, if satisfied that there is a sufficient cause for it (3).

When Magistrate cannot pass adequate sentence—A case does not come within the purview of this section merely because the District Magistrate is of opinion that an offence cannot be adequately punished by a Magistrate (4). The contrary was, however, held in a Burma case (5). If in cases not falling under this section, the District Magistrate thinks that the Subordinate Magistrate has improperly discharged an accused, the former should under section 438 report the case for the orders of the High Court (6).

"Improperly discharged."—While in cases exclusively triable by the Court of Session this section empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by the Court of Session, there is nothing in the Code which suggests that the Sessions Judge or the District Magistrate should go further than find that the order of discharge was improper (7). The dictum of the Punjab Chief Court that further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish (8) does not apply to a case in which the Magistrate was acting only as a court of inquiry and not a trial court (9). Under this section, all that the Sessions Judge has to do is to come to the conclusion that the order of discharge was improper. He may reach that conclusion, not only on the ground that the order was perverse or manifestly unreasonable and inconsistent with an appreciation of the evidence in the case, but also on the ground that the Magistrate has, however competently, taken upon himself the discharge, but further he may also in a proper case do so on the ground that he disagrees with the appreciation of evidence by the Magistrate (10). Before a Sessions Judge or a District Magistrate, however, orders the commitment to

(1) *Krishna Reddi v. Subbamma*, 21 M. 126=2 Weir. 544.

(2) *Brija Nath v. Gauri Kanta*, 20 C. 633.

(3) *Empress v. Ladkia*, Bat. Un. Cr. C. 337.

(4) *Emperor v. Debi Prasad*, 8 Cr. L. J. 47=(1908) A. W. N. 189.

(5) *Tambi v. Emperor*, 9 L. B. E. 209.

(6) *Empress v. Amir Khan*, 8 M. 336=2 Weir. 657.

(7) *Aulad Hussain v. Emperor*, 128 I. C. 285=7 O. W. N. 749=A. I. R. 1930 O. 415=32 Cr. L. J. 128=(1930) Cr. Cas. 955; *Venkataraman v. Bayya*, 3 Mad. Cr. Cas. 306.

(8) *Emperor v. Kiru*, 10 P. R. 1911 Cr.=11 I. C. 132=12 Cr. L. J. 964=21 P. W. R. 1911 Cr.=203 P. L. R. 1911, followed in *Emperor v. Jagadamba*, 11 O. L. J. 834=1 O. W. N. 215=10 O. & A. L. R. 511=25 Cr. L. J. 1026=61 I. C. 802=(1924) A. I. R. (O) 368.

(9) *Aulad Hussain v. Emperor*, 128 I. C. 285=7 O. W. N. 749=A. I. R. 1930 Oudh 415=32 Cr. L. J. 128=(1930) Cr. Cas. 955.

(10) *Ramchandra v. Emperor*, 59 B. 125=A. I. R. 1935 B. 137 F. D.; Overruling *Parasharam v. Emperor*, 57 B. 480=148 I. C. 289=1933 B. 158 and differing from *In re Narainah Venkatesh*, 19 Bom. L. R. 350.

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(1) *Subba Naikar v. Emperor*, 8 Cr. Law, Mad 21=142 I. C. 783=(1929) M. W. N. 703=A. I. R. 1930 M 103; *Reg. v. Ramchand*, Rat. Un. Cr. Cas. 42.

(2) *Re Subba Naikar*, 2 Mad. Cr. Cas. 291.

(3) *Bijoy Gopal v. Iswar Chandra*,

53 C. 615=97 I. C. 659=27 Cr. L. J. 1189=1926 C. 1090.

(4) *Ibid*

(5) *Gendhal Chimanbhai v. Emperor*, 15 Cr. L. J. 291=16 Bom. L. R. 80=23 Ind. Cas. 500

(6) *Alopi Din v. Emperor*, A. I. R. 1935 A. 866.

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When Magistrate cannot pass adequate sentence—A case does not come within the purview of this section merely because the District Magistrate is of opinion that an offence cannot be adequately punished by a Magistrate (4). The contrary was, however, held in a Burma case (5). If in cases not falling under this section, the District Magistrate thinks that the Subordinate Magistrate has improperly discharged an accused, the former should under section 438 report the case for the orders of the High Court (6).

"Improperly discharged."—While in cases exclusively triable by the Court of Session this section empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by the Court of Session, there is nothing in the Code which suggests that the Sessions Judge or the District Magistrate should go further than find that the order of discharge was improper (7). The dictum of the Punjab Chief Court that further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish (8) does not apply to a case in which the Magistrate was acting only as a court of inquiry and not a trial court (9). Under this section, all that the Sessions Judge has to do is to come to the conclusion that the order of discharge was improper. He may reach that conclusion, not only on the ground that the order was perverse or manifestly unreasonable and inconsistent with an appreciation of the evidence in the case, but also on the ground that the Magistrate has, however competently, taken upon himself the discharge, but further he may also in a proper case do so on the ground that he disagrees with the appreciation of evidence by the Magistrate (10). Before a Sessions Judge or a District Magistrate, however, orders the commitment to

(1) *Krishna Reddi v. Subbamma*, 21 M. 126=2 Weir. 554

(2) *Brya Nath v. Gauri Kanta*, 20 C. 633.

(3) *Empress v. Ladhia*, Rat. Un. Cr. C. 327.

(4) *Emperor v. Debi Prasad*, 8 Cr. L. J. 47=(1908) A. W. N. 189.

(5) *Tambi v. Emperor*, 9 L. B. R. 208.

(6) *Empress v. Amir Khan*, 8 M. 336=2 Weir. 557.

(7) *Aulad Hussain v. Emperor*, 128 I. C. 285=7 O. W. N. 712=A. I. R. 1930 O. 415=32 Cr. L. J. 128=(1930) Cr. Cas. 855. *Venkatavanu v. Bayya*, 3 Mad. Cr. Cas. 306.

(8) *Emperor v. Kiru*, 10 P. R. 1911 Cr.=11 I. O. 132=12 Cr. L. J. 964=21 P. W. B. 1911 Cr.=205 P. L. R. 1911, followed in *Emperor v. Jagadamba*, 11 O. L. J. 334=1 O. W. N. 245=10 O. A. L. R. 511=25 Cr. L. J. 1026=81 I. C. 803=(1924) A. I. R. (O) 863.

(9) *Aulad Hussain v. Emperor*, 128 I. C. 285=7 O. W. N. 712=A. I. R. 1930 Oudh. 415=32 Cr. L. J. 128=(1930) Cr. Cas. 855.

(10) *Ramchandra v. Emperor*, 59 B. 125=A. I. R. 1935 B. 187 F. B.; Overruling *Parasharam v. Emperor*, 57 B. 430=143 I. C. 289=1933 B. 158 and differing from *In re Narainah Venkatesh*, 19 Bom. L. R. 350.

the Court of Sessions of an accused who has been discharged by an inferior court he should come to a finding, with reference to the evidence, that the accused has been improperly discharged. It is not enough that, in his opinion, the charge is of such a character that it should be considered by a Court of Session(1). The mere fact that a Magistrate has discharged the accused in a case triable exclusively by the Court of Session, without committing them to the Sessions is not a ground of interference under this section(2). It is the duty of a Sessions Judge in considering whether an accused person has been improperly discharged, within the terms of this section to consider all the grounds upon which such order of discharge has been passed, including a consideration of the evidence which has not been believed or, held to be sufficient to establish a *prima facie* case. Then only he can pass an order for the commitment of the accused person for a further inquiry(3). In considering whether an accused person who has been discharged by a Magistrate under s. 253, should be directed to be committed to the Court of Session, the Sessions Judge must consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him. That a different view can be taken on the evidence would not justify the Sessions Judge to direct a committal he must come to the conclusion that the finding of the Magistrate is not wrong but perverse(4).

Implied discharge.—Where the action of the Magistrate amounts in law to an order of discharge, it is open to the Sessions Judge to set it aside and direct the committal of the accused to the Sessions on being satisfied that he has been improperly discharged, even though no express order of discharge is recorded by the Magistrate(5). It has been held by the Lahore High Court in a recent case that the word "discharged" "tely discharged and set discharged or in other ly triable by the Court

of Session(6). This view is in accord with that taken by the Madras High Court in *Krishna Reddi v. Subbamma*(7) and receives an additional support by the pronouncement of their Lordships of the Privy Council in *Pratt v. British India Steam Navigation Co.*(8) The

view of the Privy Council in *Pratt v. British India Steam Navigation Co.* was distinctly overruled. The Oudh case which was decided by a single Judge makes no reference at all to the previous law

(1) *Srikishen Lal v. Emperor*, 1 Pat. L. J. 97.

(2) 2 Weir 260.

(3) *Harbans Singh v. Fakir Das*, 7 O. W. N. 77.

(4) *Ritbhanjan v. Emperor*, 26 Cr. L.J. 886—86 I. C. 822—6 Pat. L. T. 570—A. I. R. 1925 Pat. 599.

(5) *In re Gandi Appa Razu*, 43 M. 330—10 L. W. 521; following *Krishna*

(11) 23 O. L. J. 417—93 I. C. 145—3

O. W. N. 201—A. I. R. (1926) Oudh. 194,

(12) 23 M. 225.

order under this section directing a further inquiry, to be made and a committal to the Sessions(1), though there is authority to the contrary also(2). Where an accused appears to have committed culpable homicide, his conviction by a Magistrate for a minor offence does not prevent his trial for murder, etc. The Sessions Judge, if he thinks there is a *prima facie* case, may call on the accused to show cause why a commitment should not be ordered and may, thereafter, order his commitment under this section, if satisfied that there is a sufficient cause for it(3).

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(1) *Krishna Reddi v. Subbamma*, 21 M. 136=2 Weir. 544

(2) *Brya Nath v. Gauri Kanta*, 20 C. 633.

(3) *Empress v. Ladkia*, Rat. Un Cr C. 337

(4) *Emperor v. Debi Prasad*, 8 Cr. L J 47—(1905) A. W. N. 189

(5) *Tambi v. Emperor*, 9 L. B. E. 20^a

(6) *Empress v. Amir Khan*, 8 M. 336=2 Weir 557.

(7) *Aulad Hussain v. Emperor*, 128 I. C. 285=7 O. W. N. 749=A. I. R. 1930 O 415=32 Cr. L J. 128=(1930) Cr. Cas. 955; *Venkataswami v. Bayya*, 8 Mad. Cr. Cas 306.

(8) *Emperor v. Kiru*, 10 P. R. 1911 Cr.=11 I. C. 132=12 Cr. L J. 964=24 P. W. R. 1911 Cr.=203 P. L. R. 1911; followed in *Emperor v. Jagadamba*, 11 O. L. J. 334=1 O. W. N. 245=10 O. & A. L. R. 511=25 Cr. L J. 1026=81 I. C. 801=(1924) A. I. R. (O) 969

(9) *Aulad Hussain v. Emperor*, 128 I. C. 285=7 O. W. N. 749=A. I. R. 1930 Oudh 415=32 Cr. L J. 128=(1930) Cr. Cas 955

(10) *Ramchandra v. Emperor*, 59 B. 125=A. I. R. 1935 B. 137 F. B.;

no power under this section to direct the commitment for trial of persons with whose cases the Magistrate had in no way dealt(1). And while directing a Magistrate under this section to make a commitment, a Sessions Judge has no power to direct the Magistrate to take the accused's defence or ask the accused to make defence(2). An order of commitment by a Sessions Judge under this section is bad in form, if it does not specify the offence for which the parties are to be committed for trial to the Sessions(3). As to whether a Sessions Judge can direct a commitment for an offence other than that with which the accused was substantially charged in the complaint or which was specified in the warrant, or which was framed as a formal charge by the Magistrate as the preliminary hearing, see the under-noted(4) cases and the notes above under the head "implied discharge".

Order of commitment made by Sessions, if made without jurisdiction when an application against an order discharging the same accused under s. 209, Cr. P. C. previously rejected.—In an inquiry preliminary to commitment in a case under ss. 307 and 326, I. P. C. the petitioners who were some of the accused were discharged under section 209, Cr. P. C. An application against that order was rejected by the Sessions Judge but in the course of the trial of the persons who were committed to the Sessions, the Sessions Judge made an order under section 437, Cr. P. C., directing the petitioners to be committed to the Sessions. It was held the Sessions Judge had jurisdiction to make the order of commitment(5).

Fresh inquiry.—In a case triable exclusively by the Sessions Court a District Magistrate under this section is not restricted to order the commitment of the accused who may have been discharged as this section contemplates a fresh inquiry being held(6). Where, after the order of discharge of an accused person fresh evidence comes to light the District Magistrate should not direct a subordinate Magistrate to commit the accused, for it will amount to committal for trial on the evidence of witnesses whom the accused has not had an opportunity of cross-examining. The proper course for the District Magistrate is to direct a fresh inquiry(7). But where a District Magistrate refers a case to a Subordinate Magistrate for further inquiry the subordinate Magistrate having previously discharged the accused, the District Magistrate has no right to fetter him in his discretion as to whether he should commit the case or not(8).

When commitment and not fresh inquiry should be ordered.—Where there has been no failure to make a due inquiry, but the District

(1) *Norab Singh v. Kokil Singh*, 24 W. R. Cr. 70.

(2) *Queen v. Ghatee*, 4 N. W. P. II C. R. 10.

(3) *Jay Kurn v. Man Patuch*, 21 W. B. Cr. 41.

(4) *Queen v. Taruck Nath*, 19 W. R. Cr. 20; *Re Sundram Aiyar*, 2 Welr. 549; *Sessions Judge of Coimbatore v. Muralin Goundan*, 41 M. 282.

(5) *Delidas v. Emperor*, 33 C. W. N.

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(6) *Emperor v. Maniruddin*, 18 C. 76.

(7) *Re Lu Gappa*, 2 Welr. 550

(8) *Impress v. Munisami*, 15 M. 30.

on the subject. The view taken by the Madras High Court in *Krishna Reddi v. Subbamma*(1) was accepted by the Allahabad High Court in *Sheo Narain v. Radha Mohan*(2) and in *Yad Ram v. Emperor*(3), and also by the Judicial Commissioner of Sind in *Khanun v. Emperor*(4). In *Sessions Judge of Coimbatore v. Murappa Goundan*(5) the Full Bench case was distinguished, but it was followed in *Gandi Appa Razu v. Emperor*(6). It would thus appear that the weight of authority is decidedly in favour of the view taken by the Lahore High Court.

'By an inferior court.'—See notes to section 435 under the head "Inferior criminal court". A District Magistrate is competent to revise an order of discharge made by a Magistrate having powers under section 30 in a case triable only by a Court of Session(7). Where an Assistant Collector passes no order under section 476 of the Code and refuses to commit a person for trial to the Court of Sessions he passes the order not as a criminal court but as a revenue court exercising the powers of a Magistrate and so the District Magistrate as a District Magistrate has no jurisdiction to revise his order under this section as the powers of the District Magistrate under section 435 and the following sections are confined to interference with criminal courts subordinate to himself(8).

Order him to be committed for trial.—In cases triable exclusively by a Court of Session, this section empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by such court. There is nothing in the section to show that when such order is made, the commitment thereupon must necessarily be made by the Magistrate who has discharged him, whilst the first proviso to it shows that it may be made by such court or by the District Magistrate according as the power under that section happens to be exercised by one or the other. The words "order him to be committed for trial" in this section mean "commit him for trial". It is competent therefore to the Court of Sessions in such a case to make the commitment itself(9). Assuming, however, that it is necessary for that court to send its order to the Magistrate who has discharged the accused, for the latter to frame a charge and direct the accused to be tried on it by such Court, the omission by the court to observe the formality is an irregularity on its part before the trial, and s. 537 applies(10). The words "order him to be committed" in this section do not mean more than "pass an order for his committal". It is, therefore, competent to a District Magistrate to make a committal himself or to direct a Subordinate Magistrate to make it(11). A Court of Sessions has

(1) 24 M. 186

(2) 42 A. 128.

(3) 94 I. C. 350=27 Cr. L. J. 615=L. R. 7 A. 115 Cr.; see also *Sukhala v. Emperor*, A. I. R. 1934 A. 141=1934 Cr. C. 193=148 I. C. 999=85 Cr. L. J. 606=56 All. 520=(1984) A. L. J. 478.

(4) 82 I. C. 700=25 Cr. L. J. 1268=(1925) A. I. R. (Sind) 190.

(5) 41 M. 982.

(6) 43 M. 330.

(7) *Yadu v. Emperor*, 12 N. L. R. 94

Cr. P. C.—98

(8) *Lachman Prasad v. Emperor*, 5 Luck. 435 (436).

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(10) *En press v. Krishna Bhat*, 10 B. 819 (324)(11) *Sessions Judge v. Malinja*, 7 Cr. L. J. 29=3 M. L. T. 25; *Empress v. Sirendra Nath*, 28 C. 397.

orders a commitment, the High Court should be most unwilling to interfere and should require strong grounds before setting aside such an order(1). Similarly an order refusing to commit an accused person to the Sessions will not be interfered with by the High Court in the absence of very strong reasons especially when the Sessions Judge has refused to take action against the order of discharge(2). A court of Revision will refuse to disturb an order, however illegal it may be, unless it is unjust, and, however legal it may be, the court will not hesitate to disturb it in revision if it is unjust, as it is a court and not an academy of law(3).

Questioning commitments under s. 215.—The order of a Sessions Judge or District Magistrate passed under this section directing commitment cannot be quashed under s. 215(4).

438. (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by, or under any general or special order of, the Sessions Judge.

Amendment.—The words "or under any general or special order of" have been inserted in sub section (2) by section 118 of Act No. XVIII of 1923. The reason for this change as given in the report of the Select Committee of 1916 is as follows: "In order to provide for the absence of a Sessions Judge we think it is necessary to empower him to make a general order authorising the Additional Sessions Judge to exercise all the powers. We have provided for it specifically by this amendment".

Scope.—When the record of any proceeding has been examined

(1) *Fattu v Fattu*, 26 A. 561 (569); *Aulad Hussain v. Emperor*, 128 I. O. 285-7 O. W. N 749=A. I. R. (1900) Oudh 416=82 Cr. L. J. 128=(1930) Cr. Cas. 956; *Hussainbhoy v Emperor*, A I R. 1934 S. 27=1934 Cr. C. 225=118 I. C. 1060=35 Cr. L. J. 894=21 A. I. Cr. R. 211.

(2) *Mathura Prasad v Narendra Singh*, 121 I. C. 891=31 Cr. L. J. 413=Ind. bul. (1920) N g 160-A. I. R. 1930

Nag 110.

(3) *Emperor v. Daulat Singh*, 113 I. C. 911=A. I. R. 1928 Nag 343=11 N L R. 245=80 Cr. L. J. 270.

(4) *In re Kalagava*, 27 M. 51=2 Weir 247; *Muthra Chetty v. Emperor*, 30 M 224; *Pincouri v. Emperor*, 1, Pat. L. T. 153; *Munshi Mander v. Karu*, 6 Pat L. T. 146=25 Cr. L. J. 1089=81 I. C. 913=6 Pat. L. T. 146=(1925) A. I. R. (Pat) 279.

Magistrate is of opinion, on the merits of the evidence recorded that the order of discharge is wrong, his proper course is to make an order of commitment under this section(1).

Proviso (a) : Notice to accused.—A District Magistrate or a Sessions Judge, acting under this section should give the accused an opportunity of showing cause before himself why a commitment should not be made(2). A commitment without giving opportunity to the accused to meet the charge is not good(3). An opportunity given to show cause, before the subordinate Magistrate, cannot be regarded as a compliance with the law, though the Subordinate Magistrate forwards a statement of the accused to the District Magistrate(4). Where, however, a District Magistrate being of opinion that an accused person is improperly discharged by a subordinate Magistrate, makes an order to commit him to a Court of Sessions without giving any notice to the accused, but the committing Magistrate, before so doing issues notice, the irregularity of the District Magistrate comes within the terms of and is cured by s. 537(5). An opportunity does not mean any opportunity but a special opportunity after being called upon to show cause(6). When notice is issued under this section, the accused is not legally bound to avail himself of the opportunity given to him to show cause, and he is at liberty either to appear and show cause or to stay away(7). Where, upon a revision petition, filed by the complainant under this section against an order of discharge, making only some of the accused respondents, the District Magistrate set aside the order of discharge and committed to the Sessions all the accused including even those who were not parties to the revision petition and had no notice of it, it was held that the order so far as it related to the accused who were not parties to the revision petition was irregular and should be set aside(8).

Interference by High Court.—The High Court has full jurisdiction under s. 439 to revise a commitment order under this section, on points of law as well as of facts(9). But though the High Court has this power, it will only exercise it, where it is manifest that the Sessions Judge's order is improper, e.g., where there is no evidence to prove the offence charged, or where it is clear that the court would not act on the evidence(10). Where a Court of Sessions or District Magistrate considers that an accused person has been improperly discharged and

(1) *Yado v. Emperor*, 12 N. L. R. 91, *Hari Das v. Saritulla* 15 C. 608, F. B.

(2) *Thammanna v. Emperor*, 15 M. L. J. 373 = 2 Cr. L. J. 774; *Empress v. Khamir*, 7 Cal. 662; *In re Bundhoo*, 22 W. R. Cr. 67;

662 = 10 C. L. R. 8

(6) *Empress v. Gobind*, Rat. Un. Cr. Cas. 588.

(7) *Kanwar Singh v. Empress*, 15 P. R. 1893 Cr.

(8) *Munikka Pedayachi v. Emperor*, 49 M. S. 71 = 42 M. L. J. 155 = 26 Cr. L. J. 1570

(9) *Rash Behari v. Emperor*, 12 C. W. N. 117 = 6 Cr. L. J. 406 = 6 C. L. J. 760; *Perthi Chand v. Sampatia*, 7 C. W. N. 227.

(10) *Muthiah Chetty v. Emperor*, 30 M. 224 = 16 M. L. J. 529 = 5 Cr. L. J. 100,

Sessions Judge's order illegal, should move the Public Prosecutor to bring it before the High Court(1). A Sessions Court is superior to all other local criminal courts including that of a District Magistrate. A Sessions Judge has therefore powers under this section to refer to the High Court the judgment of a District Magistrate made in the exercise of his appellate jurisdiction(2). If the Sessions Judge is of opinion that an order by the District Magistrate directing further inquiry is wrong a reference can be made(3). And where a Sessions Judge finds that a Magistrate empowered under s 30, for the fact tried a case which he is not competent to try, he should send the case to the High Court for an order that the accused be committed to the Court of Sessions for trial(4). A Sessions Judge can call for the record and report under this section even if the convict has not moved him(5).

If he thinks fit.—A District Magistrate or Sessions Judge is not bound to refer any and every case, in which he detects an error(6).

When reference may be made.—When a Sessions Judge considers that the judgment or order is contrary to law or the sentence is severe, he can refer the case to the High Court(7). A reference can only be made to the High Court if after accepting the findings of facts arrived at by the trial Magistrate some question of law arises which necessitates interference with the order passed by the trial court(8). Where the District Magistrate deals with the matter in the exercise of his revisional powers he cannot, under the law, quash the proceedings, but if he thinks the contention of the defence to be made out, the only course open to him is to make a reference to the High Court for final order(9). A District Magistrate has no jurisdiction to make an order giving direction to a Magistrate as to the order and manner of trial of cross-cases. If he is of opinion that such an order is necessary in the interests of justice his proper course is to make a reference to the High Court under the provisions of this section(10). If a District Magistrate

35 Cr. L. J. 27; *Emperor v. Maung Myat*, 9 Rang 352=A. I. R. 1931 Rang. 251=134 I. C. 220=1931 Cr. C. 891=82 Cr. L. J. 1125; *In re Angamuthu*, 13 Cr. L. J. 714=23 M. L. J. 732=(1912) M. W. N. 812=12 M. L. T. 170=16 I. C. 522; *Emperor v. Mahalirpuri*, 2 N. L. R. 149; *Emperor v. Allah Mahir*, 100 I. C. 361=25 A. L. J. 191=28 Cr. L. J. 291=A. I. R. (1927) All. 279=49 A. 443; *Emperor v. Karam-di*, 23 C. 250, *Emperor v. Ganga*, 26 A. 378.

N. cavi.

(3) *Darbari v. Jagoo Lal*, 22 C. 573.

(4) *Emperor v. Shamira*, 27 Cr. L. J. 816=95 I. C. 766=A. I. R. 1926 Lah. 575.

(5) *Pais Ram v. Emperor*, A. I. R. 1931 Lah. 145=131 I. C. 353=1931 Cr. C. 257=32 P. L. R. 71=32 Cr. L. J. 700.

(6) *Nibarun v. Bhuggobutty*, 20 W. R. Cr. 40.

(7) *Raj Kristo v. Nittyanund*, 20 W. R. Cr. 50.

(8) *Emperor v. Peters*, A. I. R. 1934 O. 276=11 O. W. N. 717=1934 O. L. R. 307. *Dulani v. Shalmani*, A. I. R. 1934 O. 276.

(2) *Kallu v. Crown*, 3 Lah. 23=68 I. C. 609=23 Cr. L. J. 577=4 Lah. L. J. 449; *Shib Das v. Crown*, 335 P. L. R. 1918; *Opendra v. Dulkhni*, 12 C. 473; but see *Khamis v. Emperor*, 14 C. W.

Hussain, A. I. R. 1929 C. 204=49 C. L. J. 62=115 I. C. 95=30 Cr. L. J. 401=12 A. I. Cr. R. 873.

(10) *Sheikh Bahatar v. Nobadali*, 63 I. C. 625=28 C. W. N. 487=1924 U

under section 435 the Sessions Judge or District Magistrate has jurisdiction under this section to report for the orders of the High Court the result of the examination that he has made. There is nothing in this section to limit the power of the Sessions Judge or District Magistrate to report the result of the examination of the record to proceedings under section 435 other than those to which s. 436 is applicable. At the same time a report ought not to be made to the High Court under this section on matters of fact, or unless the examination of the proceedings in the inferior court discloses a question of law which the Sessions Judge or District Magistrate thinks would more properly be determined by the High Court(1).

This section contains nothing to limit or qualify the powers which it confers on a Court of Session or a District Magistrate, or to suggest that the High Court should not consider a case so reported and pass orders accordingly(2).

Sessions Judge or District Magistrate may report.—This section authorizes a Sessions Judge or District Magistrate to make reports to the High Court on examination of the records of the proceedings of an inferior criminal court, but such reports should only be made in cases where the proceedings are not themselves the subject of a revision case or an appeal case pending before him; his duty is therefore to pass a judicial order. This section is not intended to enable the District Magistrate to get the opinion of the High Court on a question of law arising in a case pending before him or to transfer the decision of a difficult case pending before him to the High Court(3). If he is competent to deal with a case appealed to him he should not refer it to High Court(4). This section appears to contemplate action by the Sessions Judge or District Magistrate upon examination of the proceedings of a subordinate Court. It does not apparently authorize the Sessions Judge or Magistrate to refer his own order with a recommendation that it be altered(5). Where, however, it is discovered, after the trial has begun in a case tried with the aid of Assessors, that one of them is interested or otherwise unfit to sit as an Assessor, the Sessions Judge should refer the case to the High Court to set aside the order by which the incompetent Assessor was appointed and all the subsequent proceedings in the trial(6). A Sessions Judge is not a court inferior to the District Magistrate and the latter is, therefore, not empowered by law to make a reference under this section to the High Court taking exception to the propriety of an order of the former(7). A District Magistrate, if he considers the

(1) *Emperor v. Maung Ba Thon*, 32 Cr. L. J. 950=132 I. C. 842=9 Rang 239

(5) *Ramasis v. Emperor*, A. I. R. 1933 Lat 637=146 I. C. 970=13 Pat 150=1933 Cr. C. 1550=14 P. L. T. 753=35

(3) *In re 1st and 2nd Gurnaud*, 24 I. C. 352=15 Cr. L. J. 472.

(4) *Sree Kissen v. Juglal*, 9 W. R. Cr. 6; *Queen v. Nusseeroodeen*, 11 W. R. Cr. 24.

101=27 Cr. L. J. 1253=A. I. R. (1917) Sind. 45; *Emeyer v. Sarofat Hossain*, A. I. R. 1933 C. 791=57 C. L. J. 211=1933 Cr. C. 1958=146 I. C. 354=

make a reference to the High Court if his only objection to the finding of the court below is based on the merits, unless it is very clear that the conviction is wrong and there can be no reasonable doubt of the matter(1). A necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the High Court for the exercise of its revisional jurisdiction(2). Where the District Magistrate can himself make the order a reference is illegal(3). When therefore, an appeal is preferred to the Sessions Judge, he cannot without disposing of the appeal under s. 423 make a reference to the High Court(4). A Sessions Judge or District Magistrate cannot refer a case to the High Court on a point arising in appeal pending before him(5). A reference cannot be made on representation of the complainant who holds office as District Superintendent of Police(6) or on the report of a darogha(7). A Sessions Judge is not competent to report to the High Court the order of a District Magistrate ordering further inquiry by a subordinate criminal court into the case of an accused person who has been discharged by that subordinate criminal court(8). A reference under this section should not be made when the trial Magistrate has to determine whether process is to issue or not(9).

Reference against order under ss. 145 or 107 Cr. P. C.—In revision from an order under s. 145 of the Code all that a District Magistrate can do is to make a reference to the High Court under this section(10). But in the case of orders under section 145 which are mere police orders to be made by Magistrates to quiet disputes, even if it should appear from the judgment of the Magistrate that there is an error of law, references should not be made unless it appears that the error of law is of such a character as to call interference by a higher authority(11). A reference under this section against an order passed under s. 145 asking the High Court to confirm a part of the order and to quash the rest is not in form and cannot be entertained(12). Where a Magistrate has discharged an accused person under s. 107 Cr. P. C. the

(1) *Emperor v. Sudaman*, 49 A. 551 = 1927 A. 475 = 25 A. L. J. 379 = I. R. 8 A. 51 Cr. = 28 Cr. L. J. 899 = 100 I. C. 1055; *Phakir v. Madar*, 58 C. 1081 = A. L. R. (1931) Cal. 619 = 35 C. W. N. 374 = 33 Cr. L. J. 1237 = 131 I. C. 915

(2) *Empress v. Ishan Chandra*, 9 C. 847.

(3) *Bindu v. Male*, 28 C. 102; *Bega Singh v. Crown*, 7 P. W. R. 1914 Cr.; *Emperor v. Mohan Lal*, 13 A. L. J. 477

(4) *Empress v. Durga*, (1891) A. W. N. 130.

(5) *Emperor v. Mohan Lal*, 18 A. L. J. 477; *Emperor v. Rahimdin*, 105 I. C. 802 = 28 Cr. L. J. 918 = A. L. R. (1928) Sind. 62.

(6) *Empress v. Nagoo*, Rat. Un. Cr. Cas. 340.

(7) *Empress v. Kunjal*, (1891) A. W. N. 80

(8) *Crown v. Waryam*, 10 P. R. 1912 Cr.

(9) *Emperor v. Maung Ba Thon*, 9 Rang. 239 = 1931 Rang. 225 = 132 I. C. 821 = 32 Cr. L. J. 720 = Ind. Rul. (1931) Rang. 214.

(10) *Maung San E. v. Maung Mye Du*, 117 I. C. 59 = 1928 Rang. 242; *Fseruddi v. Otaruddi*, 89 I. C. 626 = 26 Cr. L. J. 1166 = A. L. R. (1925) Cal. 1234.

(11) *Phakir v. Madar*, 58 C. 1081 = 1931 C. 619 = 32 Cr. L. J. 1237 = 131 I. C. 915 = 35 C. W. N. 374 = 1931 Cr. C. 503; *Kushal v. Jamna*, 23 Cr. L. J. 724 = 69 I. C. 452 = 1923 Lah. 46.

(12) *Collector of Howrah v. Santak Das*, 99 I. C. 1010 = 1927 C. 261 = 41 C. L. J. 593 = 99 I. C. 1010 = 28 Cr. L. J. 210.

considers that a Magistrate has no jurisdiction to try a particular offence he cannot quash proceedings but must refer the case to the High Court(1). Similarly, where a Sessions Judge is of opinion that a Magistrate empowered under s. 30, Cr. P. C., has in fact tried a case which he is not competent to try, he should send the case to the High Court for an order that the accused be committed for trial to the Court of Sessions(2). So also, if a Sessions Judge is of opinion that an order of a District Magistrate directing a further inquiry under section 436 is wrong, a reference to the High Court may be made under this section(3). Where in a proceeding under section 147, an order is passed by a Sub-Divisional Magistrate which appears to be irregular, the Sessions Judge has no power under section 436 to direct a further inquiry, the proper course will be to call for the records from the Court of the Sub-Divisional Magistrate and submit them under this section to the High Court for passing necessary orders(4). The Sessions Judge has no powers to order further inquiry in a case where he has sent for the records, on examining the monthly criminal returns of the Magistrate. If he thinks any further inquiry necessary he should refer the case to the High Court(5). Although it is unusual for a Judge to make a reference regarding the legality of his own order, yet there is nothing in this section to preclude him from doing so(6). But in one case it has been held otherwise(7). Power to refer under this section is not limited to matters in revision under s. 439. It can be invoked in case of a matter of stay of proceedings(8). If a Sessions Judge wrongly directs the Magistrate to record the cross-examination and forward the record to him, his successor cannot review a judgment after taking the further evidence of the witnesses into consideration. The proper procedure to be followed by him in such a case is to make a reference to the High Court under this section invoking the revisional power of the court to correct the error which was committed by his predecessor(9).

When reference cannot be made—This section allows a reference when the Court of Sessions is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or inadequate, but not on the grounds of the insufficiency or incredibility of the evidence(10). A Sessions Judge sitting in revision should not

534=26 Cr. L. J. 65; *Kedar Nath v. Bijoy Mandal*, 33 O. W. N. 723=A. I. R. 1929 C. 751=1929 Cr. C. 385.

(1) *Kandasami v. Soli Goundan*, 23 M. 540.

(2) *Emperor v. Shamira*, 95 I. O. 766=27 Cr. L. J. 846=A. I. R. 1926 Lah. 575.

(3) *Darbari v. Jaggo Lal*, 22 O. 573.

(4) *Public Prosecutor v. Ghatla Ramayya*, 3 Mad. Cr. Cas 284.

(5) *Empress v. Valav*, Rat. Un. Cr. C. 407.

(6) *Emperor v. Chand Mal*, A. I. R. 1934 Lah. 185=15 Lab. 63=35 P. L. R. 8=1934 Cr. C. 333=151 I. C. 838=

35 Cr. L. J. 1436; *Emperor v. Radha Raman*, A. I. R. 1930 A. 817=129 I. C. 260=1930 A. L. J. 1076=1930 Cr. C. 1201.

(7) *Itamasis v. Emperor*, A. I. R. 1933 Pat. 597=148 I. C. 370=25 Cr. L. J. 22=14 Pat. L. T. 759.

(8) *Louis Philip v. Mahader*, A. I. R. 1933 B. 485=85 Bom. L. R. 1651=1933 Cr. C. 1589=58 Bom. 49.

(9) *Emperor v. Lakshman*, 53 B. 578=121 I. O. 568=31 Bom. L. R. 592=A. I. R. 1929 B. 309.

(10) *Empress v. Khubi*, (1881) A. W. N. 12; *Empress v. Ukhid Ali*, 17 C. P. L. R. 36; *Shah Qodla v. Barkat*, 18 W. R. 7 Cr.

representation made by the Police to the District Magistrate in the form of an official letter should be taken into consideration by a High Court as embodying the grounds for setting aside an order passed by a criminal court(1).

Power to refer proceedings of superior court.— The powers given to a District Magistrate to make a reference to the High Court, relate to proceedings before an inferior court, and do not empower him to question the propriety of a judgment or sentence passed by a superior criminal authority, as the Sessions Judge(2). In cases where he feels it necessary to question the adequacy of sentence by a superior court, he should not instruct but inform the Public Prosecutor, who might after receiving proper instruction from the Local Government lay the matter before the High Court on his own initiative(3). Where, therefore, a Sessions Judge has made an order under s. 436 which the District Judge upon application being made to him considers wrong he might not pass a contrary order, but should report the matter to the High Court so as to avoid conflict of decision(4). The section does not authorize the District Magistrate to refer to the High Court a case in which the Sessions Court has, under s. 123 of the Code, refused to confirm his order under s. 118. If the District Magistrate, as the officer responsible for the peace of his District, is dissatisfied with any such order, his proper course is to ask the Public Prosecutor to move the High Court for the revision of the same(5). The powers conferred by s. 438 read with s. 435 upon a District Magistrate to make a reference to the High Court refers clearly to a "proceeding before any inferior criminal court." By the words "or otherwise" in this section the Legislature never intended to give to a Magistrate the powers to question the propriety of a judgment or sentence by a superior criminal authority nor by the use of the words "or which has been reported for orders" in s. 439 could it have been intended that such report might be made by an inferior criminal authority with respect to a proceeding by a superior authority(6). A Sessions Judge is not empowered by law to

(1) *Emperor v. Brahma Din*, 105 I. C. 638—L. R. 8 A. 139 Cr.—8 A. I. Cr. R. 335—A. I. R. 1927 A. 727—28 Cr. L. J. 946—26 A. L. J. 76.

(2) *Emperor v. Shah Nawaz*, 8 Cr. L. J. 161—18 L. R. 40; *Emperor v. Jannabai*, 28 A. 91; *Crown v. Waseem*, 5 Lab. 11 (14)—25 Cr. L. J. 928—81 I. C. 544—(1924) A. I. R. (L) 437; *Emperor v. Lobo*, 41 B. 47—18 Bom. L. R. 796; *A. David In re*, 6 C. L. R. 245; *Emperor v. Jahandi*, 23 C. 249; *Empress v. Karamdi*, 23 C. 250; *Hiraman v. Ram Kumar*, 18 C. 186; *Emperor v. Ganeshi*, 23 C. 392; *Emperor v. Mahbirpuri*, 2 N. L. R. 149; *Emperor v. Baldeo Prasad*, 46 A. 851 (855)—24 A. L. J. 772—82 I. C. 285—25 Cr. L. J. 1277—5 L. R. A. Cr. 121—A. I. R. (1924) All. 770; *Emperor v. Dailal*, 24 A. L. J. 274—27 Cr. L. J. 327—92 I. C. 743—L. R. 7 A. 33 Cr. and 161 Cr.; *Empress v. Zor Singh*, 10 A.

146; see *Empress v. Fazal Dad*, 24 Cr. L. J. 573—73 I. C. 269—(1924) A. I. R. (Lab.) 420; *Emperor v. Kasim*, 17 B. L. R. 268—26 Cr. L. J. 177—83 I. C. 881.

(3) *Emperor v. Shah Nawaz*, 8 Cr. L. J. 161—18 L. R. 40; *Empress v. Sher Singh* 9 A. 362 and see other cases cited in the last note.

(4) *Empress v. Pirithi*, 12 A. 431.

(5) *Empress v. Jahandi*, 23 C. 249.

(6) *Empress v. Karamdi*, 23 C. 250 (251); *Emperor v. Sarafat Hussain*, A. I. R. 1933 C. 791—57 C. L. J. 211—146 I. C. 351—25 Cr. L. J. 27; *Emperor v. Maung Myat*, 9 Rang 352—A. I. R. 1931 Rang 251—134 I. C. 220—1931 Cr. C. 891—82 Cr. L. J. 1125; *Emperor v. Allah Mahr*, 100 I. C. 361—25 A. L. J. 121—28 Cr. L. J. 281—A. I. R. (1927) All. 279—49 A. 443; *Emperor v. Isher Singh*, 1927 Lab. 85—26 P. L. R. 801—

Sessions Judge has no jurisdiction under s. 436 to set aside the order of discharge and direct further inquiry. He can only report under this section to the High Court(1).

Reference against orders of acquittals—The High Court has jurisdiction to entertain a reference by the Sessions Judge against the order of acquittal and, if necessary, to set it aside, though such power must be exercised in exceptional cases only, where there has been either a denial of the right of a fair trial or a flagrant and glaring failure of justice(2). A reference under this section recommending revision of orders of acquittal stands on no higher footing than an application of a private prosecutor for such revision(3). A reference under this section by the Sessions Judge, recommending that an erroneous acquittal by a subordinate court be set aside, is acceptable even in ordinary cases, for an appeal against such acquittal under s. 417 by the Local Government restricted to only in exceptional cases. However, such reference by the District Magistrate who has means to communicate with and move the Local Government under s. 417, may not be acceptable(4). The proper course for the District Magistrate, if he is dissatisfied with an order of acquittal, would be to move the Local Government for exercising its powers under section 417 and not to make a reference to the High Court under this section(5). The High Court will not ordinarily entertain a reference by a District Magistrate in regard to an order of acquittal(6). But the powers of the District Magistrate to take action under this section are not shut out by sub section (5) of section 439 because the Local Government could have appealed and has not done so(7).

Reference in police proceedings.—This section does not empower the Magistrate of a District to refer to the High Court the proceedings of a Superintendent of Police, the latter not being a "Court Subordinate" to the Magistrate(8). The Code does not contemplate that a

(1) *Emperor v. Abdul Haq*, 40 A. 140.
(2) *Nathu Mal v. Abdul Haq*, 12 Lah. L. J. 5; *Wazie v. Emperor*, 7 Pat. 579=116 I. C. 763=1929 Pat. 139;
(3) *Emperor v. Abdul Haq*, 40 A. 140.

(4) *Nathu Mal v. Abdul Haq*, 12 Lah. L. J. 5; *Wazie v. Emperor*, 7 Pat. 579=116 I. C. 763=1929 Pat. 139;
(5) *Emperor v. Abdul Haq*, 40 A. 140.

(6) *In re Amiruddin*, 24 A. 316; *Emperor v. Madar*, 25 A. 128; *Crown v. Achhar Singh*, 5 Lah. 16 (19)=81 I. C. 547=1924 Lah. 451=25 Cr. L. J. 931; *Hrishi Kesh v. Abadhaut*, 44 C. 703; *Emperor v. Ranga Rair*, 15 M. 36; *Ohhay Teli v. Madhon*, 19 W. R. 55 Cr.; *Venkata Krishna v. Lakshmi Narasimham*, 1910 M. W. N. 517=8 I. C. 293=8 M. L. T. 335; *Mogal Beg In re*, 35 M. L. J. 665; *Re Sinnu Goundan*, 38

of the reference(1). In a case where a Sessions Judge has called for the record of an inferior Court he is, before referring the case to the High Court for orders, bound to call upon the inferior court for explanation of the order passed, and should submit such explanation together with the rest of the record, to the High Court(2). The trying Magistrate is not entitled to make any suggestion or representation in the explanation which he may submit to the High Court of anything which is not founded on the record before him. The Magistrate is not the prosecutor. He must hold the scales evenly(3). The report should not contain any representation of the complainant protesting against the Subordinate Magistrate's decision(4). It should contain a recommendation that the sentence be revised or altered(5).

High Court's powers in dealing with a reference.—On a reference by a District Magistrate to the High Court under this section the High Court will not interfere merely because the evidence before the lower court has not been according to the referring officer, properly appreciated. There must be some substantial error of law to justify the court exercising its exceptional powers of revision under the section(6). It is not the rule of the court to interfere with decisions of facts upon evidence except for special reasons(7). Where the trial court has fully considered the evidence and discharged the accused the High Court will not interfere, on a reference by the District Magistrate, unless it is shown that the order of the trial court was either perverse or unreasonable(8). If a court had the power to try the offence of which it has convicted the accused, it is not necessary to quash the conviction, merely because the facts disclose a more serious offence which the court was not competent to try unless the accused has been prejudiced or the sentence is inadequate(9). In the case of an acquittal, when the Local Government has not preferred an appeal under s. 417, the High Court ought not to interfere in revision, on a reference under this section, where it cannot do so without practically hearing the case on the evidence as an appeal in order to satisfy itself that the opinion of the referring court is correct though it has jurisdiction to intervene in revision in such cases(10). If in a proceeding before the Sessions Judge for a reference to the High Court under this section, admissions of fact are made by either party, then those admissions of fact ought to be accepted by the High Court for the purposes of the reference(11).

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, High Court's powers of revision

(1) *In re Kesava Panda*, 9 Cr. L. J. 502. The reasons for the reference should accompany the record, 1871 A. W. N. 60.

(2) *In re Kesava Panda*, 9 Cr. L. J. 502.

(3) *In re Kesava Panda*, 9 Cr. L. J. 502.

(4) *In re Kesava Panda*, 9 Cr. L. J. 502.

(5) *In re Kesava Panda*, 9 Cr. L. J. 502.

(6) *In re Abdul Rahiman*, 99 I. C. 949=88 M. L. T. 15=28 Cr. L. J. 207=A. I. R. 1927 Mad. 434.

(7) *Phalir v. Madar*, 58 C. 1031=A. I. R. 1931 C. 619=35 C. W. N. 874=1931 Cr. C. 803=32 Cr. L. J. 1237=194 I. C. 915.

(8) *Emperor v. Jagdamla*, 11 O. L. J. 334=1 O. W. N. 245=25 Cr. L. J. 1026=81 I. C. 802.

(9) *In re Mohideen Sahib*, 21 I. C. 688=25 M. L. J. 481=14 Cr. L. J. 640.

(10) *Uthukesh v. Aladhaul*, 44 C. 703.

(11) *Garib v. Muchiram*, 30 C. W. N. 339=21 I. C. 805=A. I. R. 1925 C. 1029=27 Cr. L. J. 132.

make a reference under the provision of this section to the High Court taking exception to certain remarks made by a Sessions Judge in the course of his judgment and asking the same to be expunged therefrom(1).

Power to refer question of law.—A reference to the High Court in a criminal matter can only be made in respect of error on a point of law(2). But a Sessions Judge should not make a reference to the High Court merely in order to obtain a ruling on a question of law where he does not really dissent from the actual decision arrived at(3). There is no provision in the Code which enables a Judge to stop a trial already commenced and to refer to the High Court any question or questions of law arising on the merits in the case(4). This section empowers the Sessions Judge and District Magistrate, on examining the record of any proceeding under section 435, to report to the High Court for order the result of such examination, which means that the Sessions Judge or District Magistrate is to report the incorrectness or illegality of the sentence or order and not that he should refer abstract points of law to the High Court(5). There is no provision of the Code under which an appellate court having once admitted an appeal, can "refer" it to the High Court for a decision on a point of law. The appellate court must dispose of the appeal itself in one of the manners prescribed by section 423 of the Code(6). A Court of Session, after it had asked the Assessors their opinion in a case which was being tried by it, suspended the trial of the case and made a reference to the High Court under the corresponding section 296 of Act X of 1872, on a question of jurisdiction which had arisen in the trial of the case, and the High Court held that it was not intended that that section should be so used, and the Court of Session must dispose of such question itself(7).

Power to take evidence.—Neither this section nor s. 435 or any other empowers a District Magistrate to take further evidence with a view to reporting a case the record of which he has examined(8).

Contents of the reference—Referring courts ought to make their references in the form prescribed by the circular orders of the High Court, stating in what particular portion of the order, the court making the reference considers an error on a point of law to exist(9). A reference under this section should be in the form of a judicial order(10). It should contain a chief abstract of the case and the grounds

27 Cr. L. J. 430=93 I. C. 158; *Emperor v. Fazal Dad*, 78 I. C. 269=24 Cr. L. J. 572.

(1) *Emperor v. Khuda Bux*, 98 I. C. 101=27 Cr. L. J. 1253=A. I. R. (1927) Sind. 45.

(2) *Emperor v. Asimullaa*, 85 I. C. 939=26 Cr. L. J. 651=A. I. R. 1925 C. 1068.

(3) *Emperor v. Madho Singh*, 86 I. C. 801=23 A. L. J. 189=A. I. R. 1925 A. 318=26 Cr. L. J. 865=47 A. 409.

(4) *Emperor v. Bapuji*, Bat. Un. Cr. C. 214.

(5) *Chouri v. Putari*, 5 O. C. 316.

(6) *Emperor v. S. J. ...*

(9) *Phakar v. Madar*, 88 C. 1091=1931 Cal. 619=32 Cr. L. J. 1237=134 I. C. 915; *Kutiswar v. Jitendra Nath*, A. I. R. 1926 C. 316=26 Cr. L. J. 1055=67 I. C. 975=30 C. W. N. 616.

(10) *On Pe v. Emperor*, 1924 Rang. 295=3 Bur. L. J. 27=25 Cr. L. J. 1303=82 I. C. 471.

knowledge(1). Section 435 states the grounds, and provides the machinery, for the exercise of the powers which the later sections confer(2). This section simply sets out the revisional powers of a High Court. It does not purport to qualify, add to, or detract from, any of the provisions of section 435, and has to be read along with this section in order to find whether certain proceedings are open to revision by the High Court(3). The duty of the High Court is to satisfy itself as to the correctness, legality or propriety of the order of the lower court and to pass such orders as may be necessary. The powers of the High Court in revision as described in this section are general and their generality cannot be cut down by any decision(4). The object of revisional legislation is to confer upon superior criminal courts a kind of paternal or supervisory jurisdiction, without the intervention necessarily of any interested party, in order to correct any miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand, in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals(5).

"Any proceeding"—See notes to section 435. Under the Code of 1882 the words were 'judicial proceedings' and it was held that the Magistrate's proceedings under s. 8 of the Reformatory Schools Act was a "judicial proceeding" and open to revision(6). It was also held that the proceedings in which it has been determined whether an accused person should be admitted to bail by a Magistrate is a judicial proceeding, and, as such, cognizable by the High Court as a Court of Revision(7). Though the word judicial is no longer retained and therefore a discussion is thereby avoided as to what constitutes judicial proceeding, this does not mean that the High Court can interfere with executive acts(8). The execution of a warrant issued by the Political Agent, under section 7 of the Indian Extradition Act is an executive Act, and the High Court cannot interfere in revision with an order of this character(9). The granting of sanction under section 197 of the Code is an executive act, and does not become a judicial one because the sanction

(1) *Thakar Dass v. Emperor*, 15 Cr. L. J. 217 (body)=22 I. C. 1001=17 O. O. 25; *Karmal Kutty v. Udayavarma*, 36 M. 275 (The history of the law relating to superintendence and revision by the High Court reviewed).

(2) See the cases cited in the last note.

(3) *Udai Bhan v. Ram Samajiah*, 18 Cr. L. J. 100=37 I. C. 308=3 O. L. J. 546=19 O. C. 126.

(4) *In re Srivaramamurthy*, 60 M. L. J. 370=A. I. R. 1931 M. 242=1930 M. W. N. 849=3 M. Cr. C. 891=1931 Cr. C. 362=131 I. C. 649=33 L. W. 610=32 Cr. L. J. 763.

(5) *Emperor v. Nasrullah*, 9 A. I. Cr. R. 205=29 Cr. L. J. 446=103 I. C. 667=L. R. 9 A. 47 Cr.=A. I. R. 1928 All. 257.

(6) *Emperor v. Manaji*, 14 B. 391. The revisional jurisdiction given to the

Joint Magistrate under s. 76 (6) of the Madras Village Courts Act is greater than what he has under this section: *Nara-*

A. I. 12=

63;

43;

73;

Jugat v. Empress, 26 C. 786.

(8) *Satan v. Emperor*, 23 Cr. L. J. 39; *Gullai v. Emperor*, 42 O. 193; *Dharmbai v. Emperor*, 19 Cr. L. J. 588=45 I. C. 396=11 S. L. R. 113; *In re Damma*, 29 A. 563; *In re Pandurang*, 12 Bom. L. R. 1023; *Chinnasawmy v. Emperor*, 11 Cr. L. J. 69=4 I. C. 876=19 M. L. J. 666; *Imambur v. Emperor*, 15 Cr. L. J. 514=21 I. C. 952=7 S. L. R. 191.

(9) *Gullai v. Emperor*, 42 C. 793.

or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a court of appeal by sections*** 423, 426, 427 and 428 or on a court by section 338, and may enhance the sentence; and when the Judges composing the court of revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the court shall not inflict a greater punishment for the offence which, in the opinion of such court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Amendment—In sub section (1) the figure "195" has been omitted by s. 119 of Act XVIII of 1923. This is consequential to the amendment made in s. 195. Sub-section (6) has been newly added enabling the accused to question the propriety of his conviction when a notice has been issued to him by the High Court for enhancement.

Scope.—Section 435 authorizes a High Court in revision to call for the records of inferior criminal courts, and sections 437 and 439 lay down the powers which a High Court may exercise in proceedings, the records of which have been called for by itself, or which have been reported for orders, or which may otherwise come to its

cited in the last note would seem to be that it is not a matter connected with any proceedings before any inferior criminal court within the meaning of section 435(1). But the long standing course of procedure in the Punjab is that in such cases revisions lie to the High Court and lie under this section, irrespective of whether the order under revision was passed by a civil, criminal, or revenue court(2). And the same view obtains in Sind. According to the Sind Court section 115 of the C. P. C. has no application to such a case, as the jurisdiction under s. 476 of the Cr. P. C. is conferred on a civil court by the latter Code and the exercise of that jurisdiction must be governed by the machinery provided by the statute which confers the jurisdiction, that is to say, the Cr. P. C.(3). A direction to prosecute under s. 476 can be revised by the High Court only when it appears that the direction is based on grounds merely fanciful, grounds so empty and so obviously wrong that the court granting it cannot be said to have formed a serious judicial opinion(4).

The record of which has been called for by itself.—Under this section, the High Court has full powers to examine the record of a case and pass such orders as may be necessary(5). The language in this section "the record of which has been called for by itself" is not used in contradistinction to "which otherwise comes to its knowledge" and these latter words cannot be read so as to have reference to a petition(6). The High Court is competent to act in the exercise of its criminal revisional jurisdiction even though the accused does not desire it(7). High Court in revision is not bound by s. 412 but may examine the record for the purpose of seeing whether the accused have had a fair trial and whether their plea of guilty was based on a proper conception

Muhammad Bhaku v. Empress, 23 C. 531; *Emperor v. Har Prasad*, 40 C. 477; *Ramzan Ali v. Opoono Charan*, 4 L. B. R. 138; *Thakur Das v. Emperor*, 17 O. C. 25; *Emperor v. Kasht*, 39 A. 695; *Nga Sen v. Sookaram*, 2 U. B. R. 23=32 I. C. 674;

(2) *Dhanpat Rai v. Balak Ram*, 13 Lab. 342; *Lachman Singh v. Emperor*, A. I. R. 1931 Lab. 105=32 P. L. R. 46=1931 Cr. C. 169=191 I. C. 216=32 Cr. L. J. 617=16 A. I. Cr. R. 282; *Bishan Singh v. Amritsaria*, 5 P. R. 1903 Cr. F. B.; *Barkat Ram v. Croten*, 89 P. W. R. 1911 Cr.

(3) *Gerimal v. Sheucaram*, 95 I. C. 631=27 Cr. L. J. 750=20 S. L. R. 90=1926 S. 215.

(4) *In re Parshotamdas*, 25 Bom. L. R. 232.

(5) *Maula Balhsh v. Lal Chand*, 23 P. B. 1916 Cr.=37 I. C. 473=18 Cr. L. J. 121; *Satindra Nath v. Emperor*, 111 I. C. 394=48 O. L. J. 143=23 Cr. L. J. 812; *Sargi v. Bhumi*, 3 Cr. Law Nag. 14.

(6) *Udai Bhan v. Ram Samajh*, 3 O. L. J. 546=19 O. C. 136=37 I. C. 309=18 Cr. L. J. 100; *Kamal Kully v.*

164; *In re Maano Prasad*, 3 A. 503=(1881) A. W. N. 15; *Feroza Jan v. Amir Ali*, 9 O. L. R. 593=74 I. C. 415; *Peary Lal v. Emperor*, 21 A. L. J. 899=75 I. C. 148=21 Cr. L. J. 109; *Simeon v. Emperor*, (1922) A. 439=66 I. C. 515=23 Cr. L. J. 221; *Pam Narain v. Harbans Singh*, 71 I. C. 617=1923 A. 490.

(1) *Purnachandra v. Dhalu*, 58 C. 874=51 C. L. J. 57; *Nawab Ali v. Madhuri Saran*, 99 I. C. 45=1927 O. 14=3 O. W. N. 203.

of their own motion, frequently set aside convictions of persons jointly tried and convicted at one trial, who had not preferred appeals though they could have done so, but in which the matter had come up before the court on appeal or revision filed by other convicts, if on examining the record it was discovered that the lower courts had acted illegally on a point which affected all the convicts equally(1).

Application for revision by third party against accused's wishes.—The High Court can exercise its revisional jurisdiction under this section at the instance of a person who is a total stranger to the proceedings. If the illegality of a proceeding is brought to the notice of the High Court, it is immaterial who does so—whether he be a party or a stranger,—and the court should take action of its own accord(2). Ordinarily, where a person being a friend and as such interested in the liberty of another sentenced to imprisonment applies in revision, the court will not interfere, where it appears that the prisoner is of age, educated and sane, unless the court is satisfied that there has been a miscarriage of justice. Even where there has been a miscarriage of justice, the court, in the interest of the prisoner himself, where he himself prefers to abide by the decision already given, must be careful to avoid taking any action which may place him in other and perhaps greater jeopardy, while seeking to remove the stigma of illegality from the administration of the law. On the other hand, the court cannot allow any such alleged miscarriage to be used to gratify a desire for self-advertisement or pretended martyrdom at the expense of the court's reputation for impartiality and justice(3).

Interference with acquittal at the instance of private prosecutor.—Although the High Court has jurisdiction, under this section, to set aside the order of acquittal, it has become a settled practice that it will not ordinarily interfere, in revision at the instance of a private prosecutor(4).

R. 71=32 Cr. L. J. 700=191 I C 853=
A. I. R. 1931 Lab 145=1931 Cr. C. 257.

(1) *Rakhial v. Empress*, 5 O. W. N. 830; *Bachinta v. Emperor*, 31 I O 833—17 Cr. L. J. 97=7 P. W. R. 1916; *Prad. Bhambhani v. Emperor*, 52 I O

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4. **Conclusions**

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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— *Journal of the American Medical Association*, 1997

J. 259. —

(2) *Emperor v. Bishechar Prasad.*

26 A. 159 F. B.; *Oudh Bar Association*v. *Emperor*, 6 Luck. 266; *Pars Ram*

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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N. 71C=Ind. Rul (1931) Cal. 558=
(1931) Cr Cas 506; *Narain Prasad v.*
Emperor, 45 A. 128, *Pars Ram v.*
Emperor, 31 Cr. L. J. 700=181 I. C.
853=A. I. R. 1931 Lah. 145=32 P.
L. R. 71=Ind. Rul 1931 Lah. 419=1931
Cr. C. 257; *Emperor v. Bisheshwar*
Prasad, 56 A. 1507.

(1) *Sher Khan v. Anwar Khan*, 23 N. I. R. 40=1927 Nag 170=102 I. C. 119=28 Cr. L. J. 523; *Siban Rai v. Bhagwat Das*, 5 A. I. Cr. R. 401=5 Pat 25=6 Pat. L. T. 833=27 Cr. L. J. 235=92 I. O 219=A I R 1926 Pat. 176; *Naranakath v. Parakkal Mamu*, 45 M. 286=71 I. C. 65=(1921) M. W. N. 662=16 I. W. 626=43 M. L. J. 663=1923 M. 171=24 Cr. L. J. 17; *Gulli Bhagat v. Naran Singh*, 77 I. O. 731=2 Pat. 709=25 Cr. L. J. 416=A. I. R. 1924 Pat. 283; *Qayyam Ali v. Faiyaz Ali*, 27 A. 359; *Emperor v. Sheedarshan*, 44 A. 832; *Ct. Sukho v. Durga Das*, 2 A. 418.

of the facts(1). The powers of a High Court under sections 435 and 439 are wide and it can proceed in the matter even *suo motu* and interfere if it considers just and proper. A High Court can call for and examine the record of any proceedings and interfere even when a certain order, though legal, is improper(2).

Or which has been reported—Section 438 authorises a District Magistrate to make reports to the High Court on examination of the records of the proceeding, of inferior criminal courts, but such reports should only be made in cases where the proceedings are not in themselves the subject of a revision or appeal pending before him(3). A reference to the High Court under that section should only be made for some reason specified in the section, which appears from the inspection of the record(4). A District Magistrate is not competent to refer the proceedings of a superior court to the High Court(5). It is not the practice of the High Courts in India to take action under this section on a report by a District Magistrate which has for its object interference with a decision by a Court of Session(6).

Or which otherwise comes to its knowledge.—The High Court may exercise any of the powers conferred on a court of appeal even in cases which may come to its knowledge otherwise than on a petition by the convict. It has been held in *Narain Prasad v. Emperor*(7) that it would be open to the High Court, on information contained in a newspaper, a placard on a wall or an anonymous postcard, to take action, if it considered that sufficient grounds were established to justify sending for record under s. 435, even though a court should be unwilling to interfere if the convict himself does not contest the propriety of his conviction. The same view was taken in *Hiranand v. Emperor*(8) wherein it was held that even where the accused has not moved the High Court, the High Court is competent to act in the exercise of its criminal revisional jurisdiction, though it is the practice not to interfere in revisions when the convicted person has failed to exercise his right of appeal. In this connection it may be stated that the various High Courts have whenever they have thought fit to do so, exercised their revisional powers in cases in which the convicts could have appealed but had not done so(9). It may also be stated that the High Courts have,

(1) *Ali Hossain v. Emperor*, A. I. R. 1930 Rang 849=128 I. C. 845=1930 Cr. C. 1177.

(2) *State v. Bhatnagar*, 30 Cr. L. J. 117.

(3) *State v. Bhatnagar*, 30 Cr. L. J. 117.

(4) *State v. Bhatnagar*, 30 Cr. L. J. 117.

(5) *State v. Bhatnagar*, 30 Cr. L. J. 117.

(6) *State v. Bhatnagar*, 30 Cr. L. J. 117.

(7) *Narain Prasad v. Emperor*, 45 A. 851 (855); *Emperor v. Jammabai*, 28 A. 91; *Emperor v. Ganga*, 38 A. 378.

(8) *Hiranand v. Emperor*, 73 I. C. 269=24 Cr. L. J. 573.

(9) 45 A. 128 (129)=71 I. C. 213=A. I. R. 1923 A. 85=20 A. L. J. 909=24 Cr. L. J. 115.

(10) 17 S. L. R. 245=76 I. C. 230=A. I. R. 1924 S. 129=25 Cr. L. J. 134.

(11) *Emperor v. Sakinabai*, 55 B. 220=129 I. C. 345=A. I. R. 1931 Bom 70=

(1931) Cr. C. 78=32 Bom. L. R. 1506=32 Cr. L. J. 263; *Emperor v. Abdul*

Qadir, 32 Cr. L. J. 219=129 I. C. 221=A. I. R. 1930 Lah 1044=(1930) Cr. C. 1210; *Pars Ram v. Emperor*, 32 P. L.

Cr. Cas. 674; *Emperor v. Baldeo*, 46 A. 851 (855); *Emperor v. Jammabai*, 28 A. 91; *Emperor v. Ganga*, 38 A. 378.

(6) *Emperor v. Fazal Dad*, 73 I. C. 269=24 Cr. L. J. 573.

(7) 45 A. 128 (129)=71 I. C. 213=A. I. R. 1923 A. 85=20 A. L. J. 909=24 Cr. L. J. 115.

(8) 17 S. L. R. 245=76 I. C. 230=A. I. R. 1924 S. 129=25 Cr. L. J. 134.

(9) *Emperor v. Sakinabai*, 55 B. 220=129 I. C. 345=A. I. R. 1931 Bom 70= (1931) Cr. C. 78=32 Bom. L. R. 1506=32 Cr. L. J. 263; *Emperor v. Abdul Qadir*, 32 Cr. L. J. 219=129 I. C. 221=A. I. R. 1930 Lah 1044=(1930) Cr. C. 1210; *Pars Ram v. Emperor*, 32 P. L.

of their own motion, frequently set aside convictions of persons jointly tried and convicted at one trial, who had not preferred appeals though they could have done so, but in which the matter had come up before the court on appeal or revision filed by other convicts, if on examining the record it was discovered that the lower courts had acted illegally on a point which affected all the convicts equally(1).

Application for revision by third party against accused's wishes.—The High Court can exercise its revisional jurisdiction under this section at the instance of a person who is a total stranger to the proceedings. If the illegality of a proceeding is brought to the notice of the High Court, it is immaterial who does so—whether he be a party or a stranger,—and the court should take action of its own accord(2). Ordinarily, where a person being a friend and as such interested in the liberty of another sentenced to imprisonment applies in revision, the court will not interfere, where it appears that the prisoner is of age, educated and sane, unless the court is satisfied that there has been a miscarriage of justice. Even where there has been a miscarriage of justice, the court, in the interest of the prisoner himself, where he himself prefers to abide by the decision already given, must be careful to avoid taking any action which may place him in other and perhaps greater jeopardy, while seeking to remove the stigma of illegality from the administration of the law. On the other hand, the court cannot allow any such alleged miscarriage to be used to gratify a desire for self-advertisement or pretended martyrdom at the expense of the court's reputation for impartiality and justice(3).

Interference with acquittal at the instance of private prosecutor.—Although the High Court has jurisdiction, under this section, to set aside the order of acquittal, it has become a settled practice that it will not ordinarily interfere, in revision at the instance of a private prosecutor(4).

R. 71=32 Cr. L. J. 700=131 I. C. 353=
A. I. R. 1931 Lah. 145=1931 Cr. C. 237.

(1) *Rakhal v. Empress*, 5 C. W. N. 330; *Bachinta v. Emperor*, 31 I. C. 833=17 Cr. L. J. 97=7 P. W. R. 1916;
Rakhal v. Emperor, 55 I. C.

C. 174=A. I. R. 1931 C. 410=35 C. W. N. 716=Ind. Rul. (1931) Cal. 553= (1931) Cr. Cas. 506; *Narain Prasad v. Emperor*, 45 A. 128; *Pars Ram v. Emperor*, 32 Cr. L. J. 700=131 I. C. 353=A. I. R. 1931 Lah. 145=32 P. L. R. 71=Ind. Rul. 1931 Lah. 419=1931 Cr. C. 237; *Emperor v. Bisheshwar Prasad*, 56 A. 1507.

(4) *Sher Khan v. Anwar Khan*, 23 N. I. R. 40=1927 Nag. 170=102 I. C. 119=28 Cr. L. J. 523; *Siban Rai v. Bhagicut Das*, 5 A. I. Cr. R. 401=5 Pat. 25=6 Pat. L. T. 833=27 Cr. L. J. 235=92 I. C. 219=A. I. R. 1926 Pat. 176; *Narainakath v. Parakkal Mamu*, 45 M. 286=71 I. C. 65=(1921) M. W. N. 663=16 L. W. 626=43 M. L. J. 663=1923 M. 171=24 Cr. L. J. 17; *Gulli Bhagat v. Narain Singh*, 77 I. C. 734=2 Pat. 708=25 Cr. L. J. 416=A. I. R. 1924 Pat. 253; *Qayyam Ali v. Faiyaz Ali*, 27 A. 319; *Emperor v. Sheedarshan*, 44 A. 332; *Cl. Sukho v. Durga Das*, 2 A. 413.

J. 259.

(2) *Emperor v. Bisheshwar Prasad*, 56 A. 159 F. B.; *Oudh Bar Association v. Emperor*, 6 Luck. 266; *Pars Ram v. Emperor*, A. I. R. 1931 Lah. 145; *Sham Lal v. Emperor*, A. I. R. 1931 Lah. 97; *Lilawati v. Emperor*, A. I. R. 1932 Lah. 384; *Secretary, High Court Bar Association, Lahore v. Emperor*, A. I. R. 1932 Lah. 559; *Vidya Wali v. Emperor*, A. I. R. 1932 Lah. 613.

(3) *Ramendra Chandra v. Emperor*, 58 C. 1303=32 Cr. L. J. 644=132 I.

Interference at the instance of Sessions Judge.—An application from the Sessions Judge requesting the High Court to set aside a conviction passed by his predecessor and affirmed by a Judge of the High Court in appeal, on the ground that on certain materials that had since come to the knowledge of the District Magistrate, the conviction was wrong, cannot be entertained in revision. In such cases the District Magistrate may refer the matter to the Local Government who have power under Chapter XXIX to do the needful(1).

High Court should not be moved in the first instance—According to a practice of the High Court an application in revision to the Sessions Judge or to the District Magistrate is an essential step in the procedure of filing a criminal revision in the High Court, and failure on the part of the applicant in this respect operates as a bar to the application being entertained by the court(2). For fuller discussion on this point see notes to s. 435 under the head "to whom application should be made".

Revisional powers when to be exercised.—The controlling power of the High Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary, greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case"(3). The Code confers the widest powers of revision upon the High Court and Judges should not seek to lay down rules which confine that discretion in a manner in which the legislature has not seen fit to confine it(4). The High Court should not hesitate to exercise discretion in its revisional jurisdiction whenever circumstances seem clearly to justify its so doing(5). No definite rule can fetter the action of the High Courts in the use of their revisional powers, technical flaws and minor errors in the procedure of the lower courts and even mistakes in the appreciation of portions of evidence are good grounds for interference where they have resulted in substantial prejudice or injustice to the

(1) *Kali v. Emperor*, 1 A. I. Cr. L. T. 527

(2) *Emperor v. Muhammad Hashim*, 55 A. 261=1933 A. L. J. 119=19 A. I. Cr. R. 168=14 L. R. A. Cr. 46=1933 Cr. C. 523=145 I. C. 726=84 Cr. L. J. 119
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19 A. L. J. 425=63 I. C. 875=22 Cr. L. J. 715=3 U. P. L. R. (A.) 77; *Abdul Matlab v. Nandlal*, 50 C. 423; *Nathesingh v. Emperor*, 102 I. C. 352=L. R. 8 A. 67 Cr.

(3) *Emperor v. Bankatram*, 28 B. 533 (534)

(4) *Shankarshet v. Emperor*, A. I. R. 1933 Bom. 483=35 Bom. L. R. 1010=1933 Cr. C. 1586=58 Bom. 40=147 I. C. 25

(5) *Raghupat Sahay v. Emperor*, A. I. R. (1922) Pat. 160=3 Pat. L. T. 93=1922 P. H. C. C. 26=66 I. C. 336=23 Cr. L. J. 272; *William v. Kothandarama*, 14 M. L. T. 200; *Lekhradj v. Debi Pershad*, 12 C. W. N. 678.

accused(1). The powers of revision are given to the High Court for the correction of injustices and not for the correction of mere illegalities(2). The circumstances which will justify the interference of the High Court have not been and cannot be laid down with precision. While the Judges have repeatedly held that only when exceptional grounds exist the High Court ought to interfere, the decided cases show that no hard and fast rule can be laid down but that when in the interests of justice the High Court's intervention becomes necessary, it ought not to be refused(3).

Grounds of interference.—It is well established that the court may interfere both on any question of law, such as jurisdiction, illegality or irregularity or on a question of pure fact(4). It is necessary in revision to see whether there has been any error of law, any irregularity, any abuse of, or failure to exercise judicial discretion, which would justify interference in revision(5). Only in case of (i) defective investigation, (ii) of failure to consider important evidence (iii) of consideration of the evidence from a wrong point of view, (iv) of contravention of any express provision of law, (v) of conviction upon facts which will not support the same, will the revisionary powers of the High Court be exercised(6). Revisional jurisdiction has been conferred in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or harshness in sentence(7).

High Court can rectify errors of law.—The High Court sitting as a court of criminal revision is entitled to rectify any error in law which would lead to injustice(8). But an order that proceeds upon an error of law, but which, apart from that error, is a proper order ought not to be set aside(9). It is, however, open to the High Court to revise a finding based on a misapprehension of the law(10). The question that there was no legally admissible evidence against the accused is rather

(1) *Phuman v. Emperor*, 11 P. R. 1908 Cr. = 3 P. W. R. 79 = 8 Cr. L. J. 250.

(2) *In re Gobind Kunbi*, 109 I. O. 214 = A. I. R. 1928 Nag. 172 = 29 Cr. L. J. 486 = 10 A. I. Cr. R. 173.

(3) *Ramanathan v. Subrahmanya*, 47 M. 721 (725), *Mahomed v. Mahomed Idris*, 88 I. C. 189 = 26 Cr. L. J. 1101.

good: *Angnoo v. Emperor*, 24 Cr. L. J. 257.

(5) *In re Almdar Hussain*, 23 A. 249 (251).

(6) *Lakshminarasappa v. Mekalavenkatappa*, 31 M. 133 at p. 135.

(7) *Emperor v. Nasrullah*, 29 Cr. L. J. 446 = 109 I. O. 567 (563) = A. I. R. (1928) A. 287; See *Nogi Reddy v. Emperor*, A. I. R. 1930 M. 443 = 120 I. C. 69 = 30 Cr. L. J. 1160 = 3 M. Cr. O. 18 (judgment vitiated by confusion and wrong notion about facts cannot be upheld).

(8) *Ibrahim v. Guranditta*, A. I. R. 1932 Lah. 362 = 33 P. L. R. 267 = 186 I. C. 705 = 33 Cr. L. J. 341 = 1932 Cr. O. 491 = 18 Lah. 599.

(9) *Sri Kishan v. Debi Dayal*, A. I. R. 1925 O. 739 = 2 O. W. N. 843 = 90 I. C. 915 = 26 Cr. L. J. 1619.

(10) *Jagan Nath v. Emperor*, 1929 Pat. 429 (431) = 115 I. O. 895 = 80 Cr. L. J. 646 = 10 P. L. T. 489 = 12 A. I. Cr. R. 560.

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19 A. L. J. 425=63 I. C. 875=22 Cr. L. J. 715=3 U. P. L. R. (A.) 77; *Abdul Mallab v. Nandlal*, 50 C. 423; *Nathesingh v. Emperor*, 102 I. C. 352=L. R. 8 A. 67 Cr.

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escaped notice(1). A defective investigation by a Magistrate constitutes a material error and will justify the High Court in setting aside the conviction(2). Improper advice given by the Judge to the Jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the Jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty(3).

Every irregularity or illegality does not call for interference.—It is well settled that every irregularity or illegality does not *ipso facto* vitiate a trial or call for the exercise of the powers of interference by the appellate or revisional court(4). The High Court will not interfere in revision where the illegality in trial has been purely technical and has not prejudiced the petitioner(5). The High Court will not interfere in revision on the ground that the provision laid down in section 342 had not been strictly complied with, unless it is proved that the accused had been prejudiced thereby(6). Mere omission to serve notice of appeal on the District Magistrate, under sections 422 and 423, is only an irregularity and will not render the proceedings, *ab initio* void(7). Where a Sessions Judge agreeing with the Assessors simply makes an endorsement that the accused is acquitted and directs that he be set at liberty and writes the full text of his judgment assigning reasons for his order a few days later, he commits an irregularity under section 537 of the Code, but such irregularity does not vitiate the proceedings(8). It is only allegations of the gravest departure from procedure that a High Court will interfere in revision so as to take the conduct of a criminal case pending before a subordinate court before its termination out of its hands(9). Where an applicant has not in any way been prejudiced by an irregularity, the High Court will not interfere in revision on the ground of that irregularity(10).

Joint trial.—The joint trial of two parties arrayed against each other in a riot is not warranted by sections 233 and 239 and is altogether illegal and void and not merely irregular within the purview of section 537. However the revisional jurisdiction under this section being by its terms entirely discretionary, the High Court is not bound to interfere on the revision side in such a case, when no prejudice is

(1) *Empress v. Murli*, 2 A. 336 (339).

(2) *Re Reddi Ramaiya*, 2 West 570.

(3) *Re Elahree Buksh*, 5 W. R. Cr. 80.

(4) *Rajabali v. Emperor*, A I R 1930 B 315—1930 Cr. C. 1147=24 S. L. R. 446; *Murlidhar v. Emperor*, 93 I O. 1054=27 Cr. L. J. 558. High Court would not interfere unless there are glaring defects, *Kamikka Persi ad v. Emperor*, 4 O W. N. 729=1917 O 315.

(5) *Murlidhar v. Emperor*, 93 I O. 1054=27 Cr. L. J. 558=6 A. I. Cr. R. 267; *Abdul Rohman v. Emperor*, A. I. R. 1935 C. 316.

(6) *Gurdeal Singh v. Bhola*, 10 Pat. L. T. 196; *Hazara Singh v. Emperor*,

6 A. I. Cr. R. 303=27 P. L. R. 183.

(7) *Vellayanambalam v. Salaiservai*, 39 M 505.

(8) *Sankaralinga v. Narayana*, 68 I. C. 615=16 L. W. 413=43 M. L. J. 369=(1922) M. W. N. 579=31 M. L. T. 812=23 Cr. L. J. 583=1922 M. 60.

(9) *In re Nachiappa Udayan*, 105 I. C. 803=(1927) M. W. N. 752=53 M. L. J. 528=26 L. W. 487=A. I. R. 1927 M 975=89 M. L. T. 452=28 Cr. L. J. 979=9 A. I. Cr. R. 139; See *Lallani v. Emperor*, A. I. R. 1931 A. 514=32 A. L. J. 241=8 A. W. E. 571.

(10) *Madhugir v. Rashid Ahmad*, 18 Cr. L. J. 765=41 I C 141=15 A. L. J. 642.

one of law than of fact(1). So, also, the question whether a criminal has been sufficiently identified, and whether his conviction on the evidence of one witness only, should stand, is a point more of law than of fact, and the High Court will interfere in revision in such cases(2). The question whether upon the facts found or proved, malice has been established is a question of law(3). The question whether a fee levied by a bye-law framed under U. P. Municipalities Act is excessive and unreasonable is a mixed question of fact and law and cannot be raised in revision for the first time(4).

High Court can rectify material error in the proceedings—The High Court will interfere in revision where there is a material error in the decision upon the facts, but some error in law or procedure which affects the decision(5). Thus, where in a case of theft of grass, the Magistrate found that the evidence for the prosecution was weak and biased and that it was possible that the accused did get permission from the joint proprietors to cut the grass, it was an error of law of the Magistrate not to have acquitted him; and in revision the Chief Court set aside the conviction(6). Where the subordinate court has taken a wrong view of the facts through an error in law, e.g., where it places the burden of proof on the accused contrary to s. 101, Evidence Act, the High Court will interfere in revision(7). When an accused person is convicted of being in possession of stolen property with a guilty knowledge, and the property was not recently stolen, the Chief Court, in the absence of evidence showing dishonest possession, can, on the revision side, cancel the conviction, as it is a "material error" under this section to presume guilty knowledge from mere possession where the theft is not recent(8). Although technical flaws and minor errors in the procedure of the lower courts, or mistakes in the application of portions of the evidence would not ordinarily be sufficient grounds for setting aside a conviction on the revision side, nevertheless the Chief Court is bound to interfere where such errors and omissions have resulted in substantial prejudice or injustice to the accused(9). Omission to take a very material evidence proffered by the accused was held to have prejudiced him, and to afford ground for High Court's interference under this section(10). The High Court is not precluded from exercising the power of revision under this section, where there has been a conviction on evidence which has received no false that, if it

(1) *Nga Tun Hlaing v. Emperor*, A. I. R. 1934 Rang. 60=1934 Cr. C. 877=148 I. C. 876=95 Cr. L. J. 808.

(2) *Meherali v. Emperor*, A. I. R. 1931 B. 13=1931 Cr. C. 61=130 I. C. 278=92 Cr. L. J. 543.

(3) *Nirsu Narayan v. Emperor*, A. I. R. 1926 Pat. 499=7 Pat. L. T. 608=1926 P. R. O. C. 314=27 Cr. L. J. 1090=97 I. C. 854.

(4) *Ajmeri v. Emperor*, A. I. R. 1934 A. 39=3 A. W. R. 181=1934 A. L. R. 429=1934 Cr. C. 70=148 I. C. 603=35

Cr. L. J. 701=56 A. 241=1934 A. L. J. 60.

(5) *Re Dili Churn*, 20 W. R. Cr. 40(41).

(6) *Ram Jas v. Emperor*, 17 Cr. L. J. 203=25 I. C. 175=27 P. W. R. 1916 Cr.

(7) *Empress v. Nageeth*, Rat. Un. Cr. C. 794.

(8) *Sohna v. Crown*, 15 P. R. 1875 Cr.

(9) *Phun an v. Emperor*, 11 P. R. 1678 Cr.

(10) *He Hari Perhad*, 24 W. R. Cr. 60

or of the warrant by an application to the court under section 491 of the Code. On the other hand, it has been held that where a warrant has been issued by a Political Agent under s. 7 of the Extradition Act of 1903, its execution by District Magistrate or a Chief Presidency Magistrate in British India in accordance with the Act, is a judicial act and the High Court has, therefore, power in revision to interfere with the proceedings of the Magistrate and the order to surrender the fugitive criminal(1). It may be noted that although section 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III of that Act, yet where the order was made clearly without jurisdiction, it is open to revision by the High Court at the instance of the party whose liberty is affected by it(2).

Abatement.—The principal of section 431 is applicable to revisions and that consequently no revision can be entertained against a sentence where the accused has since died, except a sentence of fine(3). Hence a petition for the revision of an order directing the petitioner to pay compensation under section 250 of the Code does not abate on the death of the petitioner(4).

Non exercise or improper exercise of powers of discretion vested in a Magistrate.—S. 435 of the Code gives the High Court ample power to interfere, should it see fit to do so, in any case where a Magistrate has either refused to exercise a discretion vested in him by the law, or has exercised that discretion in an improper manner, or on improper grounds(5). The High Court is not debarred from interfering in cases requiring the exercise of discretion if it appears on the fact of the proceedings that the Magistrate has exercised no discretion or has exercised his discretion in a manner wholly unreasonable(6).

Disqualification of Magistrate.—The proceedings of a Magistrate are liable to be reversed by the High Court on the revision side on the ground of a disqualification in the Magistrate in a particular case, owing to personal or pecuniary interest or bias(7).

Improper and faulty procedure.—The High Court can interfere in revision where the inquiry has been faulty(8); or where the lower court has based its decision on a wrong view of certain of the evidence, as where it has not, as it ought to have, treated certain evidence as evidence of accomplices(9); or where the Magistrate based his decision

151 I. C. 279=85 Cr. L. J. 1296=4 A. W. R. 1526.

(1) *In re Bai Aisha*, 53 B. 149=1929 Bom. 81=31 Bom. L. R. 62=2 Cr. L. W. 817=117 I. C. 331=30 Cr. L. J. 772.

(2) *Emperor v. Gullisahu*, 14 Cr. L. J. 673; *Emperor v. Huseinally*, 7 Bom. L. R. 463.

(3) *Daulat Ram v. Crown*, 8 P. R. 1919 Cr.; see also *Khatari v. Emperor*, 6 P. R. 1893. Cr.

(4) *Prin Singh v. Bhola*, 14 P. R.

1908 Cr.=9 Cr. L. J. 103.

(5) *Nizam of Hyderabad v. Jadob*, 19 C. 52.

(6) *In re Juggat Chander*, 2 Cal. 110.

(7) *Charde v. Empress*, 40 P. R. 1884 Cr.

(8) *Nolin Krishna v. Russick Lall*, 10 C. 1047; *Bhattoo Jivaji v. Mulji Dayal*, 12 B. 377.

(9) *In re Rajani Kant*, 2 O. W. N. 672.

shown to have been caused by the joint trial(1). But in one case it has been held that in such a case the trial is bad and no question of prejudice arises. Where, therefore, a joint trial is bad, it is open to an accused person who has been convicted at such trial, to take the point of misjoinder in revision, even if it was not taken before in either of the courts below, and there is no obligation on him to prove prejudice(2).

Illegal joinder of charges.—Where the accused was tried at one trial for committing eleven different offences of the same kind it was held that although the joinder of the charges was illegal and the conviction therefore bad, the High Court was not bound to interfere in revision as the accused did not appear to have been prejudiced by the misjoinder, but had pleaded guilty and had made no application for revision(3). Where it was found that a technical offence was committed by the petitioner under s. 170 I. P. C. and it was also found that the petitioner acted rather through vanity than with any criminal intention the High Court after setting aside the conviction on the ground of misjoinder of offences, did not think it necessary to order further inquiry(4).

Improper order.—Under this section, read with section 435, the High Court has power to revise an order or proceeding which, though legal, is, in its opinion, sufficiently improper to justify its interference(5).

Illegal order purporting to act in executive capacity.—When an illegal order is passed and action taken which involves matters coming within the purview of law and justice and within the scope of the authority of the courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a judicial officer, more particularly when no authority other than that of a judicial nature for this action is cited; and the High Court can interfere in revision(6).

Misreading of evidence and fundamental errors.—The High Court, can under s. 435, interfere in revision on the grounds of misreading of documentary evidence and fundamental errors in principle which vitiate the conduct and disposal of the case(7).

Extradition.—It has been held by the High Court of Calcutta(8), and following it by the High Court of Allahabad(9) that the High Court's power of revision and superintendence do not extend to proceedings under the Extradition Act of 1903, but if arrested or detained in custody, the accused may question the legality of the proceedings,

(1) *Ala Dya v. Emperor*, 5 P. B. 1906 Cr. = 4 Cr. L. J. 75

(2) *Dalsuk Roy v. Emperor*, 81 I. C. 843 = 25 Cr. L. J. 807; See *Emperor v. Manant*, 92 I. C. 689 = 27 Bom. L. R. 1843 = 49 B. 892 = 1926 B. 110 = 27 Cr. L. J. 305.

(3) *Emperor v. Tha Byaw*, 4 L. B. R. 815 = 9 Cr. L. J. 15.

(4) *Muthusami v. Tahsildar of Ramnad*, A. I. R. 1933 M. 484 = 1933 Cr. C. 662 = 1933 M. Cr. C. 187 = 146 I. C. 195 = 24 Cr. L. J. 1183

(5) *Faiz Mohammad v. Emperor*, 9 N. L. R. 81.

(6) *S. N. v. Emperor*, 4 P. B. 1909 Cr. at p. 9

(7) *Emperor v. Bal Gangadhar Tilak*, 33 B. 473 = 10 Bom. L. R. 973 = 9 Cr. L. J. 226 = 4 I. C. 277.

(8) *Rudolf Stallmann v. Emperor*, 88 C. 547; *Gull v. Emperor*, 42 C. 793; *In re Rudolf Stallman*, 39 C. 164 see also *In re Bai Arha*, 117 I. C. 521 = 30 Cr. L. J. 772 = 53 B. 149 = 2 Cr. Law. 817 = 31 Bom. L. R. 62 = 1929 B. 81.

(9) *Sandal Singh v. District Magistrate*, 56 A. 402 = A. I. R. 1934 A. 148 = 1934 Cr. C. 214 = 1934 A. L. J. 656 =

not do so(1). As, however, there is an appeal on behalf of Government from an acquittal, attempt to obtain virtually an appeal from such a finding in proceedings for revision should on public grounds be discouraged(2). It has thus been the settled practice that the High Court will not ordinarily interfere with an order of acquittal at the instance of a private prosecutor, because it is always open to the aggrieved complainant to move the Local Government to appeal under s. 417(3). The High Court should not entertain an application by a complainant to revise an order of acquittal after the Local Government has declined to direct an appeal against it(4). Nor will the High Court as a rule interfere in revision with acquittals on a reference by a Magistrate where the Local Government might have appealed and not done so(5). Even in the case of a reference by a Sessions Judge, the High Court will not as a rule, reverse an acquittal when the Government has a right of appeal, and has not appealed, especially in a question of public administration like correct weight and measures(6). A reference under s. 438 recommending revision of orders of acquittal, stands on no higher footing than an application of a private prosecutor for such revision(7). The powers of the High Court in criminal revision are not intended for the gratification of private malice, nor are they to be used to indicate the position of a private prosecutor where a merely technical offence has been committed, however, clearly that technical offence may have been proved(8).

When High Court will not interfere.—It is not usual for a High Court to interfere in revision with the decision of the lower courts when that decision is based upon a consideration of the evidence but

52 I O 788 = 20 Cr L J. 708 (especially in a case like defamation); *Faujdar v. Kasi*, 42 C 612; *Rakhal Das v. Kailash*, 11 C. L. J. 119 (so also in a case of insult); *Mathura v. Chakra*, A. A. I R. 1935 O. 176, but the High Court will not move in such a case unless there is some glaring defect

(1) *Thandavan v. Perianna*, 14 M 863; *Binda Pershad v. Ripusudan*, 5 N. L. R. 4; *Reddy Ramanya*, *In re*, 2 Weir. 570; *Thandavan v. Perianna*, 2 Weir. 571; *Queen-Empress v. Shekh Badruddin*, 8 B 197; *Empress v. Miyaji*, 3 B. 150; *Qayyam Ali v. Fayyaz Ali*, 27 A. 359; *Faujdar v. Kasi*, 42 C 612; *Gulli v. Narain Singh*, 2 Pat. 708; *Anant v. Hari Charan*, 26 Cr. L. J. 516 = 85 I O 356 = 2 Pat. L. R. 250 = A. I. R. 1925 Pat. 821; *Damodar v. Jujhar Singh*, 26 Cr. L. J. 1348 = 89 I. O. 383 = A. I. R. 1926 Nag. 115; *Bachcha v. Bachcha*, 28 O. C. 384 = 12 O. L. J. 63 = 99 I. C. 934 = 2 O. W. N. 50 = A. I. R. 1925 O. 321 = 27 Cr. L. J. 854; *Siban Rai v. Bhagwant*, 5 Pat. 25 = 6 Pat. L. T. 833 = 27 Cr. L. J. 235 = 92 I. O. 219 = A. I. R. 1926 Pat. 176; per Mullick, J. Contra

Per Macpherson, J.; *Emperor v. Atma Ram*, A. I. R. 1934 A. 846 = 4 A. W. N. 246 (High Court will not go into evidence)

(2) *Thandavan v. Perianna*, 14 M. 363

(3) See the cases cited in the last but one note.

(4) *Graham v. Elsey*, 8 L. B. R. 356.

(5) *In re Aminuddin*, 24 A. 846, followed in *Emperor v. Madar Baksh*, 25 A. 128 and in *Emperor v. Gur Dayal*, 12 A. L. J. 255; *Empress v. Jahandi*, 23 C. 249; *Hrishikesh v. Abadhaut*, 44 C. 703; *Empress v. Ranga*, 15 M. 86, *Mogal Beg*, *In re*, 35 M. L. J. 665; *Re Sinnu Gowdan*, 38 M. 1028; *Crown v. Achhar*, 5 Lah. 16 (19).

(6) *Emperor v. Hark Chand*, 40 A. 84; *Ct. Nathu Mal v. Abdul Haq*, 1930 Lah. 159

(7) *Dabiraddi v. Sakat Molla*, 56 C. 924 = 83 C. W. N. 258; *Hrishi Kesh v. Abadhaut*, 18 Cr. L. J. 309 = 38 I. C. 421 = 21 C. W. N. 250.

(8) *Narayan v. Emperor*, 125 I. C. 134 = 9 Pat. 113 = A. I. R. 1930 Pat. 211 = 31 Cr. L. J. 789 = 1930 Cr. O. 509 = Ind. Eul. 1930 Pat. 466.

not upon the evidence recorded but on unrecorded evidence taken verbally subsequently on the spot(1); or where there were previous convictions alleged against the accused, and the Magistrate, without questioning the accused, or calling for proof of the convictions, convicted and sentenced him(2).

Revision of cases in which term of imprisonment has been served—The High Court is competent, in the exercise of its powers of revision under this section, to interfere with a conviction, even though, in consequence of the expiry of the sentence, it may not be possible to interfere with the latter(3).

Order passed without jurisdiction—The High Court will interfere with an order of a Magistrate passed without jurisdiction under a certain Act, even though that Act provides that the conviction under it shall not be open to appeal or revision(4).

Inferences not warranted by evidence.—Inferences not warranted by the evidence, drawn to the prejudice of the accused, are good grounds for a criminal revision(5).

How powers of High Court can be revoked.—See notes above under the head "or otherwise comes to its knowledge." The High Court may exercise its powers of revision upon information in whatever way received, and, consequently upon the petition of a private person occupying the position of a complainant(6). The powers to call for records under this section are at all times to be exercised and such powers may be put in force not merely on matters coming before the Judge or Magistrate in court, but also on matters coming to his knowledge on reliable information(7). The High Court can exercise the revisional powers given to it under this section, on an application made by the Government in an official communication instead of through the law officer of the Crown(8). Though the section gives the High Court power to call for cases not only on judicial information, but also "which otherwise come to its knowledge," yet, in most circumstances, the right to practice is that Judges should be moved in open court(9).

Interference with acquittal at the instance of a private prosecutor.—There is a conflict of case-law on the point whether the High Court will interfere with an order of acquittal on the application of a private prosecutor. In some cases it has been held that it can do so on the application of a private prosecutor(10), and in others that it can

(1) *In re Sreeputte*, 24 W. R. 14 Cr.

(2) *Crown v. Santu*, 12 P. R. 1874 Cr.

(3) *Empress v. Sinha*, 7 A. 185.

(4) 2 B. L. R. 20

(5) *Nga Shwe Kyaw v. Emperor*, 18 Cr. L. J. 116=37 I. C. 468

(6) *In re Aurokiam*, 2 M. 88=2 Weir. 566.

(7) 2 Weir. 538.

(8) *Empress v. Mata Din*, (1887) A. W. N. 144.

(9) *Empress v. Abdul*, 16 B. 580=

Bat. Un. Cr. Cas 577.

(10) *In the matter of Hardeo*, 1 A. 139; 2 B. L. R. 25; *Sukho v. Durga*, 2 A. 448; *Antcar Ali v. Chairman, Deogar Municipality*, 99 I. C. 112=6 Pat. 88=28 Cr. L. J. 80=A. I. R. 1916 Pat. 449 (450) (or the High Court may of its own motion set aside such an order); *Queen Empress v. Basant Lal*, 27 C. 320; see also *Mangals v. Bama Charan*, 38 C. 765; *Shaiikh Bagu v. Raika Singh*, 18 C. W. N. 1214; *Gangadhar v. Reginald*, 25 C. W. N. 609; *Sunderabai v. Kishore Singh*,

a remedy can easily be obtained from the civil court(1). The revisional jurisdiction of the High Court will not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code(2).

Orders which are subject to revision.—A Magistrate acting under s. 221, Madras Local Boards Act, acts in the capacity of a Magistrate and his orders are subject to the provisions of ss. 435 and 439(3). Under this section the High Court has power to revise an order passed by a Magistrate granting or refusing an application of a committee under section 201 of the Punjab Municipal Act(4). Under the Code as amended by Act XVIII of 1923, the High Court has jurisdiction to interfere in revision with orders passed under section 144 or section 145 of the Code(5). The High Court has jurisdiction to revise an order passed in a proceeding under s. 488 instituted by a China woman against a Burmese husband(6).

Reversal of illegal order under s. 135.—This section read with s. 435 and 423(c), enables the Chief Court to reverse an illegal order on an application under s. 135(7).

Order granting bail.—The High Court has jurisdiction to consider whether or not the order of a subordinate court passed under s. 497, should or should not be maintained and also whether under the provisions of sub-s.(5) of s. 497, an accused person should be allowed to continue at large(8). Sections 497(3) and 439 empower the High Court to set aside an order of a Magistrate allowing bail in a non-bailable offence, after notice to the opposite party(9). But where a Sessions Judge, after considering the evidence, comes to the conclusion that there are no reasonable grounds for believing the accused guilty and admits him to bail the High Court will not go behind the finding and discharge the bail either under section 439 or any other provision of law(10). When an application of an urgent nature *e. g.*, for cancellation of bail granted by the Sessions Judge is made by the District Magistrate, the rule that the High Court will not interfere with the order of the Sessions Judge except on an application by Government, will not hold good. It is, however, desirable that the Public Prosecutor should apply for the orders of Government in cases in which there is sufficient time to do

nand v. Emperor, 25 Cr. L. J. 184=78 I. C. 230=17 S. L. R. 245=1924 Sind. 129

(1) *Loke Nath v. Nidu Biswas*, 6 C. W. N. 469.

(2) *Ahsanullah v. Mansukh*, 36 A. 403.

(3) *Rangesa Rao v. Swaminatha*, 108 I. C. 414=27 L. W. 320=1929 M. 495=29 Cr. L. J. 389

(4) *...*

(5) *Muthuswami v. Thangamma Appar*, 53 M. 320=58 M. L. J. 148=31 L. W. 16=1930 M. W. N. 82=2 M. Cr. C.

277=1930 Cr. C. 273=121 I. C. 833=31 Cr. L. J. 324=13 A. I. Cr. R. 461.

(6) *Maung v. Maung*, 76 I. C. 111=4 U. B. R. (1922) 169=25 Cr. L. J. 111

(7) *Rom Kala v. Ganda*, 42 P. R. 1885 Cr.

(8) *Emperor v. Pritam Singh*, 33 Cr. L. J. 335=33 P. L. R. 987=136 I. C. 709=A. I. R. 1932 Lah. 433=1932 Cr. O. 579=Ind. Rul. 1932 Lah. 245; *Local Government v. Ghulam Jalani*, 82 I. C. 755.

(9) *Emperor v. Bashiran*, 83 I. C. 483=1923 A. 479=26 Cr. L. J. 4

(10) *Queen v. Thimma Reddi*, 10 M. L. J. 411.

it would examine the evidence even in the exercise of its revisional powers if there are reasons justifying its doing so(1). No reason can be entertained ordinarily in cases which involve appreciation of evidence by subordinate courts unless exceptional grounds are shown to exist(2). The High Court has no power to interfere where there is a difference of opinion between the Magistrate and the Judge as to the credibility of certain witnesses(3). A decision given on evidence which was in some parts discrepant, and about the credibility of which there might be considerable question, would not, even if the High Court thought the evidence doubtful, be a material error in a judicial proceeding within the meaning of this section(4). When a Sessions Judge, after a careful and deliberate weighing of the evidence on the record, comes to a conclusion unfavourable to the accused, the High Court is not justified in interfering under this section, however, much it might hold a contrary opinion as to the value of the evidence(5); for although the High Court has power to go into the questions of fact, under this section, it will only exercise the power in cases in which it finds that it will be in the interests of justice to do so(6). The High Court will not interfere in revision unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice(7). The High Court will not ordinarily interfere where no prejudice is shown to have resulted to the accused from the illegality or irregularity complained of(8); or where the case has been disposed of on the merits without hearing the accused's pleader(9); or where a discretion has been exercised which is not on the face of it arbitrary(10); or where a prisoner is convicted by a subordinate tribunal of an offence within its jurisdiction, but the evidence discloses an offence of a graver character beyond the jurisdiction of that tribunal(11); or where the relief sought might have been got from lower court of concurrent revisional jurisdiction, unless the latter court has rejected such an application(12); or where there has been a long delay in applying for revision and the delay is not explained or accounted for by the applicant(13); or where there is remedy by appeal(14); or where

Cr; *Emperor v. Thabyan*, 4 L. B. R. 815; *Crown v. Hari Singh*, 29 P. W. R. 1913 Cr; *Emperor v. Gian Singh*, 111 I. O. 665 = A. I. R. 1928 Lah. 230 = 29 Cr. L. J. 905.

(9) *Olayet v. Emperor*, 1 Pat. 589.

(10) *Gulli v. Narain Singh*, 2 Pat. 708.

194 = 1931 Cr. O. 451.

(3) *Qodla v. Barkat*, 18 W. R. Cr. 7.

(4) *Re Huss Pereshad*, 24 W. R. Cr. 60; and see *In re Aurchiam*, 2 M. 38.

(5) *Reg v. Belilos*, 12 B. L. R. 249 = 20 W. R. Cr. 61.

(6) *Nobin Krishna v. Hassick Lal*, 10 C. 1047.

(7) *Umakant v. Emperor*, 9 Bom. L. R. 706; *Narain Prasad v. Emperor*, 20 A. L. J. 909; *Tirumalraja v. Govind Dass*, 29 M. 561.

(8) *Aladya v. Emperor*, 5 P. R. 1906

Emperor v. A. I. R. 1905

(12) *Kalicharan v. Emperor*, (1904) A. W. N. 232; *Matai v. Anant Ram*, (1890) A. W. N. 164.

(13) *Emperor v. Jagan Nath*, 27 A. 463; *Queen-Empress v. Ram Narain*, 8 A. 514; *Queen-Empress v. Ala Bahsh*, 6 A. 484; *Atadh Behari v. Ducarka*, 1 Pat. L. J. 165.

(14) *Jumo v. Emperor*, 16 Cr. 1. J. 257 = 28 I. C. 108 = 8 S. L. R. 229; *Hira-*

Order under s. 137.—The High Court has not only power to confirm an order passed under s. 137, but it has also power to modify it to such extent as may seem fit(1).

Order under s. 144.—Under the Code as amended by Act XVIII of 1923, the High Court has jurisdiction to interfere in revision with orders passed under s. 144 of the Code(2). A High Court will not decline to revise an order, passed under section 144, Cr. P. C., after the expiry of two months from the date of the order. It will examine the order to see whether it was passed with or without jurisdiction, and, if in its opinion it is a wrong order, it will express its views about it(3). But it is the practice of the Patna High Court not to interfere with an order under s. 144, the operation of which has expired(4). The High Court has no power to award costs incurred before it on the hearing of a criminal revision petition, against an order passed under Chapter XII(5).

Order under s. 145.—Since the amendment of the Code in 1923 the High Court has power under ss. 435 and 439 to interfere in the course of its ordinary revisional criminal jurisdiction with any erroneous orders passed in proceedings under s. 145(6). An order purporting to be one under s. 145 passed without following the procedure laid down therein and tacked on to an order dismissing a complaint under section 297, Indian Penal Code, is illegal and without jurisdiction and is, therefore, liable to be set aside on revision(7). A general remark in an order under s. 145 that the documentary evidence is not relevant and that the oral evidence is not satisfactory, without referring to the evidence and without giving reasons, is not a disposal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision(8). If a Magistrate omits to make the preliminary written order as required by section 145 (1) or make the inquiry under s. 145 (4), any order passed by him under the section is *ultra vires* and High Court has jurisdiction to interfere in revision(9). The High Court has jurisdiction to interfere under sections 435 and 439 with orders passed under section 145 where the question of the Magistrate's jurisdiction is involved, or the High Court is satisfied that there has been a gross miscarriage of justice(10).

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(2) *Muthuswami v. Thangammal Ayyar*, 63 M. 320.

(3) *Muthuswami v. Thangammal Ayyar*, 63 M. 320.

(4) *Muthuswami v. Thangammal Ayyar*, 63 M. 320.

(5) *Yeerapa v. Avudayammal*, 86 I. O. 147=48 M. L. J. 106=A. I. R. 1925

Mad. 428=26 Cr. L. J. 707=21 I. W. 688

(6) *Muthuswami v. Thangammal*, 1930 M. 242=121 I. O. 833=53 M. 320

(7) *Haider Ali v. Emperor*, 6 I. O. 955=24 P. W. R. 1910 Cr.=11 Cr. L. J. 422.

(8) *Lakshpat v. Emperor*, 72 I. O. 544=1 P. L. R. 152=24 Cr. L. J. 492=4 Pat. L. T. 579.

(9) *Amar Singh v. Kishan Singh*, 1 Lah. Cas. 53.

(10) *Palani Chetty v. Pathina Chetty* 24 I. C. 597=26 M. L. J. 208=(1914) M. W. N. 952=15 Cr. L. J. 509 Cases decided before the amendment of the Code which are no longer good law con,

so(1). After the High Court has disposed of an application for revision under this section an accused person who is undergoing a sentence of imprisonment cannot be let out on bail under s. 493 on the ground that he intends to apply to the Privy Council for special leave to appeal against the order of the High Court. The case having been completely and finally disposed of by the High Court, there remains no ground on which bail can be granted(2).

Order under s. 110—It is very difficult for the High Court to interfere in revision in cases under s. 110 of the Code but when a person is sentenced to imprisonment for failure to furnish security under that section, the High Court has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interests of the public security to send the accused to prison or to bind him down(3). A High Court is not a court of appeal in cases under s. 110, and its duty is not to weigh the evidence given on behalf of one side or the other but only to see whether the court below has approached the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused(4). The High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Code but it will exercise its powers of interference in a case where the order of the Magistrate is based on materials which are clearly insufficient to support the order(5).

Order under s. 118.—A High Court will not ordinarily interfere on the merits of order passed under s. 118 except in very exceptional circumstances, provided that the court hearing the appeal under s. 406 of the Code shows in its judgment that it has really, and not merely nominally, gone through the evidence on record. But where the judgment of the Sessions Judge does not fulfil these requirements and there is a clear misconception of the evidence, the High Court will interfere(6).

Order under s. 133.—A Magistrate's order under s. 133 made by a Magistrate for production of evidence being made absolute and set aside(7). But it is not the practice of the High Court to entertain an application in revision against an order made by a Magistrate in a proceeding under s. 133, unless the party aggrieved has first moved the Sessions Judge under ss. 435 and 438(8).

(1) *Emperor v. Wahidino*, 117 I. C. 773=30 Cr. L. J. 815=A. I. R. 1929 Sind 137.

(2) *Hunmantrao v. Emperor*, 91 I. O. 1001=21 N. L. R. 161=27 Cr. L. J. 185=1926 Nag. 223.

(3) *Alimuddin v. Emperor*, 62 I. C. 36=22 A. L. J. 678=1924 A. 569=25 Cr. L. J. 1172.

(4) *Kewal Kishore v. Emperor*, 69 I. C. 147=12 O. L. J. 413=A. I. R. 1925 O. 473=26 Cr. L. J. 283; *Raj Narain*

v. Emperor, 101 I. C. 886=L. R. 8 A. 53 Cr. =25 A. L. J. 393=A. I. R. 1927 All 391=28 Cr. L. J. 502.

(5) *Chandra Pal v. Emperor*, 76 I. O. 429=38 C. L. J. 198=23 I. W. N. 23=1924 C. 114=25 Cr. L. J. 189.

(8) *Rash Behary v. Phani Bhusan*, 48 O. 534.

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Order under s. 145.—Since the amendment of the Code in 1923 the High Court has power under ss. 435 and 439 to interfere in the course of its ordinary revisional criminal jurisdiction with any erroneous orders passed in proceedings under s. 145(6). An order purporting to be one under s. 145 passed without following the procedure laid down therein and tacked on to an order dismissing a complaint under section 297, Indian Penal Code, is illegal and without jurisdiction and is, therefore, liable to be set aside on revision(7). A general remark in an order under s. 145 that the documentary evidence is not relevant and that the oral evidence is not satisfactory, without referring to the evidence and without giving reasons, is not a disposal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision(8). If a Magistrate omits to make the preliminary written order as required by section 145 (1) or make the inquiry under s. 145 (4), any order passed by him under the section is *ultra vires* and High Court has jurisdiction to interfere in revision(9). The High Court has jurisdiction to interfere under sections 435 and 439 with orders passed under section 145 where the question of the Magistrate's jurisdiction is involved, or the High Court is satisfied that there has been a gross miscarriage of justice(10).

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(2) *Muthuswami v. Thangammal*
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(5) *Yeevava v. Acudayammal*, 86 I.
O. 147=48 M. L. J. 106=A. I. R. 1925

Mad. 438=26 Cr. L. J. 707=21 L. W.
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(6) *Muthuswami v. Thangammal*,
1930 M. 242=121 I. C. 833=53 M. 320

(7) *Haider Ali v. Emperor*, 6 I. O.
955=24 P. W. R. 1910 Cr.=11 Cr. L. J.
422

(8) *Lakshpat v. Emperor*, 72 I. O.
544=1 P. L. R. 152=24 Cr. L. J. 432
=4 Pat. L. T. 579.

(9) *Amar Singh v. Kishen Singh*,
1 Lah. Cas 53.

(10) *Palani Chetty v. Pathina Chetty*
24 I. C. 597=26 M. L. J. 208=(1914)
M. W. N. 352=15 Cr. L. J. 500. Cases
decided before the amendment of the Code
which are no longer good law con.

Orders under section 146.—It is only when the order of the District Magistrate offends against an elementary rule founded on the desire of the courts to place the parties to a proceeding on a footing of absolute equality, that the High Court can set it aside in revision(1). But the question whether there is a state of emergency or not is a matter within the trial court's discretion and his action in ordering attachment for maintenance of peace should not be lightly interfered with in revision(2).

Orders under s. 147.—The High Court has power under this section to interfere on the revision side with an order passed under s. 147 without complying with the procedure prescribed and giving notice to the party concerned(3). But the fact that the Manager of an estate and not his employer, the owner of the estate has been made a party to a proceeding under s. 147 is a mere irregularity, or at most an error of law which does not affect the Magistrate's jurisdiction(4).

Orders of Presidency Magistrate.—The High Court has, as a court of revision, jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial(5). The High Court has also jurisdiction under s. 15 of the Charter Act, to interfere with the order of a Presidency Magistrate dismissing a complaint under s. 203 and direct a further inquiry(6).

Orders which are not subject to revision.—(1) *Order under Railways Act.*—Under s. 113 (+), Railways Act, an order of a Magistrate is merely an administrative or a ministerial order and the proceedings before him are not criminal proceedings in a criminal court within the scope of the Code and, therefore, such an order is not open to revision(7).

(2) *Order under village Self-Government Act.*—The High Court cannot interfere under this section with the conviction and sentence passed by the union bench or court under the Village Self-Government Act (Bengal V of 1919). In a proper case, the High Court might interfere under section 107 of the Government of India Act(8).

(3) *Order under Bengal Alluvial Lands Act.*—An order under the Bengal Alluvial Lands Act, 1920, directing huts erected on a plot to be
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sult *Layee Ammal v. Srirangaraya*, 71 I. C. 228=24 Cr. L. J. 100=31 M. L. T. 202=16 L. W. 497=(1922) M. W. N. 629=43 M. L. J. 621=1923 M. 60.

(1) *Lachmi Kue v. Gajadhar*, 104 I. C. 104=9 Pat. L. T. 109=9 A. I. Cr. R. 8=28 Cr. L. J. 776=A. I. R. 1927 Pat. 393.

(2) *Prem Kaur v. Benarsi Das*, A. I. R. 1913 Lah. 409=34 P. L. R. 368=1933 Cr. C. 650=14 Lah. 615=142 I. C. 207=34 Cr. L. J. 312.

(3) *Crown v. Bhana*, 12 F. R. 1909 Cr.=105 P. L. R. 1909.

(4) *Chhakauri Lall v. Isner Singh*, 91 I. C. 814=6 Pat. L. T. 799=27 Cr. L. J. 142=A. I. R. 1926 Pat. 196.

(5) *Emperor v. Varjicandas*, 27 B. 84, *Emperor v. Nanda Gopal*, 20

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60 L. J. 705; *Debi Buz v. Jut Mal*, 83 C. 1282.

(7) *Secretary of State v. Goindram*, 126 I. C. 58=A. I. R. 1930 S. 162=1930 Cr. C. 646=31 Cr. L. J. 952=Ind. Rul. 1930 Sind. 234=24 S. L. R. 399.

(8) *Yasin Moral v. Isaf Khan*, 53 C. 1080.

(9) *Osman v. Kader*, 57 C. 232.

(4) *Orders under the Press Act.*—An order demanding from the keeper of a press under section 3 (a) of the Press Act security in supersession of a previous order dispensing with security is not open to revision(1); nor is an order under section 8 of the act for the deposit of security by the publisher of a news-paper(2); nor is an order of forfeiture passed under section 12 of that Act(3).

(5) *Court cannot revise its own order.*—A court cannot revise its own revisional order. Even a High Court cannot do this(4). No application for revision under s. 439, lies to the High Court in a case where the applicant has been convicted and sentenced at a trial held by a Single Judge of the Chief Court with the aid of Jury in the exercise of that court's original criminal jurisdiction(5). Neither a Division Bench nor a Full Bench of the Chief Court, Punjab, has power to revise, either on appeal or revision, the judgment of a single Judge of that court exercising original jurisdiction(6). Even a Judge of the High Court cannot, himself revise his own judgment(7). Nor a single Judge of the High Court has power to revise an order passed by another single Judge in appeal(8). Section 434 is the only section which enables the Division or Full Bench of the High Court to review the judgment of a single Judge exercising original criminal jurisdiction(9).

Revisional powers of High Court.—This section read with s. 423, Cr. P. C., confers upon the High Court, as a court of Revision, all the powers conferred upon it as a court of appeal, subject only to limitation set forth in para. 4, that nothing in the section shall be deemed to authorise the High Court, acting in revision, to convert a finding of acquittal into one of conviction(10). Under this section, a court has jurisdiction to exercise the powers of an appellate court conferred by section 423 (1) (c) and *a fortiori* to reverse or alter an order of commitment passed by a Sessions Judge under section 423 (1) (b) (11). This section confers on the High Court power granted to a court of appeal by s. 423 and one of the powers so granted is that of directing an accused to be committed for trial(12). The High Court can also set aside an order of discharge, and direct a charge to be framed and tried by the proper court. It can also direct a further enquiry instead of a com-

(1) *Mrs Besant v. Emperor*, 39 M. 1095.

(2) *Aga Syed v. Emperor*, 17 O. W. N. 1245.

(3) *In re Muhammad Ali*, 41 C. 466 S. B.

(4) *In re Bhogi Reddi*, A. I. R. 1933 M. 247=142 I. C. 138=(1932) M. W. N. 1162=Ind. Rul. 1933 Mad. 192=34 Cr. L. J. 278=1933 Cr. C. 374=65 M. L. J. 6.

27 A. 91; *Empress v. Fox*, 10 B. 176; *In re Abdool Sobhan*, 6 O. 63.

(7) *Hale v. Emperor*, 1 P. B. 1909 Cr.=9 Cr. L. J. 806; *In re Gibbons*, 14 O. 42.

(8) *Emperor v. Kale*, 45 A. 143 (145)

(9) *Hale v. Emperor*, 1 P. R. 1909 Cr.

(10) *Emperor v. ...*

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Orders under section 146.—It is only when the order of the District Magistrate offends against an elementary rule founded on the desire of the courts to place the parties to a proceeding on a footing of absolute equality, that the High Court can set it aside in revision(1). But the question whether there is a state of emergency or not is a matter within the trial court's discretion and his action in ordering attachment for maintenance of peace should not be lightly interfered with in revision(2).

Orders under s. 147.—The High Court has power under this section to interfere on the revision side with an order passed under s. 147 without complying with the procedure prescribed and giving notice to the party concerned(3). But the fact that the Manager of an estate and not his employer, the owner of the estate has been made a party to a proceeding under s. 147 is a mere irregularity, or at most an error of law which does not affect the Magistrate's jurisdiction(4).

Orders of Presidency Magistrate.—The High Court has, as a court of revision, jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial(5). The High Court has also jurisdiction under s. 15 of the Charter Act, to interfere with the order of a Presidency Magistrate dismissing a complaint under s. 203 and direct a further inquiry(6).

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(2) *Prem Kaur v. Benarsi Das*, A.
I. R. 1913 Lah 409=31 P. L. R. 368=
1913 Cr. C. 650=14 Lah. 615=142 I. O.
207=84 Cr. L. J. 342.

(3) *Crown v. Bhana*, 12 P. R. 1903
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(4) *Chhakauri Lall v. Isner Singh*,
91 I. O. 814=6 Pat. L. T. 799=27 Cr.
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(5) *Emperor v. Varjicandas*, 27 B.
84, *Emperor v. Nanda Gopal*, 20
C. W. N. 1123; *Protap Singh v. Khan*
Muhammad, 86 O. 991; *Colville v.*
Kristo, 26 C. 746

(6) *Charoobala v. Barcudra*, 27 O.
126; *Kedar Nath v. Khetra Nath*,
6 C. L. J. 705; *Debi Bux v. Jut Mal*,
33 C. 1282

(7) *Secretary of State v. Gobind-*
ram, 126 I. C. 59=A. I. R. 1930 S. 162
=1930 Cr. C. 646=31 Cr. L. J. 952=
Ind. Rul 1930 Sind 231=21 S. L. R. 389

(8) *Yasin Moral v. Isaf Khan*, 59
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(1) *Mrs Besant v. Emperor*, 39 M. 1085.

(2) *Aga Syed v. Emperor*, 17 O. W. N. 1345.

(3) *In re Muhammad Ali*, 41 C. 466 S. B.

(4) *In re Bhogi Reddi*, A. I. R. 1933 M. 247=142 I. C. 188=(1932) M. W. N. 1162=Ind. Rul. 1933 Mad. 199=34 Cr. L. J. 278=1923 Cr. O. 374=65 M. L. J. 6.

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J. 1975=11 O. L. J. 748.

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(7) *Hale v. Emperor*, 1 P. B. 1909 Cr.=9 Cr. L. J. 306; *In re Gibbons*, 14 O. 42.

(8) *Emperor v. Kale*, 45 A. 143 (145)

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mittal(1). The High Court has, as a court of revision jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial(2). Under section 423 (1) (d) the High Court has power, as a court of revision, to interfere with an order passed by a Magistrate under section 522, of the Code(3). But it is to be remembered that all the powers of Chapter XXXI cannot be exercised by the High Court in its revisional jurisdiction but only those vested by the section here specified(4). The question has thus been debated whether the High Court has power as a court of revision under this section read with section 423 (1) (d), to sanction the composition of an offence when entered into after the conviction of the accused. In one view the order of composition is, and in another it is not, a consequential or incidental order under section 423 (1) (d)(5). Under section 345 sub-sec. (5-A) of the Code as amended a High Court acting in the exercise of its powers of revision under this section may allow any party to compound any offence which he is competent to compound under that section(6). The High Court's power merely as a court of appeal includes all its powers of revision when there is a question of giving relief to the appellant but when it is a question of acting against the appellant in enhancing the sentence, that on the face of this section has to be done under its revisional power as distinct from its power merely as a court of appeal(7).

Power to quash proceedings—The High Court has, in the exercise of its powers conferred by section 439, read with section 423 sub-section 1, clause (c), jurisdiction to quash criminal proceedings pending in the court of a Magistrate(8). The High Court can quash criminal proceedings initiated against a person where there is nothing

(1) *Ibid.*, cf. *Mathura Prasad v. Narendra Singh*, A. I. R. 1930 Nag. 150=31 Cr. L. J. 413=123 I. C. 334; *Hakim Singh v. Lal Singh*, 121 I. C. 289, *Bhantal v. Kallu*, 121 I. C. 671=A. I. R. 1929 Nag. 360 (4).

(2) *Emperor v. Varjivandas*, 27 B. 81; *Colville v. Kristo Kishore*, 26 C. 746.

(3) *Ahmed Ali v. Keenoo Khan*, 36 C. 41; *Manki v. Bhaguanti*, 27 A. 415.

(4) *Akshoy v. Rameswar*, 43 C. 1143.

(5) Compare *Emperor v. Shiboo*, 45 A. 17=74 I. C. 1046=1922 A. 468=24 Cr. L. J. 854; *Emperor v. Hussain Khan*, 39 A. 293=39 I. C. 690=15 A. L. J. 136=18 Cr. L. J. 546; *Ram Sarup Emperor*, 19 O. C. 161 with *Audhi Rai v. Emperor*, 23 Cr. L. J. 80=65 I. C. 432; *Akshoy v. Rameswar*, 43 C. 1143=35 I. C. 515=20 O. W. N. 1071=17 Cr. L. J. 939; *Rs. Ramganyya*, 39 M. 604; *Crown v. Harnam Singh*, 35 P. R. 1918 Cr.

(6) *Emperor v. Brij Behari*, 46 A.

91=81 I. C. 717=21 A. L. J. 833=9 O. & A. L. R. 1083=1924 A. 203=25 Cr. L. J. 1005, *Nizam Din v. Crown*, 27 P. L. R. 231; *Emperor v. Bhilya Lal*, 118 I. C. 681=32 Cr. L. J. 960=A. I. R. 1929 Nag. 360.

(7) *Kitabdi v. Emperor*, A. I. R. 1931 C. 450=35 O. W. N. 184=132 I. C. 247=1931 Cr. C. 601=32 Cr. L. J. 890.

(8) *S. C. Mittra v. Kali Charan*, 106 I. C. 631=1 Luck. Cas. 653=29 Cr. L. J. 102=A. I. R. 1928 Oudh. 104; *Amar Nath v. Emperor*, A. I. R. 1928 Lah. 945=10 L. L. J. 485=113 I. C. 536 (such power will be exercised in exceptional cases); *Kalunial v. Kishumal*, A. I. R. 1935 S. 81, there must appear some infraction or evasion of law calling for prompt redress.

but mere suspicion against him(1), and there is an utter want of discretion on the part of the Magistrate in instituting the proceedings(2) and no advantage would be gained by continuing the proceedings(3). Where it appears to the High Court that the continuance of certain proceedings before a subordinate court would mean an abuse of the processes of the court it is the duty of the High Court to interfere and to quash the proceedings(4). Quashing of proceedings is a term of compendious connotation, and the practical result of quashing is the setting aside or reversal of the order initiating the proceedings(5). The High Court has ample powers under this section to quash the commitment on a question of law(6).

Power to alter or reverse an order.—Under this section, the High Court has the powers, conferred on a court of appeal by s. 423, to alter or reverse an order of the lower court(7). It has thus power to revoke an order made by a subordinate court under s. 476(8). In exercising its powers under this section, it is open to the High Court to alter any finding and confirm a conviction, and that if the evidence on the record in a case be sufficient to warrant a conviction, the court would not be justified in setting such conviction aside, merely because the view taken of the evidence by the lower court is not sustainable, or some fact which ought to have been found by that court is not found or found incorrectly(9). But the High Court will quash the conviction where it is not supported by any legal evidence, *e. g.*, when the only evidence is the admission of a co-accused(10), or where it is based on an erroneous view of the law(11). But the High Court cannot interfere and set aside a valid conviction and sentence passed by a court of competent jurisdiction after careful consideration(12). Where at the hearing of an application in revision it appears that the facts established by the record do not justify the conviction of the applicant of the offence of which he has been convicted but do justify his conviction of a minor offence of a similar nature, it is within the discretion of the court to convict the applicant of such minor offence; but it is also within the discretion of the court to refrain from doing so(13).

Power to alter conviction for one offence into another offence.—The High Court has power to alter a conviction for one offence into a

(1) *Lila Ram v. Emperor*, 109 I. C. 356=9 Lah. L. J. 514=A. I. R. 1927 Lah. 862=29 Cr. L. J. 532.

(2) *In re Umbica Proshad*, 1 C. L. R. 268 at p. 272.

(3) *Chaitan Lal v. Emperor*, 16 A. L. J. 731.

O. 100.

(5) *S. C. Mittra v. Kali Charan*, 106 I. C. 694=1 Luck. Cas. 653=29 Cr. L. J. 102.

(6) *Emperor v. Mohd. Mehdi*, A. I. R. 1934 A. 963=4 A. W. R. 521.

(7) *Khepu Nath v. Grish Chunder*, 16 C. 730.

(8) See the case cited in the last note and *Mahomed Isharul Hug v. Empress*, 20 C. 249 (350); *In re Mathura Das*, 16 A. 80 (82); *Empress v. Srinivasu*, 21 M. 124 (126) F. B.

(9) *Balmukand v. Ghanisam*, 22 C. 391 (393). See *Re Basiraddi*, 21 C. 827.

(10) *Gholam Hosain v. Mahomed Baksh*, 14 F. B. 1868 (r.).

(11) *Empress v. Basant Lal*, 27 C. 320=4 C. W. N. 311.

(12) *Queen v. Ramdoyal*, 21 W. R. 47 Cr.; *Empress v. Sham Singh*, 36 P. R. 1884 Cr.; *Queen v. Belilios*, 20 W. R. 61 Cr.

(13) *Emperor v. Mansur Hussain*, 41 A. 687.

it will not be right to allow the prosecution to shape its case afresh after the whole matter has been thrashed out and the defects brought to light in the course of prolonged proceedings. No re trial should be ordered in such a case(1). The High Court as a court of revision is not competent to set aside the conviction and sentence of an accused by a Magistrate of competent jurisdiction, with a view to directing a new trial either (a) because subsequently to the conviction fresh evidence has been discovered of previous convictions showing the accused is an habitual offender, or (b) because the accused did not disclose his true identity, or gave a false name and address to the Police or the Magistrate; and thereby contributed to the non discovery before conviction of the evidence subsequently discovered showing him to be an habitual offender(2). The mere fact that the Magistrate has acted in contravention of the clear provisions of the law and that his findings are vitiated by a consideration of inadmissible and irrelevant evidence is not by itself a ground for ordering a new trial or reversal of the conviction by High Court if the guilt is established by legal evidence on record(3).

Power to direct further evidence to be taken.—The High Court under this section has power as an appellate court to direct evidence to be taken. No such powers are given to the Sessions Judge or the District Magistrate under s. 437(4). When a Magistrate omits to set out in the charge the previous convictions of the accused and to take evidence of such convictions, it is competent to the High Court sitting as a court of revision under this section, to direct that the charge should be amended by adding a statement of the fact of the previous conviction, and that evidence should be taken in support of the charge thus amended(5). A High Court sitting as a court of revision either under this section or under section 15 of the Charter Act has power to direct a subordinate Magistrate to take additional evidence, but it must on that evidence come to an independent finding itself and not accept the one arrived at by the Magistrate(6).

Findings of fact in revision.—The Code recognizes the power to review findings of facts, the reversal of which in the discretion of the court may be necessary in order to do justice. Section 435 itself requires the court to satisfy itself as to the "correctness or propriety of any finding" and to exercise the powers "conferred on a court of appeal," which include the reversal of the findings of fact(7). The High Courts of the different provinces have reversed or disregarded findings of fact, or entered into controverted facts for the purposes of arriving at a final judgment(8). A High Court undoubtedly has jurisdiction to

(1) *Kedar Nath v. Emperor*, 29 C.W. N. 409=41 C. L. J. 172=A. I. R. 1925 C. 603=26 (r. L. J. 849=85 I. C. 705. As to High Court's power to prevent a second trial, See *Emperor v. Brijmohan Das*, 53 A. 411

(2) *Empress v. Sham Singh*, 36 P. R. 1881 Cr

(3) *Devi Das v. Emperor*, A. I. R. 1920 Lah. 318 (2)=10 Lah. 794.

(4) *Moni Mohan v. Iscar Chunder*, 6 C. L. J. 251; *Emperor v. Mulla Ibrahim*, 3 Bom. L. R. 677.

(5) *Kasim v. Empress*, 19 P. R. 1870 Cr.

conviction for another offence at the same time maintaining the sentence(1). But as a rule it would obviously be unfair to the accused that he should be convicted of a more serious offence to which he had not pleaded in the lower court. The general principle is that on appeal or revision an accused person cannot be convicted of an offence of which he could not have been convicted by the court which tried him(2). Where a person is tried and convicted for an offence under section 186 the conviction can be altered into one under section 225-B when all the material facts are stated in the complaint and duly deposed to by witnesses and the accused would not be prejudiced by the alteration of the finding(3). Where there is an appeal by the prisoner from a conviction under section 304 of the Indian Penal Code (he having been committed to stand his trial under section 302 of the Indian Penal Code) and in addition, the High Court takes *seizin* of the case under its Revisional jurisdiction, the conviction for the lesser offence under section 304 of the Indian Penal Code can be converted into one under section 302 of the Indian Penal Code, and the sentence can be enhanced accordingly, under the combined provisions of sections 423 and 439(4). But the High Court has no power in revision to alter a conviction by the lower court for culpable homicide not amounting to murder falling under the latter part of s. 304, I. P. C., into one of murder or even of culpable homicide coming under the first part of s. 304 for to do so would amount to converting a finding of acquittal into one of conviction(5).

Power to order retrial.—A High Court can, while setting aside a conviction in revision, direct a retrial under section 439, read with section 423(6). Where, therefore, the High Court sets aside a conviction in revision on the ground that the trial was illegal, it has power to direct a re-trial(7). So, also, where the offence committed by the accused falls under section 7 of the Copy-right Act who is acquitted by the court under a wrong view of the law but the matter is of great importance to the complainant as the author of a book, which if the acquittal stands will be pirated by others, it is necessary that there should be a retrial(8). So, again, where it appears that the trial is of some public importance because it is a case of execution of a warrant by the civil court process servers, and it is necessary that such process servers should be supported in the exercise of their duties, as re-trial should be ordered when there has been an absolute miscarriage of justice(9). But

(1) *Empress v. Joti Prashad*, (1887) A W N. 95, *Crown v. Devi Buksh*, 10

(4) *On Shue v. Emperor*, 1 Rang. 430; following *Bali Reddi, In re*, 37 M. 119, *Bhola v. Emperor*, 12 P. R. 1901 Cr.; *Hamid v. Emperor*, 2 L. B. R. 63.

(5) 20 M. L. J. G (n), following *Po*

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(2) *Emperor v. Po Yin*, 3 L. B. R. 232=4 Cr. L. J. 490, where earlier cases are collected.

(3) *Jamna Das v. Emperor*, 103 I. C. 833=28 Cr. L. J. 753=9 Lab. L. J. 405=8 A. I. Cr. R. 443=A. I. R. 1923 Lab. 708.

(11) 1011
(8) *Padmanabha v. Padmanabha*, 1 Mad. Crim. Cas. 101.

it will not be right to allow the prosecution to shape its case afresh after the whole matter has been thrashed out and the defects brought to light in the course of prolonged proceedings. No re-trial should be ordered in such a case(1). The High Court as a court of revision is not competent to set aside the conviction and sentence of an accused by a Magistrate of competent jurisdiction, with a view to directing a new trial either (a) because subsequently to the conviction fresh evidence has been discovered of previous convictions showing the accused is an habitual offender, or (b) because the accused did not disclose his true identity, or gave a false name and address to the Police or the Magistrate; and thereby contributed to the non discovery before conviction of the evidence subsequently discovered showing him to be an habitual offender(2). The mere fact that the Magistrate has acted in contravention of the clear provisions of the law and that his findings are vitiated by a consideration of inadmissible and irrelevant evidence is not by itself a ground for ordering a new trial or reversal of the conviction by High Court if the guilt is established by legal evidence on record(3).

Power to direct further evidence to be taken.—The High Court under this section has power as an appellate court to direct evidence to be taken. No such powers are given to the Sessions Judge or the District Magistrate under s. 437(4). When a Magistrate omits to set out in the charge the previous convictions of the accused and to take evidence of such convictions, it is competent to the High Court sitting as a court of revision under this section, to direct that the charge should be amended by adding a statement of the fact of the previous conviction, and that evidence should be taken in support of the charge thus amended(5). A High Court sitting as a court of revision either under this section or under section 15 of the Charter Act has power to direct a subordinate Magistrate to take additional evidence, but it must on that evidence come to an independent finding itself and not accept the one arrived at by the Magistrate(6).

Findings of fact in revision.—The Code recognizes the power to review findings of facts, the reversal of which in the discretion of the court may be necessary in order to do justice. Section 435 itself requires the court to satisfy itself as to the "correctness or propriety of any finding" and to exercise the powers "conferred on a court of appeal," which include the reversal of the findings of fact(7). The High Courts of the different provinces have reversed or disregarded findings of fact, or entered into controverted facts for the purposes of arriving at a final judgment(8). A High Court undoubtedly has jurisdiction to

(1) *Kedar Nath v. Emperor*, 29 C.W. N. 409=41 C. L. J. 172=A. I. R. 1925 C. 603=26 Cr. L. J. 849=85 I. C. 705. As to High Court's power to prevent a second trial, see *Emperor v. Brijnagar Das*, 53 A. 411.

(2) *Empress v. Sham Singh*, 36 P. R. 1884 Cr.

(3) *Devi Das v. Emperor*, A. I. R. 1920 Lah. 318 (2)=10 Lah. 794.

(4) *Moni Mohan v. Iswar Chunder*, 6 C. L. J. 251; *Emperor v. Mulla Ibrahim*, 3 Bom. L. R. 677.

(5) *Kasim v. Empress*, 19 P. R. 1879 Cr.

(6) *Sadalaimuthu v. Enen Samban*, 15 Cr. L. J. 767=31 I. C. 367.

(7) *Emperor v. Sarja Prasad*, A. I. R. 1924 O. 356=11 O. L. J. 330=25 Cr. L. J. 1060=81 I. C. 890; *Ram Kishan v. Emperor*, 18 Cr. L. J. 915=44 I. C. 147=2 P. L. W. 298.

(8) *Emperor v. ...*

entertain a revision on grounds of fact, but it is equally well established that this power should be very sparingly exercised. There is a well-marked distinction between an application in revision and an appeal. It would be futile for the legislature to grant the right of appeal in some cases and to withhold in others, if the High Court under the guise of a revision were to allow conclusions of fact based on evidence to be canvassed and attacked, on the footing of an appeal. Broadly speaking, the rule is that the High Court will only entertain a revision on facts where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced(1). The Court will not as a rule, on revision go into the evidence and examine the conclusion of the court below, otherwise an appeal would virtually be against every decision of the subordinate courts, which was clearly not intended by the Legislature. It is only where there are exceptional grounds for its interference in the interests of justice that the High Court interferes in the exercise of its revisional jurisdiction with the findings of fact of inferior courts(2). The correct principle in dealing with an application for revision as regards facts, is to refuse to interfere when there is evidence on the record which is adequate and which, if believed, justifies the conviction. Where two courts have agreed on the facts, the mere fact that the High Court might have come or would have come to a different conclusion on the facts would not except in rarest cases, justify its interference(3). The High Court acting in revision, under s. 435, is bound to accept the finding of the lower court unless there is any error of law or procedure vitiating that finding or unless there are any special circumstances apparent on the record to show that in arriving at its conclusion of fact the lower court has misapprehended the evidence(4). Ordinarily, the

974; *Emperor v. Saroda Prasad*, 32 C. 156; *Ram Prasad v. Emperor*, 16 C. L. J. 453; *Empress v. Badruddin*, 8 B. 197; *Empress v. Daya Ram*, 14 Bom. 331; *Empress v. Abdul Rahimman*, 16 B. 580; *Emperor v. Bankatram*, 28 B. 533; *Emperor v. Saraju Prasad*, 11 O. L. J. 330; *Shiam Sunder v. Emperor*, 20 A. L. J. 276; *Tabiri v. Crown*, 6 Lah. L. J. 326; *Ram*

ror, 8 P. R. 1898 Cr. = 7 Cr. L. J. 353 = 20 P. W. R. 1908 Cr.; *Horakrishna v. Emperor*, 121 I. C. 321 = A. I. R. 1930 Pat. 203; *Munno Lal v. Emperor*, A. I. R. 1935 O. 241.

(2) *Empress v. Daya Ram*, 14 B. 331; *Reid v. Richardson*, 14 C. 361; *Raja Dabu v. Muddun Mohun*, 14 C. 169; *Empress v. Bad-*

672, where the lower court had not, as it ought, viewed certain evidence as evidence of an accomplice the High Court interfered.

(3) *Swami Dayal v. Emperor*, 8 P. R. 1908 Cr. at p. 26 = 7 Cr. L. J. 353 = 30 P. W. R. 1908 Cr.

R. 391.

(1) *Abdul Wahid v. Abdullah*, 45 A. 656 (661); *Ahsanulla v. Mansukh*, 36 A. 403 (405); *Swami Dayal v. Empe-*

High Court will not consider questions of fact in criminal revision but it will do so where the lower courts have approached the case from a wrong point of view and the evidence which has been produced in the case has not received due consideration(1). The mere application of a party to examine the evidence in any case would not be a sufficient ground for doing so. There must appear on the face of the judgment or order complained of, or of the record, some ground to induce the High Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. But no hard and fast rule can be laid down; each case ought to be dealt with according to its own circumstances(2). It is not the practice of the High Court in the exercise of its revisional powers to interfere lightly with any decision on a point of fact in which two subordinate courts have concurred(3).

Interference with the findings of fact—Where the finding is not based on any positive evidence but upon inferences drawn from certain circumstances arising from the evidence and all the materials on which the finding is based are set forth in the judgments of the courts below, it is open to the accused to ask the High Court to consider if the conclusion arrived at by the courts below are warranted by those materials(4). So also, where the judgment of appellate court is a meagre one and shows that the appellate court has not gone thoroughly into the questions dealt with at the trial by the first court, the High Court will in revision investigate the original trial to see whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial and that the decision was given according to law(5). Where, the courts below have not applied their minds properly to the defence set up by the accused, and consequently there has been a failure of justice, it is necessary for the High Court to interfere(6). Where the courts below have not properly before their minds the contentions of the parties and this fact considerably effects their decision, the High Court will interfere(7). Where the evidence against an accused person is weak, suspicious and inconclusive, the High Court can, on revision side, examine and discuss the evidence on the record and upset the findings of the lower courts(8).

27 Cr. L. J. 74—A. I. R. 1926 Nag. 127;
D. --- C. --- E. --- 5 Pat. I

L. R. 40, *Mohammad Ali v. Dinoy-*
ican Din, 117 L. C. 452=1929 O 240;
15-1-1929. — Emperor A. I. R.

(1) *Rangi Lal v. Emperor*, 126 I. C. 679-7 O. W. N. 556=A. I. R. 1930 O. 321-31 Cr. L. J. 1078=Ind Rul (1930) Oudh. 407=(1930) Cr Cas. 725. A find-

(2) *Keshub Chunder v. Alhil*, 22 C.
998.

(3) *Jan Mahomed v. Emperor*,
A.I.R. 1935 S. 105

(4) *Hara Krishna v. Emperor*, 11 Pat. L. F. 319; the more so where the lower court has based its inference on circumstances which really did not exist; *Nga Ba Myat v. Emperor*, A. I. R. 1934 Rang. 422—1934 Cr. C. 265—148 I. C. 1035=35 Cr. L. J. 819.

(5) *Alay Ahmad v. Emperor*, 20 Cr. L.J. 370=50 I. C. 978

(6) *Keshowdas v. Emperor*, A. I. R. 1933 S. 359—1933 Cr. C. 1335—146 I. C. 952—35 Cr. L. J. 206

(7) *Lalchand v Emperor*, A. I. R. 1933 S. 396=1933 Cr. O. 1436=147 I. C. 66=35 Cr. L. J. 270.

(8) *Bhagwan Singh v Emperor*, 20 P. W. R. 1907 Cr.

entertain a revision on grounds of fact, but it is equally well established that this power should be very sparingly exercised. There is a well-marked distinction between an application in revision and an appeal. It would be futile for the legislature to grant the right of appeal in some cases and to withhold in others, if the High Court under the guise of a revision were to allow conclusions of fact based on evidence to be canvassed and attacked, on the footing of an appeal. Broadly speaking, the rule is that the High Court will only entertain a revision on facts where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced(1). The Court will not as a rule, on revision go into the evidence and examine the conclusion of the court below, otherwise an appeal would virtually be against every decision of the subordinate courts, which was clearly not intended by the Legislature. It is only where there are exceptional grounds for its interference in the interests of justice that the High Court interferes in the exercise of its revisional jurisdiction with the findings of fact of inferior courts(2). The correct principle in dealing with an application for revision as regards facts, is to refuse to interfere when there is evidence on the record which is adequate and which, if believed, justifies the conviction. Where two courts have agreed on the facts, the mere fact that the High Court might have come or would have come to a different conclusion on the facts would not except in rarest cases, justify its interference(3). The High Court acting in revision, under s. 435, is bound to accept the finding of the lower court unless there is any error of law or procedure vitiating that finding or unless there are any special circumstances apparent on the record to show that in arriving at its conclusion of fact the lower court has misapprehended the evidence(4). Ordinarily, the

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(3) *Sitami Dayal v. Emperor*, 8 P. R. 1908 Cr at p. 26-7 (Cr. L. J. 353-30 P. W. R. 1908 Cr.

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(4) *Hara Krishna v. Emperor*, 11 Pat L.T. 319; the more so where the lower court has based its inference on circumstances which really did not exist; *Nga Ba Myat v. Emperor*, A. I. R. 1934 Rang. 422=1934 Cr. C. 265=148 I. C. 1035=25 Cr. L. J. 819.

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(6) *Keshowdas v. Emperor*, A. I. R. 1933 B. 359=1933 Cr. C. 1335=146 I. C. 952=25 Cr. L. J. 266

(7) *Laichand v. Emperor*, A. I. R. 1933 B. 396=1933 Cr. C. 1436=147 I. C. 66=35 Cr. L. J. 270.

(8) *Bhagwan Singh v. Emperor*, 20 P. W. R. 1907 Cr.

(1) *Rangi Lal v. Emperor*, 126 I. C. 679=7 O. W. N. 556=A. I. R. 1930 O. 321=31 Cr. L. J. 1078=Ind. Rul. (1930) Ondh. 407=(1930) Cr. Cas. 715. A finding as to existence of a conspiracy cannot be challenged before the High Court; *Abdul Rahman v. Emperor*, A. I. R. 1935 U. 316; nor can a finding as to evidentiary value of accounts: *Ibid.*

Where the lower courts have failed to scrutinize carefully the proof of corroboration of accomplice evidence, the High Court can interfere on the revision side and set aside even the concurrent finding, of the two courts below if such a proof is found defective(1). It is the settled practice of the High Court to refuse to interfere, in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower court or the misconstruction of documents, or the placing by that court of the onus of proof on the accused contrary to the law of evidence(2). It is unusual in revision to disturb a finding of fact unless it is so manifestly erroneous that a miscarriage of justice would result from it being uncorrected(3). It is not open to the High Court to go behind the finding of fact in revision unless it is shown that the evidence on the record left no scope for the courts below to come to that conclusion(4). The High Court does not as a rule interfere in revision with findings of fact unless it can be said that these findings are based on no evidence or are obviously incorrect(5). A revisional court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law(6).

Power to allow composition.—See notes above under the head "Revisional powers of High Court".

Power to order restoration of property.—In revision the High Court may make any amendment, or consequential or incidental order which may be just; e. g., it may make an order in revision restoring the property of an accused person of which he has been deprived in favour of the complainant when the accused has been acquitted(7). The High Court has power in revision not only to set aside a Magistrate's order for the disposal of property passed under s. 523, but also to order restitution of the property to the person entitled thereto(8). The High Court may in the exercise of its revisional powers pass an order, under s. 517 to refund the money received by false pretences(9).

Power of High Court to deal with non-appealing accused.—The High Court has power under this section, in a proper case, to deal with the case of accused persons not appealing against their conviction,

(1) *Manna v Crown*, 3 P W R. 1911 Cr.

(2) *Ganesh Bhalant v. Emperor*, 5 I. C. 612=12 Bom. L. R. 21=11 Cr. L. J. 180. As to erroneous construction of a document upon which the guilt or innocence of the accused depended, see *Karim Bakh v. Emperor*, 12 P. W. R. 1935 Cr.

(3) *Emperor v. Duranshabib*, 6 Bom. L. R. 1906; *Mohammad Zahur v. Emperor*, 9 O. L. J. 483; *Hiranand v. Emperor*, 17 S. L. R. 215=25 Cr. L. J. 134=76 I. C. 230; *Deoji v. Emperor*, 27 Cr. L. J. 830=95 I. C. 606=A. I. R. (1926), Nag. 459

(4) *Allahbur v. Emperor*, 1929 S. 90

=116 I. C. 99=80 Cr. L. J. 948.

(5) *Haripado v. Emperor*, A. I. R. 1930 C. 645=34 C. W. N. 550=127 I. C. 553=31 Cr. L. J. 1225=1930 Cr. C. 1206

(6) *Umed Singh v. Emperor*, 77 I. C. 183=21 A. L. J. 765=25 Cr. L. J. 327=46 A. 64

(7) *Manki v. Bhagwanti*, 2 A. L. J. 64=27 A. 415.

(8) *Ma Thein v. Ma The*, 12 Bur. L. T. 266=21 Cr. L. J. 561=37 I. C. 81=10 L. B. R. 156; *Ch. Kyin To v. E. Cho*, 4 L. B. R. 14.

(9) *Nga Tha Yin v. Emperor*, 15 Cr. L. J. 555=24 I. C. 903.

while considering and trying the appeal preferred by some other persons, and cl. (5) of the section does not in any way affect the jurisdiction vested in the High Court to deal with their case(1). The High Court is not precluded by sub-section (5) of this section from interfering with the conviction of an accused who has not appealed where the matter comes before the High Court in an appeal preferred by the co accused(2). Where of several persons tried jointly by a Magistrate, some received appealable sentences, others non-appealable and on appeal by those who received appealable sentences the Court may set aside the conviction of those who have not appealed(3). Similarly

the persons fined(4).

Power to expunge remarks from lower court's judgment.—Damaging remarks cannot be made against the character of a witness without sufficient trustworthy proof on the record and without further hearing his explanation to the suspicions raised against him. The High Court can on the revision side expunge such remarks from the judgment of a subordinate court where there is nothing to justify them(5). A Magistrate should not in his judgment in a criminal case make observations, prejudicial to the character of a person who is neither a witness in, nor a party to the proceedings, and who has had no opportunity of being heard, and upon material which is not legal evidence in the case. It would be denial of justice to allow the reflections made upon his character of the petitioner to stand(6). In disposing of the appeal of one of two co-accused, who were tried together and one of whom was acquitted, the appellate court has no right to make use of expressions which amount to a finding that the accused was wrongly acquitted. The High Court will not allow such expressions to remain on record(7). But where a Sessions Judge, in convicting accused persons, passed strictures on the complainant, a Police Officer, as a result of which he was dismissed from service, and he, thereupon, applied to the High Court to delete the remarks from the judgment of the Sessions Judge, the Court held that it would be an extraordinary exercise of powers of the High Court assuming that it possessed them to order that the

(1) *Bronjo Rakhal v. Empress*, 5 O. W. N. 330; *Mouze Ali v. Emperor*, 31 O. L. J. 305; *Rajnikanta v. Emperor*, 58 O. 902; *Raghu v. Emperor*, 5 Pat. L. J. 430, *Allah Ditta v. Crown*, 25 Cr. L. J. 495=77 I. C. 723. *Emress v. Rattan Singh*, (1893) A. W. N. 51; *Kartar Singh v. Crown*, 7 P. W. R. 1916 Cr.; *Crown v. Sada*, 14 P. W. R. 1909; *Mangal Singh v. Emperor*, A. I. R. 1934 Lah. 346.

(2) *Champa v. Emperor*, 9 A. I. Cr. R. 545=108 I. C. 81=A. I. R. 1928 Pat 320=29 Cr. L. J. 935.

(3) *Emperor v. Bhola*, 39 A. 549 *Emress v. Karam Ali*, (1891) A. W. N. 149.

(4) *Mangi Ram v. Emperor*, 9 P. R. 1909 Cr.

(5) *Naba v. Emperor*, 11 I. C. 577 =12 P. W. R. 1911 Cr.=12 Cr. L. J. 393.

(6) *Benarsi Das v. Crown*, 6 Lah. 166 =59 I. C. 270=A. I. R. (1925) Lah. 392 =26 Cr. L. J. 1326.

(7) *Abdul Aziz v. Emperor*, 82 I. C. 173=25 Cr. L. J. 1245=A. I. R. 1925 Lah. 129.

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(8) *Ma Thein v. Ma The*, 12 Bar. L. T. 266=21 Cr. L J. 561=57 I. C. 81=10 L. B. R. 156; *Ct. Kyin To v. E. Cho*, 4 L. D R. 14.

(9) *Nga Tha Yin v. Emperor*, 15 Cr. L J. 555=24 I. C 963.

(4) *Allanbur v. Emperor*, 1929 S. 90

the proceedings in the lower court at an interlocutory stage only when the accused is not guilty on the face of the proceeding and in order to prevent his further harassment(1). Where a case is *prima facie* vexatious, an interference is clearly required to prevent an abuse of such right as the complainant may have to an action in the criminal courts(2). The High Court has jurisdiction to interfere in a proceeding pending before a Magistrate in the exercise of its revisional powers and to pass an order of discharge in favour of the accused person if it considers such an order to be in the interests of justice(3). No doubt a court of revision should be most reluctant to interfere in a pending case, but where, upon the alleged facts, there is no justification for the charge against the accused, he should not for a moment longer than is necessary be allowed to remain in the position of a person accused of an offence and forced to defend himself against a charge which there is no legal evidence to establish(4). Though an order framing a charge is interlocutory and it is not usual for the High Court to interfere with interlocutory orders, yet the High Court has undoubted power to examine the proceedings of the lower court at the stage when charge is framed and, if necessary, to set aside the charge and quash the proceedings(5). The High Court has power to quash a criminal proceeding in its early stages before any evidence has been recorded, but this is a power which will be only exercised in exceptional cases(6). Thus, it can interfere when the proceedings before the inferior court have not proceeded any further beyond the issue of summons(7). Where a District Magistrate had ordered a witness to show cause why he should not be prosecuted for perjury, the High Court reversed the order in revision on the ground that the statement complained of had been made by

J. 644=103 I. C. 100=A. I. B. 1927 S. 231; *Rama Rao v. Venkataramaiah*, A. I. R. 1935 M. 257 (order of committing Magistrate admitting certain evidence

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at p. 138. *Quow Lai v. Ahunt Pershad*, 25 C. 233; *Hari Charan v. Girish Chandra*, 31 C. 68 at p. 74; *Empress v. Nageshappa*, 20 B. 543; *Re Kuppuswami Aiyar*, 89 M. 561; *Ramanathan v. Subramanya*, 47 M. 722.

(2) *Kirpa Devi v. Emperor*, 9 Cr. L. J. 151=4 P. W. R. 1909 Cr.; *Hari Charan v. Girish Chandra*, 38 C. 68 (74)=13 C. L. J. 49=11 Cr. L. J. 525=7 I. C. 747; *Emperor v. Krishna Rao*, 6 N. L. J. 119.

(3) *Gopal Das v. Maghi Ram*, 90 I. C. 232=A. I. R. 1925 Lah. 439=7 Lah. L. J. 252=28 Cr. L. J. 1808.

(4) *Maung Ba Yone v. Ma Hla Kin*, A. I. R. 1933 Rang. 277=1933 Cr. C. 1128=146 I. C. 402=35 Cr. L. J. 52; following *Jagat Chandra v. Empress*,

26 C. 748; *Hari Charan v. Girish Chandra*, 38 C. 68; *Empress v. Nageshappa*, 20 M. 543.

(5) *Tarak Singh v. Emperor*, 103 I. C. 835=29 P. L. R. 237=28 Cr. L. J. 755=9 Lah. L. J. 440=8 A. I. Cr. R.

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(2) *Kirpa Devi v. Emperor*, 9 Cr. L. J. 151=4 P. W. R. 1909 Cr.; *Hari Charan v. Girish Chandra*, 38 C. 68 (74)=13 C. L. J. 49=11 Cr. L. J. 525=7 I. C. 747; *Emperor v. Krishna Rao*, 6 N. L. J. 119.

(3) *Gopal Das v. Maghi Ram*, 90 I. C. 232=A. I. R. 1925 Lah. 439=7 Lah. L. J. 252=28 Cr. L. J. 1808.

(4) *Maung Ba Yone v. Ma Hla Kin*, A. I. R. 1933 Rang. 277=1933 Cr. C. 1128=146 I. C. 402=35 Cr. L. J. 52; following *Jagat Chandra v. Empress*,

26 C. 748; *Hari Charan v. Girish Chandra*, 38 C. 68; *Empress v. Nageshappa*, 20 M. 543.

(5) *Tarak Singh v. Emperor*, 103 I. C. 835=29 P. L. R. 237=28 Cr. L. J. 755=9 Lah. L. J. 440=8 A. I. Cr. R.

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at p. 138. *Quow Lai v. Ahunt Pershad*, 25 C. 233; *Hari Charan v. Girish Chandra*, 31 C. 68 at p. 74; *Empress v. Nageshappa*, 20 B. 543; *Re Kuppuswami Aiyar*, 89 M. 561; *Ramanathan v. Subramanya*, 47 M. 722.

(2) *Kirpa Devi v. Emperor*, 9 Cr. L. J. 151=4 P. W. R. 1909 Cr.; *Hari Charan v. Girish Chandra*, 38 C. 68 (74)=13 C. L. J. 49=11 Cr. L. J. 525=7 I. C. 747; *Emperor v. Krishna Rao*, 6 N. L. J. 119.

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(5) *Tarak Singh v. Emperor*, 103 I. C. 835=29 P. L. R. 237=28 Cr. L. J. 755=9 Lah. L. J. 440=8 A. I. Cr. R.

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(4) *Maung Ba Yone v. Ma Hla Kin*, A. I. R. 1933 Rang. 277=1933 Cr. C. 1128=146 I. C. 402=35 Cr. L. J. 52; following *Jagat Chandra v. Empress*,

remarks complained of should be deleted(1). The High Court has no power to expunge from the judgments of the lower courts remarks reflecting unfavourably upon the credibility or the character of witnesses, in cases in which the effective orders of the courts are not before the High Court either in appeal or on revision(2). It is different, however, where the court is adjudicating on final order in appeal or on revision. In *Baroda Nath v. Karant*(3) the Registrar of the court was directed to expunge from a judgment of the Sessions Judge remarks which reflected on the Local Government, the District Magistrate and the Deputy Magistrate. In 1911 Twomey, J., of the Lower Burma Chief Court, in the case of *Ma Kya v. Kin Lat Gyi*(4) held that he had the power to order passages to be expunged from a judgment, but refused to use it. In another case of the same Chief Court, *Emperor v. Thomas Pellako*(5), the presiding Judge directed passages to be expunged from a judgment. In *Lachchu v. Emperor*(6) the Judicial Commissioner of Oudh directed a passage, which reflected upon the conduct of a counsel, to be expunged from the judgment. The High Court can, however, order any objectionable remarks to be expunged from the lower courts judgment, irrespective of the fact whether there has and has not been an appeal or revision petition against the main order(7). A Judge has power to re-consider and expunge damaging observations regarding a witness in a criminal case, who had at the trial no chance of defending himself. This does not amount to reviewing a criminal judgment and there is no question of re-considering the guilt of the accused(8).

Interlocutory matters.—The High Court has power to interfere in a pending criminal case but such power is only to be exercised in exceptional circumstances which cannot be laid down with precision, the main test being that the intervention should be necessary in the interests of justice and that a bare statement of the facts without any elaborate argument should be sufficient to convince the court that it is a fit one for its interference at an intermediate stage(9). Speaking generally it will be inadmissible to interfere in a pending case unless there is some manifest and patent injustice apparent upon the face of the proceedings and calling for prompt redress(10). The High Court will interfere with

(1) *Emperor v. Sidramaya*, 19 Bom. L. R. 912.

(2) *Emperor v. Dunn*, 44 A. 401.

(3) 2 C. W. N. p. cxi (Journal).

(4) 11 I. C. 1000=4 Bur. L. T. 173.

(5) 14 I. C. 643=5 Bur. L. T. 20=12 Cr. L. J. 259.

(6) 24 I. C. 156=15 Cr. L. J. 470=1 O. L. J. 141.

(7) *Benaraj Das v. Crown*, 6 Lah. 166; *Amar Nath v. Crown*, 5 Lah. 476 (481)=26 Cr. L. J. 463=85 I. C. 143; *Maharam v. Emperor*, A. I. R. 1929 Lah. 201=29 Cr. L. J. 1102=112 I. C. 696.

(8) *In re Umar Hayat Khan*, 5 I. C. 681=2 P. W. R. 1910 Cr.=11 Cr. L. J. 178.

(9) *Madhav Bhaquant v. Emperor*, 26 Cr. L. J. 1093=88 I. C. 181=A. I. R. 1925 Nag. 345; following *Chao Lal v. Anant Prasad*, 25 C. 239; *Ramanathan v. Sivarama*, 47 M. 722=81 I. C. 785=20 L. W. 234=(1924) M. W. N. 556=47 M. L. J. 879=25 Cr. L. J. 1009=A. I. R. (1925) M. 39; *Donlea v. Mrs. Donlea*, 31 P. I. R. 801=A. I. R. 1930 Lah. 681=32 Cr. L. J. 145=128 I. C. 542; *Amirbuz v. Emperor*, A. I. R. 1934 5 183; *Emperor v. Bhagwati Prasad*, A. I. R. 1929 O. 513=6 O. W. N. 937=123 I. C. 222; *Jagan Parshad v. Emperor*, A. I. R. 1930 Lah. 346.

(10) *Jagot Chandra v. Empress*, 26 C. 756=3 C. W. N. 741 followed in *Mani Lal v. Kamber Ali*, 28 Cr. L.

in his deposition the description of such offence(1). There is no provision in the Code for an interlocutory appeal against a Magistrate's decision that he has jurisdiction in a case(2). It is under very rare and exceptional circumstances that the High Court would interfere on the revisional side with an interlocutory order of a Magistrate rejecting a piece of a documentary evidence(3). The High Courts rarely interfere in respect of pending criminal cases, but where a case is *prima facie* vexatious, an interference is clearly required to prevent an abuse of process of court(4). The fact that the case against the petitioners is an extremely weak one is no ground for quashing the charge framed against them in revision. If the case results in conviction the appellate court can rectify the matter(5). But if a charge is framed by the Magistrate where none should have been framed it might be said without violence to the language of the Code that the procedure is irregular and the High Court has power to interfere(6). The High Court will rarely interfere in the midst of a trial and order commitment unless it is shown that the failure on the part of the Magistrate to commit is extremely improper(7). In very exceptional instances alone a High Court should interfere in revision with the action of a subordinate court in respect of any pending case and especially when such case has reached the stage when a charge has been drawn up and only the defence of the accused remains to be heard(8).

Remedy by way of appeal open.—Where a remedy ultimately lies by way of appeal it is unnecessary for the High Court to move in revision. And if the lower court is clearly acting without jurisdiction the party need not concern himself at all about the trial but can simply appeal if the matter comes to judgment. If on the other hand it is not so clear, and it is a moot point whether or not the lower court has jurisdiction, then that matter should be thrashed out fully in both the courts below before it is brought if necessary to the High Court(9).

Enhancement of sentence—It is to be observed that the power of enhancing on appeal no longer exists(10). But the High Court may ;

(1) (1889) A.W.N. 212.

(2) *Kavhi Ram v. R. L. Dikshit*, A. I. R. 1926 O 280=3 O W.N. 101=27 Cr. L. J. 191=91 I. C. 1007.

(3) *Wamanrao v. Emperor*, 22 N. L. R. 34=94 I. C. 899=1926 Nag. 304=27 Cr. L. J. 707.

(4) *Kirpa Devi v. Emperor*, 9 Cr. L. J. 151=1 I. C. 93.

(5) *Nand Lal v. Emperor*, A. I. R. 1932 Lah. 319=83 P. L. R. 231=140 I. C. 607=34 Cr. L. J. 62.

(6) *Gokul Prasad v. Delhi Prasad*, 23 A. L. J. 21=26 Cr. L. J. 748=A. I. R. 1925 A. 311=86 I. C. 281; *Harendra v. Jotish*, 40 O. L. J. 283=26 Cr. L. J. 645=A. I. R. 1925 Cal 100=85 I. C. 641; *In re Kuppasami*, 29 M. 561=28 M. L. J. 505=16 Cr. L. J. 477=29 I. C. 109; *Bishun Das v. Crown*, 33 P. R. 1910 Cr.; *Bahadar v. Crown*, 18 P. W. R. 1910 Cr.

(7) *Bhadr v. Emperor*, 19 O. L. J. 490=3 O. W. N. 201=27 Cr. L. J. 417=A. I. R. 1926 Oadh 191=93 I. C. 145.

(8) *Mandul v. Kamber Ali*, 103 I. C. 100=28 Cr. L. J. 614=A. I. R. 1927 Sind 231.

(9) *Sendiappa v. D. B. Madura*, A. I. R. 1931 Mad. 419=1930 M. W. N. 1271=3 M. L. W. 475=1931 (r. C. 467=132 I. C. 319=64 M. 595=32 Cr. L. J. 895=4 M. Cr. C. 183=60 M. L. J. 495; *In re Ramireddi*, 54 M. 251=A. I. R. 1931 M. 240=33 M. L. W. 542=1931 Cr. C. 836=131 I. C. 624=32 Cr. L. J. 779=4 M. Cr. C. 141=(1931) M. W. N. 700=60 M. L. J. 691; *Assudomal v. Isardas*, A. I. R. 1934 S. 78 (1); otherwise, where no right of appeal is expressly given: *Nagu Sertai v. Emperor*, A. I. R. 1934 M. 478=(1934) M. W. N. 483.

(10) *Azim Khan v. Empress*, 45 P. R. 1857 Cr.

the witness only as to his recollection and belief(1). The High Court has power in revision, to quash an order of a Magistrate directing a warrant to issue against an accused person(2). The High Court can interfere with the proceedings of a Magistrate while they are in the interlocutory stage pending investigation, and may suspend such proceedings, even without having the record before it(3). In one case the High Court interfered in revision during the hearing of a case where the Magistrate had refused to allow any cross-examination of the prosecution witnesses until the examination-in-chief of all the witnesses had been completed and a charge framed. This course was held to be illegal(4). The High Court can, likewise, interfere with the interlocutory order of a Magistrate refusing to summon certain witnesses for the defence(5). The High Court can interfere and set aside an interlocutory order of a Magistrate refusing to let in evidence(6). 'But it is only allegations of the gravest departure from procedure that a High Court will interfere in revision so as to take the conduct of a criminal case pending before a subordinate court before its termination out of its hands(7).

Revision of interlocutory order.—There is ordinarily no justification for a High Court to take up in revision what are really interlocutory matters in a criminal Court(8). The High Court as a rule will allow proceedings to go on and take their course in lower courts and will not interfere with a pending proceeding even though irregularly conducted, unless there is an exceptional ground for interference(9). Generally speaking a High Court would not investigate whether pending proceedings were of a criminal or civil nature if the inquiry involved lengthy arguments. But a safe and practical test is whether a bare statement of the facts of the case without any elaborate argument would suffice to persuade the High Court that the case is a fit one for interference(10). The High Court will not interfere with the conduct of a case on the ground that the written complaint did not fully describe the offence, if the complainant stated

(1) *Chadha v. Emperor*, 14 A. L. J. 851.

(2) *Ladha Shah v. Zaman Ali*, 81 I. C. 851—26 Cr. L. J. 267.

(3) *Abdul Kadir v. The Magistrate of Purneah*, 20 W. R. 23 Cr.

(4) *Durga Datt v. Emperor*, 10 A. L. J. 114; *In re Mutha Chetty*, 81 I. C. 44—19 L. W. 891—25 Cr. L. J. 556—1924 M. 735.

(5) *Rovel Singh v. Emperor*, 130 P. L. R. 1901.

(6) *Lurinda v. Karachi Mun.*, 8 S. L. R. 298.

(7) *In re Nachianpa*, 9 A. I. Cr. R. 189—1 Mad. Cr. Cas. 9.

(8) *Jagan Nath v. Emperor*, 128 I. C. 50—31 P. L. R. 893—A. I. R. 1930 Lah. 346—32 Cr. L. J. 82—(1930) Cr. O. 394; *Udharam v. Emperor*, 26 Cr. L. J. 1303—89 I. C. 247—A. I. R. 1925 S. 231; *Mahomed v. Idris*, 18 S. L. R.

274—88 I. C. 189—26 Cr. L. J. 1101—A. I. R. 1925 S. 328; *Badullah v. Lachmi Narain*, A. I. R. 1926 O. 556—3 O. W. N. 720—97 I. C. 951—27 Cr. L. J. 1191; *Kashi Ram v. R. S. Dikshit*, 6 A. I. Cr. R. 4; *Udharam v. Emperor*, 89 I. C. 247—A. I. R. 1925 S. 231—26 Cr. L. J. 1303.

(9) *Verumal v. Emperor*, A. I. R. 1933 S. 169—1933 Cr. C. 533—145 I. C. 617—34 Cr. L. J. 1019; *Choa Lal v. Anant Pershad*, 25 C. 233; *Muhammed v. Idris*, 26 Cr. L. J. 1101—88 I. C. 189—1925 S. 328—18 S. L. R. 274; *Emperor v. Jivandas*, 20 Cr. L. J. 764—53 I. C. 492; *Kohnraj v. Emperor*, 21 Cr. L. J. 343—55 I. C. 679.

(10) *Verumal v. Emperor*, A. I. R. 1933 S. 169—1933 Cr. C. 533—145 I. C. 617—34 Cr. L. J. 1019.

that circumstance alone is not an insuperable obstacle to the enhancement of the sentence when the sentence passed is manifestly inadequate(1).

Recommendation for enhancement: Sentence already served.—It is not necessary that the Government should instruct the Government Pleader to move the High Court to enhance sentences. It is competent to the District Magistrate to bring to the notice of the High Court cases of inadequate sentences. The High Court has, under its revisional powers, jurisdiction to enhance sentence howsoever the case comes to its notice(2). In the case of a recommendation for enhancement of sentences, the High Court, is not always bound to interfere under this section, even when the order of the court below is clearly wrong in law, particularly when the accused has already undergone the sentence of imprisonment or has paid the fine imposed upon him(3). But in some cases it has been held that the High Court can, on a reference, pass a substantive period of imprisonment even if the accused has already served out the sentence of imprisonment passed on him by the court below(4). In a reference for enhancement of sentence, it is the practice of the court to accept the conviction as conclusive and to consider the question of enhancement on the basis of the facts found by the lower court(5). But sub-section (6) newly added by the Amendment Act, 1923, gives to the accused person the right of showing that the conviction is wrong.

Disposal of application for revision.—Ordinarily a Judge disposing of a revision petition filed by a convicted person or his pleader against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence. He can, therefore, entertain a second revision petition from the complainant or a reference from a District Magistrate for enhancement of the sentence(6). Even where after a single Judge has disposed of a jail appeal preferred by an accused an application by Local Government to enhance the sentence can be entertained(7).

Power to enhance sentence.—The High Court as a court of revision may at one and the same time alter a finding and enhance a sentence(8). But it should not so interfere unless the sentence is manifestly inadequate(9) or there is misconception of the principle on

v. *Das*, A. I. R. 1931 Lah. 613=35 P. L. R. 537.

(1) *Emperor v. Shahzad Ahmad*, 114 I. C. 72=1928 Lah. 961; *Emperor v. Shankar Narayan*, 6 A. I. Cr. R. 269.

(2) *Emperor v. Roger De Silva*, 13 Bom. L. R. 1185.

(3) *Emperor v. Hari Singh*, 21 I. C. 471=29 P. W. R. 1913 Cr.=14 Cr. L. J. 599; *Crown v. Jagat Singh*, 11 Ah. 453.

(4) *Emperor v. Shahzad Ahmad*, 114 I. C. 72=1928 Lah. 961=30 Cr. L. J. 240=Ind. R. (1929) Lah. 232; *Emperor v. Shankar Narayan*, 6 A. I. Cr. R. 269.

(5) *Emperor v. Chinto*, 32 B. 162;

Emperor v. Chinto, 32 B. 162;

830=1933 A. L. J. 957=20 A. I. Cr. R. 124=146 I. C. 157=34 Cr. L. J. 1205=14 L. R. A. Cr. 248.

(8) *Bhola v. Emperor*, 12 P. R. 1904 Cr.

(9) *Empress v. Chuni Lal*, 7 P. R. 1859 Cr.; *Emperor v. Hari*, 14 Cr. L. J. 599=21 I. C. 471=29 P. W. R. 1913 Cr.=313 P. L. R. 1913; *Emperor v. Mubarak*, A. I. R. 1934 S. 157.

on revision, enhance a sentence, so as to alter its nature(1). In the case of *Mchter Ali v. Empress*(2), the High Court of Calcutta in dismissing an appeal, directed as a court of revision, that the sentence passed should be enhanced. An authoritative pronouncement of the law on this subject is to be found in *Chunbidya v. Emperor*(3).

Application in revision by private individual—Under the Code a private party is not entitled to apply to the High Court to enhance a sentence passed by a subordinate court. He can only draw the attention of Government to the sentence(4). But a private complainant is entitled to apply in revision to the High Court for enhancement of a sentence passed by a Sessions Judge. It is not intended by the Code that in such circumstances the only remedy of a complainant should be to apply to a District Magistrate to move the Local Government to apply for an enhancement, because the latter will only apply for an enhancement if it is required in the public interest. The High Court does not regard the question of enhancement only from the point of view of public interest but from the circumstances of the particular case before it(5). The High Court will, in proper cases, on the application of a private person, who was the complainant in the court below, enhance the sentence passed on the accused(6). Ordinarily the High Court should be loath to take action in the matter of enhancement when the district authorities consider the sentence as sufficient but there are occasions when the High Court has every right to enforce its own opinion which may be a contrary opinion to that of the district authorities(7).

Application when to be made.—*Sentence already served.*—In all cases where the sentence is considered by the prosecution to be inadequate, the District Magistrate or the Sessions Judge, as the case may be, should be moved by the police at the earliest possible moment after the trial and where possible, before the accused has served his sentence, although the fact that the sentence has expired before such action is taken is, in itself, no reason for refusing to interfere(8). According to the general practice a convict is not sent back to jail by increasing his sentence after he has undergone the sentence and released(9). But

(1) *Empress v. Ram Kuria*, 6 A 621 F B, *Haja Ram v. Emperor*, A I R 1935 O 239.

(2) 11 C 530

(3) A I R 1935 P C 85

(4) *In re Nagji Dulla*, 48 B 358=26 Bom L R 182, *Pramatha Nath v. Gangacharan*, 118 I C 891=1929 C. 340=33 C W N 375=80 Cr L J 979 =1nd Rul (1929) Cal 702=56 Cal. 934, *Jadunandan v. Emperor* 104 I C. 244=4 O W N 699=1927 O 321=28 Cr L J. 892; *Hanuman Prasad v. Mathura Parasad*, A I R. 1933 O 441=10 O W N 903=1933 Cr C 1294 =146 I C 577=35 Cr L J 119, *Wazir v. Sarju*, 1 Cr Law. 159, *Lalhu v. Raju*, 198 L R 61=A I R 1926 S 254; *Ali Akabbar v. Kasim Ali*, A I R. 1929 C 785 (2)=50 C. L. J. 176 =33 C. W N. 605.

(5) *Man Singh v. Reoti*, 58 A. 223=28 A L J. 134=4 A. I. R 1931 A. 13 =32 Cr L J 812=L R. 12 A. Cr 16 Cr.=15 A I Cr R 109=129 I C. 444=1931 Cr Cas 13.

(6) *M. T. Das v. Aloo*, 8 Rang. 578 =A I R. 1931 Rang 52=129 I. C 510 =32 Cr L J. 353=15 A. I. Cr R. 455; but see *Gunwant v. Govind*, 10 A. I. Cr. R. 19

(7) *Wazir v. Sarju*, 1928 A 417=30 Cr L J 221; *Debi Singh v. Ram Charan*, 30 Cr L J 210=113 I. C 769.

(8) *Emperor v. Prabhu*, 107 I. C. 535 =9 A. I. Cr R 523=29 Cr. L. J. 261=A I R 1928 1st 201.

(9) *Emperor v. Sadar Din*, A. I. R. 1923 Lah 14=30 Cr. L. J. 2=112 I. C. 769=11 A. I. Cr. R. 577; *Emperor v. Hari Singh*, 29 P. W. R. 1913 Cr.=21 I. C. 471=14 Cr. L. J. 599; *Emperor*

which sentence is given(1). Thus it may refuse to enhance sentence on the mere ground that it would have itself passed a heavier sentence(2). That is to say, High Court will not ordinarily enhance the sentence on revision merely on the ground that if it were seized of the trial of the accused it would have awarded a longer sentence of imprisonment than that awarded by a Magistrate but will interfere where the sentence awarded by the trial court is grossly inadequate(3). The principles upon which the High Court habitually acts as a court of revision in relation to the enhancement of sentences, where the law allows a discretion to the court whose sentence is impugned, are that it should not interfere if the sentence passed involves substantial punishment, and should interfere if the sentence is manifestly inadequate. The court is, in particular, slow to interfere where interference would involve the imprisonment of persons already discharged from jail, though this circumstance is no insuperable obstacle. The court also frequently declines to interfere in order to enhance a sentence, on the mere ground that it would itself have passed a heavier sentence, contenting itself with pointing out that the sentence is so far light that a heavier sentence would have been maintained(4). Where a sentence is substantial, though inadequate and the convict has served the sentence, there should be no enhancement in revision(5). The enhancement of a sentence by the High Court, under this section, is a serious proceeding. The High Court should not ordinarily interfere where a substantial sentence has been passed by the trying court and will be always slow to interfere, unless the sentence passed is manifestly inadequate(6). And for this purpose the High Court should see whether there is matter on the record of the case showing that the sentence passed is clearly inadequate to

(1) *In re Rasammal*, 26 I. C. 321 = 15 Cr. L. J. 20

(2) *Emperor v. Dhana Lal*, 110 I. C. 796 = A. I. R. 1928 Lah. 951 = 29 Cr. L. J. 761; *Empress v. Chuni Lal*, 7 P. B. 1889 Cr.; *Khana v. Emperor*, 107 I. C. 759 = 29 Cr. L. J. 276 = 9 A. I. Cr. R. 501; *Emperor v. Khairati Lal*, 107 I. C. 775 = 29 Cr. L. J. 201 = 10 A. I. Cr. R. 27; *Emperor v. Das*, A. I. R. 1931 Lah. 613 = 35 P. L. R. 527.

= 49 I. C. 772 = 20 Cr. L. J. 212 = 18 P. L. R. 1919 = 3 P. W. R. 1919 Cr.; see *Emperor v. Sada Singh*, A. I. R. 1930 Lah. 338.

(5) *Emperor v. Ram Sarup*, 32 Cr. L. J. 943 = 131 I. C. 577 = 32 P. L. R. 5 = A. I. R. 1931 Lah. 132 = Ind. Rul. (1931) Lah. 625 = 1931 Cr. Cas. 880.

(6) *Emperor v. Pario*, 18 Cr. L. J. 708 = 40 I. C. 708 = 10 S. L. R. 207; *Suraj Mal v. Ram Nath*, 105 I. C. 820 = 28 Cr. L. J. 996 = A. I. R. 1928 Nag. 58; *Emperor v. ...*

Cr. C. 120 = 100 I. C. 125 = 35 Cr. L. J. 365 = 17 A. I. Cr. R. 439; *Empress v. Chuni Lal*, 7 P. R. 1889 Cr.; *Empress v. Saif Ali*, 17 P. R. 1898 Cr. F. B.; *Abdul v. Emperor*, 19 P. W. R. 1910 Cr. = 11 Cr. L. J. 389 = 6 I. C. 639; *Emperor v. Hart Singh*, 29 P. W. R. 1913 Cr. = 14 Cr. L. J. 599 = 21 I. C. 471; *Emperor v. Budha*, 7 P. R. 1919 Cr.

Sub-section (2): Notice to accused.—The direction as to service in this sub section is mandatory(1). A reasonable opportunity for the accused to be heard is an essential condition precedent to the exercise of jurisdiction under this section, when the court is considering the question of enhancing the punishment inflicted on the accused. Where the condition is not fulfilled, the court acts without jurisdiction in enhancing the sentence and its order is void *ab initio* and without jurisdiction and does not operate to bar a fresh hearing on the merits(2). Where the High Court has made an order to the prejudice of an accused without issuing notice to him and giving him an opportunity of being heard it has ample power under the present Code to vacate its order and re-hear the matter in the presence of both sides(3). In a criminal appeal it is desirable that the High Court should first deal with the appeal on its merits. It might then consider whether or not a notice to enhance the sentence should issue under this section(4). Where, however, the accused have preferred an appeal and they have had an opportunity of being heard personally or by pleader, it is open to the appellate court to change their conviction to one under a graver section, without further calling upon them or issuing to them a formal notice, when the Public Prosecutor asks to do so(5). Revision of an order passed under section 203, can be made without notice to the person complained against(6). It is not obligatory on a superior court to give any notice to a person against whom a Magistrate has refused to issue process under s. 202, when proceedings are being taken to revise that order(7). Where a notice under this sub-section is issued to the accused to show cause why the sentence should not be altered, sub-section(6) becomes applicable and the accused becomes entitled to show cause against his conviction(8). Where notice has been issued to the accused to show cause why his sentence should not be enhanced and at the hearing neither the accused nor his counsel is present, the High Court cannot pass an order enhancing the sentence(9). The High Court must hear the accused, before altering the conviction against him into one involving a more serious offence, or before passing an order enhancing the sentence(10). But a High Court may by virtue of section 423 issue a warrant of arrest without previous notice to the accused, because a warrant of arrest is not an order to the prejudice of the accused within the meaning of this sub-section(11).

Sub section (4).—This sub section makes it clear that the High

(1) *Emperor v Wali*, A. I. R. 1933 Lah. 433=142 I. C. 622=Ind. Rul. 1933 Lah. 224=34 Cr. L. J. 371=1933 Cr. C. 674.

(2) *In re Tadi Somu Naidu*, 47 M. 428=84 I. C. 850=46 M. L. J. 456=84 M. L. T. 218=20 L. W. 18=1924 M. 640=26 Cr. L. J. 370.

(3) *Emperor v Mangal Naran*, 49 B. 460=27 Bom. L. R. 355=26 Cr. L. J. 968=A. I. R. 1925 B. 268=87 I. C. 424.

(4) *Bakshan v. Emperor*, A. I. R. 1927 S. 85=98 I. C. 113=27 Cr. L. J. 1265.

(5) *Gada Husain v. Janaki*, 8 I. O. 371=18 O. C. 289=11 Cr. L. J. 629.

(6) *Morrison v Crowder*, 92 I. C. 590=27 Cr. L. J. 302.

(7) *Emperor v Sain Das*, 94 I. C. 257=8 Lah. L. J. 180=27 Cr. L. J. 593=A. I. R. 1926 Lah. 375.

(8) *Paras Ram v. Emperor*, 26 Cr. L. J. 543=85 I. O. 393=1925 O. 476.

(9) *Govinda v. Keshavrao*, Rat. Un. Cr. Cas. 634, where there was death of the accused.

(10) *Emperor v. Nga E Maung*, 8 L. B. B. 290.

circumstances(1).

Limit of enhancement: sub-sec. (3).—The power of enhancement of sentence conferred upon the High Court by this section is limited only by sub-section(3), which does not regard the difference in the powers of the trying Magistrate under section 32, but lays down the general rule that in cases of sentences passed by Magistrates not empowered under section 34, the limit of enhancement shall be the sentence that may be inflicted by a presidency or a first class Magistrate. This was the view taken by the two Judges of the Sind Judicial Commissioners' Court in the case reported as *Emperor v. Kamal*(2). In accordance with this interpretation of law the High Court can inflict any punishment for the offence which in the opinion of the court has been committed which might have been inflicted for such offence by a Magistrate of the first class. In other words, it can inflict a sentence of two years' rigorous imprisonment in spite of the fact that the Magistrate who tried the accused could only have inflicted a sentence of six months' rigorous imprisonment(3). This limitation does not apply to a sentence which has been passed by a Magistrate acting under section 34 of the Code(4). Where the court, instead of sentencing an accused, has ordered him to enter into a bond to appear and receive sentence when called upon, the provisions of this section will not enable the High Court to substitute for that order a sentence of whipping or of imprisonment, there being no sentence(5). The power of enhancement of sentence under this section can only be exercised where the sentence passed is a legal one. A sentence for the period already passed by accused in the lock-up is not a legal sentence(6).

Difference of opinion in criminal revision case.—Where the Judges of a Division Bench differ in a criminal revision case, section 439 read with this section requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the court(7). It is different, however, where the jurisdiction is exercised under section 107 of the Government of India Act, 1915, and not section 439, on revision of the proceedings under section 145. Section 429 and 439 do not apply. When this is the case the matter is governed by cl. 36 of the Letters Patent(8).

(1) *Crown v. Jagat Singh*, 1 Lah. 453; *Emperor v. Sadar Din*, A. I. R. 1929 Lah. 191=80 Cr. L. J. 2=112 I. O. 769=11 A.I.Cr. B. 577; *Emperor v. Hari Singh*, 21 I. O. 471=20 P. W. R. 1913 Cr.; *Emperor v. Karam Khan*, 118 I. O. 540.

(2) 16 Cr. L. J. 712=9 S. L. R. 82=90 I. O. 1000.

(4) *Sewa Singh v. Ranjha*, 75 I. O. 356=24 Cr. L. J. 932=A. I. R. 1923 Lah. 600.

(5) *Emperor v. Ghasi*, 37 A. 31=26 I. O. 635=12 A. L. J. 1244=16 Cr. L. J. 43; *Emperor v. Nur Khan*, 20 Cr. L. J. 99=48 I. O. 979.

(6) *Crown v. Asghar Ali*, 27 P. R. 1919 Cr.; see also *Bagel Singh v. Crown*, 9 P. W. R. 1907 Cr.

(7) *In re Dudekula Lal Sahab*, 40 M. 976 (978); *Lal Dhari v. Sukdeo*, 37 C. 892 (910); *Rahmatulla v. Rahimullah*, 27 C. 501 (505).

(8) *Mariam v. Merjan*, 47 C.

accused that he was guilty(1), or where serious injustice has been caused by an error of law(2), or where the order is wholly without jurisdiction(3); or where the accused were acquitted on account of wrong appreciation of a point of law(4); and the case was of great importance to the petitioner in his position as an author of the book(5); or where the Magistrate's order of acquittal proceeds on a misconception of law on the material points involved in the case(6); or where the order of acquittal is based on a misreading of a statutory provision(7); or where the complainant has not had a fair hearing(8); or where a Magistrate fails to appreciate or even to correctly cite in his judgment the evidence of an important witness(9); or where the acquittal is based not upon an appreciation of doubtful evidence, but upon a manifest error in law appearing on the face of the judgment(10); or where it is passed on a compromise which is invalid(11). But the power should not be exercised merely on the ground that the evidence found to be insufficient by the trial court justifies a conviction(12). Misappreciation of evidence can afford no ground for setting aside an order of acquittal in revision(13). Interference is however not improper if the finding of acquittal is based on an erroneous view of the law. If the findings of fact would justify a conviction if a correct view of the law has been taken, that should not prevent interference(14). But in other case the same court has held that High Court should not interfere in revision on the ground that acquittal is based on an erroneous view of the law applicable to the case(15). Where, however, no prejudice is caused, High Court will be very reluctant to interfere with the acquittal of persons who have undergone a trial in a court of competent jurisdiction or with the order of such a competent court under section 250(16).

(1) *Emperor v. Nga San Wein*, 19 I. O. 177=U. B. R. (1912) 148=14 Cr. L. J. 177.

(2) *Emperor v. Data Ram*, 109 I. O. 363.

(3) *Emperor v. Ram Udit*, 33 Cr. L. J. 511=187 I. C. 625=A. I. R. 1932 O. 251=9 O. W. N. 319; *Masala v. Emperor*, 5 A. I. Cr. R. 339; *Emperor v. ...*

Tirathadas, 17 I. O. 403=6 S. L. R. 181=18 Cr. L. J. 771.

(6) *Bala Prasad v. Muzammil Hussain*, A. I. R. 1934 A. 190=1934 Cr. O. 200=1934 A. L. J. 541=149 I. C. 612=35 Cr. L. J. 998=4 A. W. R. 569; *Fakir Chand v. Fakir*, 69 I. C. 379=23 Cr. L. J. 699; *Re Junge Gowda*, 4 Mys. L. J. 1.

(7) *Masala v. Emperor*, 27 Cr. L. J. 358=92 I. C. 870.

(8) *Ram Khelwan v. Sheo Nand*, A. I. R. 1932 A. 191=30 A. L. J. 166=1932 Cr. C. 207=13 L. R. A. Cr. 45=140 I. C. 122=33 Cr. L. J. 418=54 All. 418.

(9) *Bazu v. Raika Singh*, 26 I. C. 170=15 Cr. L. J. 722=18 O. W. N. 1244.

(10) *Ahmadabad Municipality v. Magunlal*, 9 Bom. L. R. 156=5 Cr. L. J. 171.

(11) *Harnam Singh v. Sain Das*, 71 I. O. 248=24 Cr. L. J. 120.

(12) *Sitaram v. Tilok Chand*, A. I. R. 1933 Nag. 36=1933 Cr. O. 78=28 N. L. R. 298=34 Cr. L. J. 145.

(13) *Sakharam v. Mujahiduddin*, A. I. R. 1931 Nag. 102=121 I. C. 51=31 Cr. L. J. 194; but see *Nallammai v. Ramasami*, 4 I. C. 1183=5 M. L. T. 258=11 Cr. L. J. 195.

(14) *Sitaram v. Tilok Chand*, A. I. R. 1933 Nag. 36=1933 Cr. C. 78=28 N. L. R. 298=34 Cr. L. J. 145.

(15) *Ram Chand v. Chauthmal*, A. I. R. 1929 Nag. 87=11 N. L. J. 242=30, Cr. L. J. 405.

(16) *Debi Prasad v. Emperor*, 1924 A. 674=A. R. 5 A. 93 Cr.; *Bicha Kudumbam v. Sertatikara*, 3 Mad. Cr. Cas. 221.

Court cannot, under this section, convert a finding of acquittal into one of conviction(1). In many cases the High Court refused to interfere, with an acquittal, the reason being that the Government had the right to appeal, and that if it did not choose to do, the court would not set aside the acquittal(2). In the absence of a Government appeal the High Court is precluded, under this section, from converting a finding of acquittal into one of conviction(3). An appeal against an acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged(4).

Power to revise an order of acquittal and order retrial.—But while the High Court has no power to convert a finding of acquittal into one of conviction it has power to revise an order of acquittal. It may in case of an acquittal on appeal by a Sessions Court reverse the order and direct a retrial of the appeal(5). But the High Court has no power, in revision, to order the retrial of a person, who has been acquitted, except on the ground that the trial has been illegal, or so radically or incurably irregular, as in fact to have occasioned a failure of justice(6). Upon a proper interpretation of this sub-section, a High Court, acting as a court of revision, is not competent to question an order of acquittal upon the merits thereof, or on the ground that it takes a different view of the facts, or of the law applicable thereto, from that upon which the order of acquittal is based(7). The High Court may on revision set aside an order of acquittal and direct a retrial if there is a case of non-recording or improper recording of inadmissible evidence(8). As a general rule, the High Court will not interfere with an order of acquittal, but it will do so where such an order is passed without examining the witnesses for the prosecution, on the mere denial of the

(1) *Emperor v. Rameshwar*, 53 B.

B.L.B. 1572-33 C.W.N. 1-55 M.I.J. 786-5 O.W.N. 911-55 I.A. 390-29 Cr.L.J. 828-111 I.C. 332.

(2) *Queen v. Toyab Sheikh*, 5 W.R. Cr. 2; *Queen v. Sobel Mahi*, 5 W.R. Cr. 32; *Reg. v. Dorabji Palavhi*, 11 Bom. H.C. R. 117; *Reg. v. Hatoo Khan*, 21 W.R. Cr. 21-12 B.L.B.

1; 50; 142.

of law, the court refused to interfere: *In re Hardeo*, 1 A. 139 F.B., *Emperor v. Sada Singh*, A.I.R. 1930 Lah 338.

259-52 M.L.J. 707-28 Cr.L.J. 397-A.I.R. 1927 Mad. 582-38 M.L.T. 379; *Chairman Purulia Municipality v. Bishun Sao*, A.I.R. 1928 Pat. 193-29 Cr.L.J. 1017-112 I.C. 345; *Emperor v. Dito*, A.I.R. 1928 S. 176; *Munshi v. Emperor*, 25 P.W.R. 1907-5 Cr.L.J. 438; *Jaita Bechar v. Dargahat*, 11 W.C. 1 m 601-1-2

1; 50; 142.

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1; 50; 142.

of law, the court refused to interfere: *In re Hardeo*, 1 A. 139 F.B., *Emperor v. Sada Singh*, A.I.R. 1930 Lah 338.

1; 50; 142.

was convicted of an offence under section 205-109 of the Penal Code but on appeal the Sessions Judge altered the conviction to one under section 419 of the Code. On revision the High Court was of opinion that the substitution of a conviction under section 419 for one under section 205-109 by the Sessions Judge did not amount to an acquittal of the accused with regard to the offence under the latter section and that sub-section (4), was no bar to the High Court re-altering the conviction from one under section 419 to one under section 205-109 of the Penal Code(1). It is doubtful whether, in a case in which it is difficult to say what was the offence committed by the accused on the facts proved, the alteration of one section into another can be said to be a case of acquittal under the former section within the meaning of this sub-section(2). In this case the accused was convicted by a Magistrate under sections 420 and 507 I. P. Code but in appeal the Sessions Judge held that sections 420 and 507 were not the proper sections applicable on the facts and altered the conviction to one under sections 385 and 508, I. P. C., and it was held that the High Court could convict the accused under section 420 and 511, I. P. C.

Power to convert conviction on a lesser offence into one on a more serious offence under ss. 423 and 439.—Where there is an appeal by a prisoner from a conviction under section 304 of the Indian Penal Code (he having been committed to stand his trial under section 302 of the Indian Penal Code and in addition, the High Court takes *seizin* of the case under its revisional jurisdiction, the conviction for the lesser offence under section 304 of the Indian Penal Code can be converted into one under section 302 of the Indian Penal Code, and the sentence can be enhanced accordingly, under the combined provisions of sections 423 and 439 of the Criminal Procedure Code(3). But where the appellant was acquitted on a charge of murder and convicted under section 326 of the Penal Code and there was no appeal before the High Court, the High Court exercising its revisional powers cannot convert the acquittal on a charge of murder into one of conviction(4). This view is in accordance with the view taken by the Judicial Committee in *Kishan Singh v. Emperor*(5). The pronouncement of their Lordships on the construction of subsection (4) sets at rest the conflict of authorities in India(6).

A. 332=L. R. 7 A. 100 Cr.=5 A. J. Cr. R. 435.

(1) *Ganpat v. Emperor*, 6 Pat. 217=102 I. C. 337=1927 Pat. 199=28 Cr. L. J. 529.

(2) *In re Doraisamy*, 48 M 774=48 M L J 190=26 Cr. L. J. 755=A. I. R. 1925 M 480=86 I. C. 339.

(3) *On Shree v. Emperor*, 1 Rang 436=25 Cr. L. J. 247=76 I. C. 711, following *Bali Reddi v. Emperor*, 87 M. 119; *Bhola v. Emperor*, 12 P. R. 1904 Cr.

(4) *Kan Thein v. Emperor*, 4 Rang. 140=5 Bur. L. J. 80=27 Cr. L. J. 1993, following *Emperor v. Sheqdarshan*

Singh, 44 A 332; *Emperor v. Shiv-pultraya*, 48 B 510, *Emperor v. Jaidonath*, 2 C 273 and dissenting from *Bhola v. Emperor*, 12 P. R. 1904 Cr.; *Emperor v. Balwant*, 9 A. 134.

(5) 50 A. 722=55 I. A. 390=111 I. C. 332=1928 P. C. 254.

(6) See (*inter alia*) *Emperor v. Shahu*, 97 I. C. 641; *Kanshi v. Emperor*, 91 I. C. 184=8 Lah L. J. 188=27 Cr. L. J. 566=A. I. R. 1916 Lah. 861=27 P. L. R. 214 and *Fazal Khan v. Emperor*, 8 Lah. 186=111 I. C. 802=28 Cr. L. J. 508=A. I. R. 1927 Lah. 369=8 A. I. Cr. R. 149, which are now superseded by the Privy Council judgment. The decisions

Scope of prohibition contained in sub-section (4).—The prohibition in this sub-section that nothing in the section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction cannot be construed as referring only to cases where the trial has ended in a complete acquittal of the accused in respect of all charges or offences. The words of the sub-section are clear and unqualified and apply equally to a case where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder(1). The following decisions holding that sub-section (4) must be construed as referring to cases where the trial has ended in a complete acquittal(2) must be deemed as overruled by the Privy Council decision cited first in the last note. The High Court has no power in revision to alter a conviction by the Lower Court for culpable homicide not amounting to murder falling under the latter part of section 304 Indian Penal Code, into one of murder or even of culpable homicide coming under the first part of section 304 as to do so would amount to converting a finding of acquittal into one of conviction(3). Where an accused is charged with the offence of murder under section 302 I. P. C. but is convicted by the Sessions Judge of the offence of culpable homicide not amounting to murder under section 304 I. P. C. he must be deemed to be acquitted of the charge of murder, and the High Court in converting in revision the finding of acquittal of the accused on the charge of murder into one of conviction acts without jurisdiction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal(4). The view that where an accused is charged under section 302, Penal Code but is convicted under section 304 the High Court is competent in revision to alter the conviction from one under section 304 to one under section 302, Penal Code(5) is no longer tenable.

Alteration of conviction under one section into conviction under another.—This section precludes the High Court from converting a finding of acquittal into one of conviction. But the section does not preclude the High Court from altering a conviction under one section into a conviction under another section(6). An accused person

(1) *Kishan Singh v. Emperor*, 50 A. 722=55 I. A. 390=111 I. C. 332= A. I. R. 1928 P. C. 254=29 Cr. L. J. 828=5 O. W. N. 911=28 L. W. 396=(1928) M. W. N. 749=29 P. L. R. 575=83 O. W. N. 1=48 C. L. J. 397=30 Bom. L. R. 1572=55 M. L. J. 706=26

ror, 37 M. 119; *Fazal v. Crown*, 8 Lah. 136=101 I. C. 892=1927 Lah. 369; *Kanshi v. Emperor*, 91 I. C. 184=8 Lah. L. J. 180=27 Cr. L. J. 593=27 P. L. R. 244; *Gaya v. Emperor*, 9 O. L. J. 342=A. I. R. 1923 O. 4=69 I. C. 81=23 Cr. L. J. 641=4 U. P. L. R. (O) 81; *Emperor v. Shahu*, 97 I. C. 641=27 Cr. L. J. 1121.

(3) *In re Subba Chukli*, 50 M. 259=52 M. L. J. 707=28 Cr. L. J. 397=1927 M. 582=100 I. C. 1053.

(4) *Kishan Singh v. Emperor*, 50 A. 722=5 O. W. N. 911.

(5) *Fazal v. Crown*, 8 Lah. 186=101 I. C. 892=1927 L. 369=28 Cr. L. J. 508.

(6) *Dulli v. Mangli*, 94 I. C. 192=24 A. L. J. 414=27 Cr. L. J. 561=1926

most sparingly exercised and only in exceptional cases where either there has been a denial of the right of fair trial or it is urgently demanded in the interests of public justice(1). The law gives the power to courts of revision to interfere even with orders of acquittal, and although interference with such orders is not usual it may be resorted to in exceptional circumstances(2). The High Court will interfere where the order of acquittal was not passed on the merits, but was made on account of the death of the complainant(3), or where the judgment of the lower court is very summary and contains no discussion of the case or distinct findings on the questions involved(4), or where there were grave irregularities in procedure and the trial was conducted in an atmosphere of prejudice(5), or where such interference is imperatively demanded in the interest of public justice or where the procedure adopted is so irregular or illegal as to vitiate the whole trial(6); or where there is a glaring defect either in the procedure or in the view of the evidence taken by the court below(7). But though the High Court has the power, under this section, to revise an order of acquittal, yet ordinarily it does not interfere with such an order in the exercise of its revisional jurisdiction because an appeal can always be made by the Local Government under s. 417 (8). The High Court does not interfere with an order of omission or irregularity unless the same has caused a failure of justice; and as regards question of facts, though the court's jurisdiction to interfere, in respect of the correctness of findings of fact, even when findings are concurrent is unquestionable, it will not as a rule, go into the evidence, save in exceptional cases, as where the

(1) *Siban Rai v. Bhagwat Das*, 5 Pat. 25=6 Pat. L. T. 833=27 Cr. L. J. 236=1926 P. 176; *Nga Po Pyaw v.*

668, *Amedabad Municipality v. Mangalal*, 9 Bom. L. R. 156=5 Cr. L. J. 171; *Panchanan v. Upendra Nath*, 1927 A. 193=25 A. L. J. 100=L. R. 8 A. 5 Cr.=27 Cr. L. J. 1404=98 I. O. 719, *Khem Chand v. Lala*, 85 I. C. 255=26 Cr. L. J. 527.

(2) *Jitan v. Damoo Sahu*, 1 Pat. L. J. 264=20 C. W. N. 862=18 Cr. L. J. 151=37 I. O. 519.

(4) *Nabin Chandra v. Rajendra*, 18 Cr. L. J. 519=39 I. O. 487.

(5) *Gangadhar v. Reginald*, 25 C. W. N. 609.

(6) *Zahiruddin v. Nasiruddin*, 71 I. O. 602=24 Cr. L. J. 168.

(7) *Kamikka Pershad v. Emperor*, 104 I. O. 228=4 O. W. N. 729=A. I. R. 1927 O. 845; *Rama Murti v. Jai Indra*, A. I. R. 1923 O. 257=9 O. W. N. 345; *Abdul Shakur v. Palli Ram*, A. I. R. 1931 O. 273=8 O. W. N. 841=132 I. O. 10=1931 Cr. O. 633=32 Cr. L. J. 828=16 A. I. Cr. R. 397.

(8) *Heerabai v. Framji Bhikaji*, 15 B. 349; *Harbans v. Emperor*, A. I. R. 1924 A. 778=22 A. L. J. 820=L. R. 5 A. 143=84 I. C. 658; *Ram Nidh v. Ram Saran*, 26 O. O. 281=81 I. C. 314=1924 O. 64=95 Cr. L. J. 794; *Qayyam Ali v. Faiz Ali*, 27 A. 359; *Balu Mal v. Ghasi*, 9 A. I. Cr. R. 821;

Acquittal in complainant's absence and under other circumstances.—An acquittal under section 247 does not stand on any different footing from an acquittal under other circumstances and the High Court, will not set aside the order of acquittal in revision except under very rare circumstances(1). Acquittal on the ground that sanction for prosecution had not been obtained is still an acquittal by a court of competent jurisdiction as contemplated by s. 403, Cr. P. C.(2). An order under s. 471 is not an order of conviction. Therefore where the accused was acquitted by the lower court on the ground that he was insane, the passing of an order under s. 471 by the High Court in revision does not amount to an alteration of an order of acquittal into one of conviction within the meaning of this sub-section(3).

Interference on reference or at the instance of a private prosecutor.—The High Court will not as a rule interfere in revision with acquittals on a reference by a Magistrate where the Local Government might have appealed and has not done so(4). But it has jurisdiction to entertain a reference and if necessary, to set aside acquittal, though such power must be exercised in exceptional cases only, where there has been either a denial of the right of a fair trial or a flagrant

on the application of a private prosecutor, where there is a material error in the proceeding in the case(7), or where an acquittal has been ordered upon a mistaken view of the law(8), or where the offence is of so personal a character that the Local Government would seldom be willing to appeal from the acquittal(9). But the High Court should not entertain an application by a complainant to revise an order of acquittal after the Local Government has declined to direct an appeal against it(10). The power of interference in revision with acquittal should be

reported as *Emperor v. Kan Thein*, 98 I. C. 705—4 Rang. 140—5 Bur. L. J. 80—A. I. R. 1926 Rang. 154—27 Cr. L. J. 139 and *In re Subba Chulli*, 10 M. 259—100 I. C. 1053—52 M. L. J. 707—28 Cr. L. J. 397—A. I. R. 1927 M. 582—38 M. L. T. 379 are in accordance with the view taken by the Judicial Committee

Empress v. Jahandi, 23 C. 249

(5) *Nathu Mal v. Abdul Haq*, 12 Lah. L. J. 5.

(6) *Faujdar v. Kasi*, 42 C. 612, where earlier cases are collected; *Nga Po Pyaw v. Nga Po Nwe*, 3 U. B. R. (1917—1920) 19; *Damodar v. Juyhar*, 89 I. C. 888—26 Cr. L. J. 1348; *In re*

J. 186.

(7) *In re Hardeo*, 1 A. 139; *In re Sukho*, 2 A. 448; *Basirulla v. Asad-ulla*, 38 C. W. N. 576—A. I. R. 1919 C. 639—30 Cr. L. J. 1013.

(8) *In re Hardeo*, 1 A. 139 F. B.
(9) *Sunderbai v. Kishore*, 20 Cr. L. J. 708—52 I. C. 788; *Faujdar v. Kasi*, 42 C. 612 at p. 616 (per Jenkins, C. J.); *Asutosh v. Purna Chandra*, 50 C. 169 (163); *Rakhai v. Kailash*, 11 C. L. J. 118.

(10) *Graham v. Elsey*, 6 L. B. R. 856,

Mad. Cr. Cas. 1

(8) *Mohammad v. Emperor*, 23 Cr. L. J. 71—65 I. C. 423—(1922) M. W. N. 10—80 M. L. T. 74—42 M. L. J. 72.

(4) *In re Aminuddin*, 24 A. 846; *Emperor v. Mudar Baksh*, 25 A. 128; *Emperor v. Gur Dayal*, 12 A. L. J. 255; *In re Mogal Beg*, 42 M. 109;

most sparingly exercised and only in exceptional cases where either there has been a denial of the right of fair trial or it is urgently demanded in the interests of public justice(1). The law gives the power to courts of revision to interfere even with orders of acquittal, and although interference with such orders is not usual it may be resorted to in exceptional circumstances(2). The High Court will interfere where the order of acquittal was not passed on the merits, but was made on account of the death of the complainant(3), or where the judgment of the lower court is very summary and contains no discussion of the case or distinct findings on the questions involved(4), or where there were grave irregularities in procedure and the trial was conducted in an atmosphere of prejudice(5), or where such interference is imperatively demanded in the interest of public justice or where the procedure adopted is so irregular or illegal as to vitiate the whole trial(6); or where there is a glaring defect either in the procedure or in the view of the evidence taken by the court below(7). But though the High Court has the power, under this section, to revise an order of acquittal, yet ordinarily it does not interfere with such an order in the exercise of its revisional jurisdiction because an appeal can always be made by the Local Government under s. 417 (8). The High Court does not interfere with an order of omission or irregularity unless the same has caused a failure of justice; and as regards question of facts, though the court's jurisdiction to interfere, in respect of the correctness of findings of fact, even when findings are concurrent is unquestionable, it will not as a rule, go into the evidence, save in exceptional cases, as where the

(1) *Siban Rai v. Bhagwat Das*, 5 Pat. 25=6 Pat. L. T. 833=27 Cr. L. J. 235=1926 P. 176; *Nga Po Pyaw v.*

Theetan, A. I. R. 1913 B. 310=25 L. J. 1389=83 I. C. 349; *Emperor v. Rameshwar*, 119 L. C. 643=31 Bom. L. R. 519=A. I. R. 1929 B. 306=53 B.

151=37 L. C. 519

(4) *Nabin Chandra v. Rajendra*, 18 Cr. L. J. 519=39 I. C. 487.

(5) *Gangadhar v. Reginald*, 25 C. W. N. 609

(6) *Zahiruddin v. Nasiruddin*, 71 I. C. 602=24 Cr. L. J. 186.

(7) *Kamikha Pershad v. Emperor*, 104 I. C. 298=4 O. W. N. 729=A. I. R. 1927 O. 345; *Rama Murti v. Jai*

Prasad, A. I. R. 1929 O. 257=4 O. W. N.

828=16 A. I. Cr. R. 397.

(8) *Heerabai v. Framji Bhikaji*, 15 B. 349; *Harbans v. Emperor*, A. I. R. 1924 A. 778=22 A. L. J. 620=L. R. 5 A. 143=83 I. C. 658; *Ram Nidh v. Ram Saran*, 26 O. C. 281=81 I. C. 314=1924 O. 64=75 Cr. L. J. 794; *Qayyam Ali v. Faiyaz Ali*, 27 A. 359; *Babu Mal v. Ghosi*, 9 A. I. Cr. R. 321;

judgment of the facts is manifestly wrong and pulpably unjust(1). The High Court will not, in its revisional jurisdiction, interfere with a verdict of acquittal merely to vindicate the position of a private prosecutor where a merely technical offence has been committed however clearly that technical offence, may have been proved(2).

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(3) *Jitan v. Damoo Sahu*, 1 Pat. L. J. 284=20 C. W. N. 862=18 Cr. L. J. 151=37 I. C. 519.

(4) *Nabin Chandra v. Rajendra*, 18 Cr. L. J. 519=23 I. C. 457.

(5) *Gangadhar v. Reginald*, 25 C. W. N. 609.

(6) *Zahiruddin v. Nasiruddin*, 71 I. C. 602=24 Cr. L. J. 156.

(7) *Kamikka Pershad v. Emperor*, 104 I. C. 278=4 O. W. N. 729=A. I. R. 1927 O. 245; *Rama Murli v. Jai Indra*, A. I. R. 1923 O. 257=9 O. W. N. 315; *Aldul Shakur v. Palli Ram*, A. I. R. 1931 O. 273=9 O. W. N. 341=132 I. C. 10=1931 Cr. C. 633=32 Cr. L. J. 618=16 A. I. Cr. R. 377.

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(1) *Rama Murti v. Jas Indra*, A. I. R. 1933 O. 257=10 O. W. N. 345=34 Cr. L. J. 661.

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(2) *Narayan v. Emperor*, 11 Pat. L. T. 772.

himself at all about the trial. If, on the other hand it is not so clear, and it is a moot point whether or not the lower court has jurisdiction, then that matter should be thrashed out fully in both courts below before it is brought if necessary, to the High Court(1). Thus, in an application by an accused for revision of an order of a Magistrate refusing to allow a private Vakil to appear on his behalf it was held that the case was not one for interference in revision because the accused could have appealed from his conviction and made it a ground of appeal that he was improperly deprived of legal assistance at the trial(2).

High Court can interfere in revision even when accused have not appealed.—It is not an inflexible rule that where either Government on the one side or an accused on the other has a right of appeal, and does not exercise it, the powers of the High Court under this section cannot be exercised; but, in such cases, these powers should be sparingly used, and save in very exceptional circumstances, not at all in reference to questions of fact(3). But it is the duty of High Court to interfere on the revisional side, when a matter has been brought to its notice, if such interference is called for in the interest of justice, even in the absence of an appeal by the convict(4). Ordinarily the High Court will not permit a criminal revision petition to be heard when the petitioner has had an opportunity of appealing and has not exercised it. But where the effect of non-interference in revision would be to sustain a heavy sentence of imprisonment which cannot stand in law, the High Court will hear the case under the general powers of revision and if necessary interfere(5). But it is maintained in some cases that a revisional court will not interfere of its own motion in such a case, where it has called for the proceedings at the instance of a party who has a right of appeal and has failed to avail himself of the right(6).

Application by third party.—The powers of revision given to the High Court under this section are wide enough to empower it to entertain a petition for revision at the instance of a third party, e.g., the Secretary of the Bar Association even though the accused person has not preferred an appeal. The restriction mentioned in this sub-section only stands in the way of interference at the instance of a party who could have appealed but did not appeal. There is ample authority for this view(7). But a Full Bench of the Allahabad High Court has held that an application in revision would not be entertainable, if the accused has failed to avail himself of his right of appeal; but the court can receive information

(1) *Sendiappa v. President, D. B. Madras*, 32 Cr. L. J. 695=54 M. 695=A. I. R. 1931 M. 419=4 M. Cr. O. 183=60 M. L. J. 495=132 I. O. 319=1931 Cr. O. 467=38 L. W. 475=(1930) M. W. N. 1271.

(2) *State v. ...* 866.
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R.
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(5) *In re Pavanur Atham*, 88 I. C. 283=20 L. W. 914=A. I. R. (1925) M. 239=26 Cr. L. J. 747.

(6) *Jumo v. Wali Mahomed*, 8 S. L. R. 229; *Nuran v. Emperor*, 81 I. C. 754=25 Cr. L. J. 1962; cf. *Croton v. Umar Din*, 2 Patiala L. R. 137.

(7) *Secretary, High Court Bar Association v. Emperor*, 33 Cr. L. J. 831=189 I. O. 696=A. I. R. 1932 Lah. 550=(1932) Cr. Cas. 713=83 P. L. R.

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appeal under s. 417 the High Court ought not to interfere in revision on a reference under s. 438 by the District Magistrate, where it cannot do so without practically hearing the case on the evidence(1).

Hearing of appeal barred by hearing of application for revision.—Where the High Court has heard an application for revision in a criminal case and passed orders thereon after going into the facts of the case and exercising its powers as an appellate court under ss. 423 and 439, it cannot afterwards hear an appeal in the case. The order passed on the application for revision is conclusive both as to the merits of the case and as to the *quantum* of punishment(2).

Hearing of revision barred by hearing of appeal.—Where the High Court has dealt with a case as a court of appeal, it will not afterwards deal with the same case as a court of revision except possibly to cure a very manifest injustice(3). But the High Court can act as a court of revision, after it has acted as a court of appeal, in order to correct an error in law which could not be set right on appeal(4).

Sub-section (6).—The effect of the addition of sub-section (6) by Act XVIII of 1923, is that the High Court, when adjudicating upon an application for enhancement of sentence, is converted into a court of appeal against conviction and the accused is entitled to show that his conviction is unjustified(5). An accused person, who is called upon to show cause why the sentence passed upon him should not be enhanced, is entitled, under this sub-section, also to show that his trial was illegal and his conviction was contrary to law(6). The dismissal of an appeal by the High Court does not debar it from subsequently enhancing the sentence, in the exercise of revisional jurisdiction, after notice to the appellant. This sub-section does not apply to a convicted person whose appeal has been heard and disposed of by the High Court itself(7). The point was fully dealt with in *Empress v. Jorabhai Kisanbhai*(8), a case in which the Bench that heard a criminal appeal was moved, after the delivery of the appellate judgment dismissing the appeal, to issue a notice to the accused to shew cause why the sentence should not be enhanced. The Bench that disposed of the rule pointed out that the dismissal of the appeal was in no way a decision that the sentences should not be enhanced and that sub-section (6) which was added to section 439 by the amendments of 1923 had no application to a case where the appeal of the accused had been heard and disposed of by the High Court itself. The ruling in *Jorabhai's*(9) case was referred to with approval in *Crown v. Dhanna*.

(1) *Empress v. Jorabhai Kisanbhai*, A. I. R. 1923 B. 573.

(2) *Queen v. Gorachand*, 5 W. R. Cr. 45.

(3) *Venkatachalam In re*, 2 Weir. 573.

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(5) *Emperor v. Tej Raj*, 92 I. C. 892 = 27 Cr. L. J. 880 = 27 P. L. R. 112; *Emperor v. Badan Singh*, A. I. R. 1928 A. 150 = 118 I. O. 577.

(6) *Emperor v. Manant K. Mehta*, 49 B. 892 = 27 Bom. L. R. 1343 = 92 I. C. 680 = 27 Cr. L. J. 805 = 1926 B. 110.

(7) *Ram Lakhan v. Emperor*, 10 Pat. 872 = A. I. R. 1932 Pat. 126 = 18 Pat. L. T. 17 = 135 I. C. 522.

(8) 50 B. 783 = 28 Bom. L. R. 1051 = 1926 Bom. 555 = 97 I. C. 805 = 27 Cr. L. J. 1173; followed in *Emperor v. Koya Partab*, 92 Bom. L. R. 1286 = A. I. R. 1930 B. 593 = 1930 Cr. O. 1140; *Khoda Bux v. Emperor*, 61 C. 6.

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(9) 50 B. 783; see also *Emperor v. Inder Chand*, A. I. R. 1934 B. 471 = 36 Bom. L. R. 954.

or knowledge from a third party and act upon it of its own accord. According to that court an application filed by a third party who is a total stranger to the criminal proceedings and has no *locus standi* to invoke the jurisdiction of the court is merely a miscellaneous application filed for the sole purpose of bringing the facts to the knowledge of the court, and in such proceeding, his counsel should not expect to be heard(1). But the mere fact that an accused in the Magistrate's Court refused to take part in the proceedings before him or stated that he had nothing to say in defence should not prevent a revision from his conviction from being heard as there is an obligation on the High Court to superintend and supervise the subordinate criminal courts and to see that orders of conviction passed by such courts are not illegal and contrary to law. If the illegality of a conviction is brought to the notice of the High Court there should not be refusal to interfere merely because the accused concerned is quite content with the order and does not wish to challenge it(2). The High Court would interfere and reduce a sentence in revision even although the convicted person fails to exercise his right of appeal and does not himself move the court in revision, and the application is made by a third party, where the convicted person has insuperable difficulties in agitating grievances in the manner provided by law; but where the convicted persons are men of position holding university degrees and practising as lawyers and they do not appeal from the judgment convicting them, the High Court will not entertain an application for reduction of sentence at the instance of third party even though the sentences are very heavy(3).

Reference—This sub-section prohibits the High Court from exercising its power of revision at the instance of the party who could have appealed; but it is no bar to dealing in revision with a case reported under section 438 by a Session Judge or District Magistrate(4). The power of the District Magistrate to make a reference to the High Court under s. 438 against an order of acquittal is not shut out by the provisions of sub-section (5), inasmuch as the District Magistrate, not being the Local Government is not a person entitled to appeal, whether or not he may be able in his executive capacity to move the Local Government to appeal(6). When the Local Government has not preferred an

911; *Pars Ram v. Emperor*, 131 I. C. 353=32 P. L. R. 71=A. I. R. 1931 Lah. 145=32 Cr. L. J. 700=Ind. Bul. (1931) Lah. 449; *Lilauati v. Emperor*, 136 I. C. 717=33 Cr. L. J. 339=33 P. L. R. 884=A. I. R. 1932 Lah. 364; *Emperor v. Mohan Lal*, 128 I. C. 221=7 O. W. N. 895=32 Cr. L. J. 104=1930 O. 497=(1930) Cr. Cas. 116; *Emperor v. Ganesh*, 55 B. 353=A. I. R. 1931 B. 140=32 Cr. L. J. 471=1931 Cr. C. 188=130 I. C. 25=33 Bom. L. R. 56 (but entertaining such an application seems to be somewhat in breach of the spirit of sub section(3) and third party ought not to apply in revision unless there is a very strong case).

(1) *Shailabala Devi v. Emperor*, 34

Cr. L. J. 1115=145 I. C. 977=A. I. R. 1933 A. 678=31 A. I. J. 1059=L. R. 14 A. 386 Cr.=1933 Cr. Cas. 1190 F. B.

(2) *Ibid*

(3) *Ambica Charan v. Emperor*, A. I. R. 1933 O. 861=144 I. C. 691=34 Cr. L. J. 814.

(4) *Emperor v. Appullicamy*, (1904) L. B. R. 209. But it is clearly desirable that District Magistrates should not place disqualification in the way of persons entitled

8rd Qr. 124.

(6) *Emperor v. Bashir*, 53 A. 42=128 I. C. 395=A. I. R. 1930 A. 741=1930 Cr. C. 997=32 Cr. L. J. 143.

Where the accused was sentenced under section 271(2) of the Code on his own plea of guilty, the only question which arises in a proceeding for enhancement of sentence is the propriety of the judgment of the court which sentenced him(1). Prior to this amendment, in cases that came up before the High Court for enhancement of sentence, it had been the practice to accept the conviction, and to consider the question of enhancement of sentence on that basis(2). But this is no longer possible, the amendment is intended to give the accused person who has been brought to the bar of the High Court to answer why a sentence passed upon him should not be enhanced, the right of showing by argument a *fortiori* not only that the sentence should not be enhanced but that the whole conviction is wrong and should be set aside(3).

Notice when to be given.—When a convicted person is already before the court as an appellant or applicant for revision, appearing through an advocate, and the court considers the case to be one for enhancement of sentence should the conviction stand, it is not necessary to issue a fresh notice or a rule on such convicted person to show cause why the sentence should not be enhanced, but the court may, on dismissing the appeal or application for revision, ask the advocate then and there to show cause against enhancement of sentence(4). It is undesirable that a notice for enhancement of sentence should be issued at the time of the admission of the appeal. The court first of all should deal with the appeal on the merits, and it is *only after disposing of the appeal that it can consider whether notice to enhance sentence should be issued*. If the notice has been issued at the time of the admission, the accused is entitled on the evidence to show that he is innocent. If the conviction is not correct on the evidence he will be entitled to an acquittal(5).

Limitation.—Article 181 of Schedule I of the Limitation Act does not apply to an application made to the High Court for revision of an order of a criminal court of inferior jurisdiction. Though there is no statutory time limit for entertaining such applications, the High Court should not as matter of practice admit applications for revision unless it is satisfied that they are made within a reasonable time, and the reasonable time would be the time granted by statute for admitting appeals. When an application for revision has been made after the expiry of the period allowed for appeal, the court should ask the applicant to give reasons for the delay and if those reasons are not sufficient, to dismiss application(6). The High Court is not inclined to exercise its discretionary powers of revision, in cases where an applicant

and (1), though the point for determination in the latter case was whether the rejection of petition for revision by the accused debarred him from exercising the right given by sub-section (6) to shew cause against his conviction. By a somewhat similar train of reasoning it was held by the Madras High Court in *In re Saiyed Anif Sahib* (2) that the dismissal of a revision petition did not prevent the High Court from enhancing the sentence passed upon the petitioner after giving him notice. Where a High Court has given a finding on appeal or in revision as to the guilt of an accused person and subsequently a notice is served upon that person to show cause why his sentence should not be enhanced the right which he would have had under sub-section (6) to re-open the question of his guilt had no such finding been given, vanishes because of the inherent incapacity of a Judge of the High Court to reconsider a decision given by another Judge (3). Where an accused person has not appealed against his conviction at all, it may be open to him to claim the right of attacking the findings of fact in the same manner and to the same extent to which he could have done if he had appealed to the lower court. But he cannot claim the same privilege where he has appealed and lost, unless he can bring his case within the ordinary rule as applicable to revision application (4). Where an appeal has been presented and dismissed either after hearing or summarily, it is not open to the accused, in showing cause why his sentence should not be enhanced, to go again into the merits (5).

Convicted person asked to show cause against enhancement of sentence; if can re open whole evidence in showing cause against conviction or is limited to grounds that would have been open to him as appellant or applicant for revision.—When a convicted person is required to show cause why the sentence passed on him should not be enhanced, the cause which under sub-sec. (6) he can show against his conviction is only such cause as it would have been open to him under the law to show if he himself had been an appellant or applicant for revision as the case might be. Consequently, when a person convicted at a Jury trial is required to show cause against enhancement of the sentence, he cannot, in showing cause against the conviction re open the whole evidence and challenge the verdict directly thereon, but is limited to the grounds mentioned in sec. 423 (2), that is to say misdirection by the Judge and misunderstanding of the law by the Jury (6). But in non-Jury cases it is competent to an accused person, when notice of enhancement is served upon him to show from the whole record that he ought to have been acquitted and he cannot be restricted with any considerations that the application was in revision and not an appeal (7).

(1) 10 Lah. 241=117 I. C. 669=80 Cr. L. J. 815=1920 Lah. 797

(2) 85 I. C. 727=1925 M. 993=26 Cr. L. J. 583.

(3) *Emperor v. Sher Singh*, 100 I. C. 234=8 Lah. 521=1927 L. 217=23 Cr. L. J. 266.

(4) *Emperor v. Lukman*, 98 I. C. 49=1927 S. 39; *Emperor v. Shidoo*, 22 S. L. R. 453=29 Cr. L. J. 936=111 I. C. 216=4 I. R. 1022 S. 26

(5) *Emperor v. Koya Partab*, 1930 B. 593=31 Bom. L. R. 1286; following *Emperor v. Jorabhai*, 50 B. 753; *Ram Lakhan v. Emperor*, 10 Pat. 572; *Croton v. Dhanna Lal*, 10 Lah. 241.

(6) *Khoda Bux v. Emperor*, 37 C. W. N. 1122=A. I. R. 1934 Cal 105=51 C. 6=147 I. C. 1121=35 Cr. L. J. 554.

(7) *Kala v. Emperor*, 116 I. C. 893=1923 L. 581=30 Cr. L. J. 692.

Where the accused was sentenced under section 271(2) of the Code on his own plea of guilty, the only question which arises in a proceeding for enhancement of sentence is the propriety of the judgment of the court which sentenced him(1). Prior to this amendment, in cases that came up before the High Court for enhancement of sentence, it had been the practice to accept the conviction, and to consider the question of enhancement of sentence on that basis(2). But this is no longer possible, the amendment is intended to give the accused person who has been brought to the bar of the High Court to answer why a sentence passed upon him should not be enhanced, the right of showing by argument a *fortiori* not only that the sentence should not be enhanced but that the whole conviction is wrong and should be set aside(3).

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Limitation.—Article 181 of Schedule I of the Limitation Act does not apply to an application made to the High Court for revision of an order of a criminal court of inferior jurisdiction. Though there is no statutory time limit for entertaining such applications, the High Court should not as matter of practice admit applications for revision unless it is satisfied that they are made within a reasonable time, and the reasonable time would be the time granted by statute for admitting appeals. When an application for revision has been made after the expiry of the period allowed for appeal, the court should ask the applicant to give reasons for the delay and if those reasons are not sufficient, to dismiss application(6). The High Court is not inclined to exercise its discretionary powers of revision, in cases where an applicant

(1) *Superintendent v. Jnanendra Nath*, 33 C. W. N. 599=49 C. L. J. 432=56 C. 1145=119 I. C. 301=30 Cr. L. J. 1038=1929 C. 747, per Buckland, J., contra per Mukerji, J.; see *Nga Yuca v. Emperor*, 1935 Rang. 49.

(2) *Emperor v. Chintoo*, 32 B. 162=7 Cr. L. J. 119=10 Bom. L. R. 93.

(3) *Emperor v. Mahadeo*, 26 Cr. L.

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(5) *Ram Chandra v. Emperor*, A. I. R. 1933 B. 153=85 Bom. L. R. 174; But see *Emperor v. Dabu*, 58 B. 392.

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has made undue delay in coming to the court for relief(1). Unexplained delay in applying for revision of an order passed to the prejudice of the applicant is a reason for the High Court in the exercise of its discretion, declining to interfere(2). Where, however, the delay caused in filing a revision to quash the proceedings is sufficiently explained by the accused the High Court can entertain the application and pass orders thereon(3).

raised for the first time in revision(5). Where no plea on the question of the severity of the sentence is urged before the court of appeal it cannot be taken in revision before the High Court(6). Where after the close of a case by both parties, the Magistrate examines a court witness and neither party asks the Magistrate to allow further arguments, no objection can be taken to that effect in a petition of revision by the High Court(7). High Court will not interfere in revision with questions of fact which a party did not put before the trial court(8). But an accused can take the point of misjoinder in revision when the joint trial is bad, even though the point was not taken in the court below. No question of prejudice arises in such a case(9). Where confession of an accused has been excluded by the trial Magistrate under s. 24, it cannot be taken into consideration in revision though such confession may be excluded wrongly(10).

Loss of record—The loss of a record after conviction is no ground for the acquittal of the accused in revision. If, however, the case is a serious one in which the accused has been sentenced to a substantial term of imprisonment, there might be some ground for directing a retrial(11).

Rule to show cause: Duty of Magistrate.—Though it is open to a Magistrate called upon to show cause to submit his remarks in answer to

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there are elements of doubt in it the accused must be given the benefit of the doubt)

(5) *Ruppa Bhimsamy v. Emperor*, A. I. R. 1929 Mad. 188=29 Cr. L. J. 1062=112 I. C. 566

(6) *Mahadeo v. Emperor*, 75 I. C. 159=21 A. L. J. 654=24 Cr. L. J. 911=45 A. C. 80=1924 A. 131.

(7) *Abdul Jabbar v. Mafizuddin*, 81 I. C. 931=28 C. W. N. 783=25 Cr. L. J. 1107.

(8) *In re Rama Raja*, A. I. R. 1926 Jour 135.

(9) *Dalsuk Roy v. Emperor*, A. I. R. 1925 C. 248=25 Cr. L. J. 807=81 I. C. 343.

(10) *Billu v. Emperor*, A. I. R. 1930 S. 168=1930 Cr. C. 654=126 I. C. 53=31 Cr. L. J. 947.

(11) *Sheo Jaiwan v. Ram Sakhi*, 18 Cr. L. J. 737=40 I. C. 737.

(9) *Kumud Nath v. Brijendra Nath*, A. I. R. 1933 Cal. 647=146 I. C. 806=35 Cr. L. J. 29

(4) *Raghubar Dyal v. Emperor*, 18 Cr. L. J. 435=38 I. C. 995 (If, however, it is established that the case for the prosecution cannot be believed and

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has made undue delay in coming to the court for relief(1). Unexplained delay in applying for revision of an order passed to the prejudice of the applicant is a reason for the High Court in the exercise of its discretion, declining to interfere(2). Where, however, the delay caused in filing a revision to quash the proceedings is sufficiently explained by the accused the High Court can entertain the application and pass orders thereon(3).

New plea in revision.—Where an accused has set up a plea of *alibi* in his defence, he cannot afterwards be allowed to put forward an entirely inconsistent plea(4). A contention which should have properly been raised in the lower courts but was not so raised will not be allowed to be raised for the first time in revision(5). Where no plea on the question of the severity of the sentence is urged before the court of appeal it cannot be taken in revision before the High Court(6). Where after the close of a case by both parties, the Magistrate examines a court witness and neither party asks the Magistrate to allow further arguments, no objection can be taken to that effect in a petition of revision by the High Court(7). High Court will not interfere in revision with questions of fact which a party did not put before the trial court(8). But an accused can take the point of misjoinder in revision when the joint trial is bad, even though the point was not taken in the court below. No question of prejudice arises in such a case(9). Where confession of an accused has been excluded by the trial Magistrate under s. 24, it cannot be taken into consideration in revision though such confession may be excluded wrongly(10).

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there are elements of doubt in it the accused must be given the benefit of the doubt)

(3) *Kumud Nath v. Brijendra Nath*, A. I. R. 1933 Cal 647=146 I. C. 866=35 Cr. L. J. 29.

(4) *Raghubar Dyal v. Emperor*, 18 Cr. L. J. 435=38 I. O. 995 (II, however, it is established that the case for the prosecution cannot be believed and

(1) *Abbas Jabbar v. Anpizuddi*, 81 I. C. 931=28 C. W. N. 763=25 Cr. L. J. 1107.

(8) *In re Rama Raja*, A. I. R. 1926 Jour 135

(9) *Dalsuk Roy v. Emperor*, A. I. R. 1925 C. 248=25 Cr. L. J. 807=81 I. C. 343.

(10) *Billu v. Emperor*, A. I. R. 1930 S 168=1930 Cr. O. 654=126 I. C. 53=31 Cr. L. J. 917.

(11) *Sheo Jawan v. Ram Sakhi*, 18 Cr. L. J. 737=40 I. C. 737.

the grounds urged by the petitioner who obtained the rule, it is not open to him to submit observations, with a view to supplement or add to his judgment(1). A Magistrate called upon to show cause against a rule issued by the High Court, must apply to the Legal Remembrancer to cause an appearance to be made for him (Magistrate) in court, and must not address the Registrar by letter(2). Where a Division Bench of the High Court issues a rule calling upon the Magistrate to show cause why the conviction and sentence should not be set aside on the ground that there was no evidence on the record connecting the accused with the offence the High Court is not confined to see whether there is any evidence to go to the Jury. The rule should be read with the judgments which were before the court at the time it was granted, reasonably in favour of the accused(3).

Detention in reformatory.—The High Court can in the exercise of its revisional jurisdiction under this section pass an order for detaining a youthful offender in a reformatory under s. 8 of the Reformatory Schools Act, 1897(4). A sentence of six months' rigorous imprisonment, on a youthful first offender aged 14½ years for an offence of dishonestly receiving stolen property under s. 411, Penal Code, is proper and where in lieu of this sentence the offender has been ordered to be detained in a reformatory school, the High Court has jurisdiction to interfere with the order for detention(5). The High Court will not in revision interfere with an order passed by a Magistrate under s. 562 (1-A) of the Code, unless the order is clearly mistaken or injudicious, or amounts to a failure of justice(6).

Review.—The High Court cannot review an order passed by itself in exercise of revisional jurisdiction(7).

440. No party has any right to be heard either personally or by pleader before any court when exercising its powers of revision:

Optional with court to hear parties. Provided that the court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

Scope of section.—No party has a right to be heard before any court exercising its powers of revision, if it is taken to be a legislative revision of usual principle that persons are

(1) *Madhusudan v. Sankti Prosad*, 7 C. W. N. 859; *Cl. Kedar v. Emperor*, 3 C. L. J. 357 (358)=3 Cr. L. J. 329.

(2) *In re Hurro Soondery*, 4 C. 20 =3 C. L. R. 93.

(3) *Rukhal Nikari v. Emperor*, 2 C. W. N. 81.

(4) *Emperor v. Lakshaman*, 80 Bom. L. R. 952=A I. R. 1928 B. 848=

112 I. C. 344

(5) *Jagarnath v. Emperor*, 82 I. C. 460=1928 Pat. 297=1 Pat. L. R. 177=25 Cr. L. J. 1912.

(6) *Murlidhar v. Mahboob Khan*, 85 I. C. 418=26 Cr. L. J. 624=47 A. 353=1925 A. 644.

(7) *Banwari Lal v. Emperor*, A. I. B. 1935 A. 466.

(8) *Sripat Narain v. Gahbar Rai*,

has made undue delay in coming to the court for relief(1). Unexplained delay in applying for revision of an order passed to the prejudice of the applicant is a reason for the High Court in the exercise of its discretion, declining to interfere(2). Where, however, the delay caused in filing a revision to quash the proceedings is sufficiently explained by the accused the High Court can entertain the application and pass orders thereon(3).

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(6) *Mahadeo v. Emperor*, 75 I. C. 159=21 A. L. J. 654=24 Cr. L. J. 911=45 A. 680=1924 A. 131.

(7) *Abdul Jabbar v. Mafizuddin*, 81 I. C. 931=28 C. W. N. 783=25 Cr. L. J. 1107.

(8) *In re Rama Raja*, A. I. R. 1926 Jour 135.

(9) *Dalsuk Roy v. Emperor*, A. I. R. 1925 C. 248=25 Cr. L. J. 807=81 I. C. 343.

(10) *Billu v. Emperor*, A. I. R. 1930 B. 168=1930 Cr. C. 654=126 I. C. 53=31 Cr. L. J. 947.

(11) *Sheo Jagan v. Ram Sakhi*, Cr. L. J. 737=40 I. C. 737.

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(3) *Kumud Nath v. Brijendra Nath*, A. I. R. 1933 Cal. 647=146 I. C. 366=35 Cr. L. J. 29

(4) *Raghubar Dyal v. Emperor*, 18 Cr. L. J. 435=38 I. O. 995. (If, however, it is established that the case for the prosecution cannot be believed and

and palpable error has been committed in the court below, then the court may direct a rule to issue in order to hear what is to be said on the other side(1).

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the court shall consider such statement, before overruling or setting aside the said decision or order.

Scope and effect of s. 441.—This section merely allows a Presidency Magistrate to supplement the reasons which have already been stated, under sections 263 and 370, for convicting an accused person. The effect of the section is not to abrogate the term of section 263 or section 370, for convicting an accused person(2). The section is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given but to enable them to supply reasons where in exercise of their privilege under s. 370 they have given no reasons at all(3).

Omission to record reasons for conviction.—The omission to record reasons is a grave irregularity which, in most cases would be sufficient to warrant interference by the High Court. But where the reports submitted under this section contain good grounds for the decision they may be considered as setting forth the reasons for the conviction, and if no substantial failure of justice has resulted the High Court will not interfere(4). The failure of a Magistrate to record reasons before taking action under sections 202 and 203 is not by itself a sufficient ground for the High Court's interference in revision. If the statement under this section by the Magistrate is satisfactory the said defect is cured and the omission may be deemed to have been supplied(5).

442. When a case is revised under this Chapter by the High Court, it shall, in manner hereinbefore provided by section 425 certify its decision or order to the court by which the finding, sentence or order revised was recorded or passed, and the court or

(1) *In re Shamdasani*, 81 Bom. L. R. 1144—A. I. R. 1929 B. 443—8 Cr. Law. Bom. 1

(2) *In re Dervish Hussain*, 71 I. C. 212—17 L. W. 18—44 M. L. J. 84—1923 M. 185—32 M. L. T. 100—24 Cr. L. J. 84—46 M. 253

(3) *Swarnammal v. Muniswami*, (1929) M. W. N. 893—A. I. R. 1930 M.

225—122 I. C. 800—8 M. Cr. Cas. 55—81 Cr. L. J. 460.

(4) *In re Dervish Hussain*, 71 I. C. 212—17 L. W. 18—44 M. L. J. 84—1923 M. 185—32 M. L. T. 100—24 Cr. L. J. 84—46 M. 253.

(5) *Rengammal v. Krishnamachari*, 2 I. C. 618—5 M. L. T. 79.

entitled to be heard before any order affecting them to their prejudice can be made. To this general rule so laid down by the Code there are two exceptions to be found in the Code itself. The first is to be found in clause (a) of the proviso to s. 436 (now s. 437). The second is contained in the second paragraph of s. 439(1). It is a good practice to hear counsel in criminal references in matters of importance, but whether a matter is a matter of importance must be left to the discretion of the Judge hearing the reference(2). It is quite open to the High Court to deal with the question whether a District Magistrate in exercising the power under s. 437 (now s. 436), exercises a proper discretion in proceeding to make an order for further inquiry without giving notice to the accused, and allowing him an opportunity of being heard(3).

No right to be heard.—The revisional power of the High Court is exercised at its own discretion and no petitioner has a right to be heard(4). But in the exercise of its discretion under this section, the court should usually hear the accused if he desires to show cause(5). But a person who applies for revision to the High Court and on being entitled to be use to proceed

has refused to appoint a legal practitioner to represent the Crown in revision, the High Court must decline to hear the counsel(7). The fact that the pleader for a party was not heard when a court was exercising its powers of revision is not a ground for a second application for revision or for review(8).

Summary rejection of appeal.—The provisions of the section do not apply to summary rejection of an appeal under section 421 of the Code(9).

Power to hear complainant before issuing a rule.—This section applies to an accused, as well as to a complainant. The High Court has power to hear the complainant in order to see what his case is about. If the case on investigation should tend to show that *prima facie* there has been any denial of natural justice, or that some gross

106 I C. 680=L R 8 A 135 Cr.—8 A I. Cr. R. 337=A I R. 1927 A. 724=25 A. L. J. 1010=29 Cr. L J 89; *Hafiz Khan v Emperor*, A. I. R. 1925 O. 558=26 Cr. L. J. 527=85 I C. 367.

(1) *Nobin Kristo v Russick Lal*, 10 C. 268 (273)—8 Ind. Jur. 376.

(2) *Sripat Narain v. Gahbar Rai*, 106 I C. 680=A. I R. (1927) A. 724=25 A. L. J. 1010=29 Cr. L. J. 89; *Ram Nihore v Emperor*, 8 A. L. J. 237=12 Cr. L. J. 231=10 I. C. 740; *Empress v. Haradhan*, 19 C. 380. In a reference under S 438 a counsel is not entitled to appear against the report; *Reg. v. Decamina*, 1 B. 61. A private pro-

(3) *Nobin Kristo v. Russick Lal*, 10 C. 268.

(4) *In re Runga Rao*, 23 M. L. J. 871 (372).

(5) *Nga Aung Myat v. Empress*, (1897—1901) 1 U. B. E. 100; *Ram Nihore v Emperor*, 8 A. L. J. 237=12 Cr. L. J. 231=10 I C. 740; *Empress v. Haradhan*, 19 C. 380.

(6) *Har Narain v Emperor*, 71 I. O 704=1923 A. 327=24 Cr. L. J. 240

(7) *Makhan v. Emperor*, 5 I C. 720=5 P. W. R. 1910 Cr.=11 Cr. L. J. 211.

(8) *Sripat Narain v. Gahbar Rai*, 106 I C. 680=L R 8 A. 135 Cr.—8 A. I. Cr. R. 337=A I. R. 1927 A. 724=25 A. L. J. 1010=29 Cr. L. J. 89.

(9) *Raj Kumar v. Tin Couri*, 9 Cr. L. J. 189=12 C. W. N. 248.

PART VIII.**Special Proceedings.****CHAPTER XXXIII.****SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED.**

Topical introduction.—The most important of the recent enactments amending the Criminal Procedure Code is the Racial Distinctions Act (XII of 1923). The Act has introduced changes of a far reaching character as regards the rights of European British subjects⁽¹⁾. The reasons for the changes as given in the statement of Objects and Reasons are as follows :—"As regards the new Chapter XXXIII it will be observed that it applies to offences punishable with imprisonment which are alleged to have been committed outside a presidency town. The first step to be taken to secure that such a case shall be tried under the provisions of the Chapter is a claim to be made by the accused person before the Magistrate. Unless such a claim is made at one of the stages indicated for the trial of a summons-case or of a warrant case, or for the inquiry preliminary to commitment, the provisions of the Chapter will not apply. The Magistrate then makes such inquiry as he thinks necessary. As a guide to the Magistrate in coming to a finding as to whether the case should be tried under the provisions of the Chapter or not, it is provided that if the complainant and the accused persons or any of them are respectively Europeans and Indian British subjects or Indian and European British subjects, he shall find that the case should be tried under the provisions of the Chapter. For other cases with which both European British subjects and Indian British subjects are connected the Magistrate must be satisfied that it is expedient for the ends of justice that the case shall be so tried. This, it is observed, is the same criterion as that now contained in clause (e) of sub-section (1) of section 526 of the Code of Criminal Procedure relating to the powers of a High Court to transfer criminal cases. If the Magistrate rejects the claim, the person has a right of appeal to the Sessions Judge whose decision is final, and if the claim is rejected by the Magistrate, the proceedings until the expiration of the appeal, or, if an appeal is presented, the period allowed for the presentation of an appeal is fixed by Article 156-A of the Indian Limitation Act, 1908. The persons who will be included within the provisions are then defined to include servants and officers to which the Local Government by general or special order may declare the provisions of

(1) See a learned article on "Criminal Jurisdiction over European British subjects" in 27 O. W. N CXXXIX.

Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified ; and, if necessary, the record shall be amended in accordance therewith.

Scope.—This section is very generally expressed and deals with every case which is revised under this Chapter by a High Court, in other words it applies to all revisions by a High Court whether under section 435 or section 439 and the provisions, that it must in every such case certify its decision or order to the court by which the finding, sentence or order revised was recorded or passed negative the idea that the High Court can revise its own finding(1).

(1) *Press v. Emperor*, 1 I. C. 747 (749)—2 Cr. L. J. 378—4 P. R. 1909 Cr. .

allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided.

Right of special procedure.—Under the Code as amended in 1923 the mere fact that an accused person is an European British subject does not *ipso facto* entitle him to a right of any special procedure or specially restrict a Magistrate or a Court of Session in his or its powers of punishment(1). A claim by the accused and a finding by the Magistrate are the two necessary ingredients for the application of the provisions of Chapter XXXIII. If any claim is made prior to commitment and there is no finding by the Magistrate the question cannot be raised in the Court of Sessions. If such a claim were made and a finding favourable to the accused were recorded by the Magistrate, the Sessions Judge would be bound to act under the provisions of Chapter XXXIII and the finding of the Magistrate would be final. When, however, the finding of the Magistrate is adverse to the claim, it is final unless the claimant appeals and in the case of an appeal the decision of the Sessions Judge shall be final(2). A claim to be tried under the provisions of Chapter XXXIII is wholly different from a claim to be as an European British subject, etc., under s. 528-A. So far as the former claim is concerned, the question of status of the claimant does not always arise, as is evident from the provisions of section 443 (1) (b) of the Code. Where as in a claim, to be dealt with as an European British subject, the claimant has to prove his own status, in a claim to be tried Under the provisions of Chapter XXXIII the claimant may or may not have to do so(3).

"Punishable with Imprisonment".—The plain and intended meaning of the words "punishable with imprisonment" in this section is that in the case of all serious offences for which a sentence of imprisonment might be passed as distinguished from petty offences punishable with fine only, the procedure prescribed by this Chapter should be resorted to. Hence, where a person is charged with murder under s. 302 he is entitled to a trial by Jury, under Chapter 33 although the punishment awardable on conviction under s. 302 does not include "imprisonment."(4).

Inquiry as to status.—A statement in an affidavit by the accused's wife that she heard from their grand parents while they were all living together that the accused's grandfather was born in England of English parents, though not controverted by the Crown by a counter affidavit is hearsay evidence and is not sufficient to establish the status of the accused as a European British subject(5).

Proceedings under s. 107 Cr. P. C.—The provisions of this

(1) *Bombardier v. Emperor*, 118 401=41' O. L. J. 87=84 I C. 1041 ;
I. O. 488=1929 Lab. 187=30 Cr. L. J
Emperor v. Haendra Chandra, 51.
C 980.

0= 4 I. R.
=88 37 I. O.

v. I. O.

(5) *Alauddin v. Emperor*, 52 C. 1203=
347 (860)=29 O. W. N. 447=26 Cr. L. J.

the section to apply, will not be included within the definition merely, because they have made a complaint or given information in their official or "quasi" official capacity. The procedure in summons-cases punishable with imprisonment is then laid down. For warrant-cases which would normally be tried under the provisions of Chapter XXI of the Code, if it is found that the case ought to be tried under the provisions of this Chapter a Magistrate is required, if he does not discharge the accused, to commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that court. Normally in the Court of Session the case will then be tried by a jury of mixed nationality, the majority of the Jurors being either Indians or Europeans and Americans according as the accused person is an Indian or an European subject of His Majesty."

S. 443 (1) Where, in the course of the trial out-

Determination regarding applicability of this Chapter.

side a presidency town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—

(a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or

(b) that in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter, record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case, —

(2) Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.

(3) Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period:

this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a Police Officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

Definition of "complainant".—This section defines who is to be deemed a complainant for the purposes of s. 443. In relation to case of which the Magistrate takes cognizance under Cl. (b) of s. 190 sub-s. (1) "complainant" means any person who has given information relating to the commission of an offence within the meaning of s. 154 of the Code(1).

Proviso.—The proviso is intended to exclude generally from the application of the definition of "complainant" in this section, Public prosecutors and public servants, etc., who make complaints or lodge information before the police in their official capacity as such Public Prosecutors or public servants, etc., irrespective of whether or not they have a personal knowledge of the facts or a personal interest in the case(2). Where a public servant makes a complaint under the orders of Government as such public servant, this Chapter has no application(3): A British Indian subject cannot claim to be tried under Chapter XXXIII in a criminal prosecution launched against him by a European employee on behalf of a railway administration(4).

445. (1) Where a Magistrate or a Sessions Judge decides under section 443 that a case in Procédure
summons cases, ought to be tried under the provisions of this Chapter and the case is a summons-case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case.

(2) Where the Magistrates constituting the bench by which a case is tried under this section differ in opinion, the case together with their opinions thereon

(1) See *In re Ganesh*, 13 B. 600.

(2) *Burchell v. Emperor*, 95 I. C. 306=27 Cr. L. J. 770=1926 S. 230=20 B. L. R. 128.

(3) *Emperor v. Zahir Haider*, 97 I. C. 17=7 Pat. L. T. 367=27 Cr. L. J. 1041=A. I. R. 1926 Pat. 8 566.

(4) *Joseph v. Lammond*, 26 Cr. L. J. 190=83 I. C. 674=1924 R. 373.

section are not applicable to proceedings under s. 107. The wording of this section obviously refers to an accused person charged with an offence punishable with imprisonment and the time during which he can make a claim before his commission for trial under s. 213 or showing cause under s. 242 or entering on his defence under s. 256. In other words, it contemplates a case of an offence triable by Sessions Court as a warrant-case and an offence triable as a summons-case. It does not contemplate anything like proceedings under s. 107 to which s. 242 does not apply at all(1).

Clause (A).—No special proceedings are prescribed where both the accused and the complainant are European British subjects and the Magistrate trying the case need not be a justice of the peace(2).

Sub section (2).—It is important to notice that while the Legislature has provided an appeal from an order rejecting a claim under s. 443, it has provided no appeal from an order accepting such a claim. But the High Court has jurisdiction to revise such an order(3). An order passed by a Magistrate that accused should be tried under this section cannot when no steps have been taken to have it set aside or corrected, be disputed by the Crown at the appellate stage(4).

Claim to be dealt with as European British subject not made before the Presidency Magistrate or High Court.—There is no provision in the Code for an inquiry, either during the preliminary inquiry by a Presidency Magistrate or on the trial in the High Court, into the question whether, if the case had been tried outside a presiding town, it would have been triable under Chapter XXIII. The proper time to raise the question is on an application for leave to appeal(5).

444 For the purposes of section 443, "complainant" means any person making a complaint, or in relation to any case of which cognizance is taken under clause (b) of section 190, sub-section (1), any person who has given information relating to the commission of the offence within the meaning of section 154 :

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority; a railway servant as defined in section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the Local Official Gazette, declare the provisions of

(3) *Christy v. Christy*, A. I. B. 1933 Lab. 1019—1933 Cr. Cas. 1556.

(4) *Singleton v. Emperor*, 85 I. C. 38=29 C. W. N. 260=41 C. L. J. 87=A. I. B. (1925) C 501=25 Cr. L. J. 662.

(5) *Martindale v. Emperor*, 52 C. 347=39 C. W. N. 447=26 Cr. L. J. 401=41 C. L. J. 87=84 I. C. 1041.

this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a Police Officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

Definition of "complainant".—This section defines who is to be deemed a complainant for the purposes of s. 443. In relation to case of which the Magistrate takes cognizance under Cl. (b) of s. 190 sub-s. (1) "complainant" means any person who has given information relating to the commission of an offence within the meaning of s. 154 of the Code(1).

Proviso.—The proviso is intended to exclude generally from the application of the definition of "complainant" in this section, Public prosecutors and public servants, etc., who make complaints or lodge information before the police in their official capacity as such Public Prosecutors or public servants, etc., irrespective of whether or not they have a personal knowledge of the facts or a personal interest in the case(2). Where a public servant makes a complaint under the orders of Government as such public servant, this Chapter has no application(3): A British Indian subject cannot claim to be tried under Chapter XXXIII in a criminal prosecution launched against him by a European employee on behalf of a railway administration(4).

445. (1) Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons-case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case.

(2) Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case together with their opinions thereon

(1) See *In re Ganesh*, 13 B. 600.

(2) *Burchell v. Emperor*, 95 I. C. 306=27 Cr. L. J. 770=1926 B. 230=20 S. L. R. 128.

(3) *Emperor v. Zahir Haider*, 97 I. C. 17=7 Pat. L. T. 367=27 Cr. L. J. 1041=A. I. R. 1926 Pat. 8 566.

(4) *Joseph v. Lammond*, 26 Cr. L. J. 190=83 I. C. 834=1924 R. 373.

shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.

(3) Any person convicted by a bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.

(4) In any case in which it is impracticable to constitute a bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like bench to such other district as the High Court may, by general or special order, direct.

(5) Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.

Procedure in summons-cases.—If the claim under section 443 is allowed, the European British subject or Indian British subject will, in summons-cases be tried by a mixed Bench of two Magistrates of the first class of whom one is an European and the other an Indian. On a difference of opinion the case will be sent, under sub-sec. (2), to a Sessions Judge who may be an Indian(1).

Sub-section (3).—On conviction by a mixed bench in summons cases an appeal will lie to the Court of Sessions (and may be heard by an Indian Sessions Judge) and on conviction by the Sessions Judge an appeal will lie to the High Court(2).

Sub-section (4).—In case it is impracticable to constitute a mixed bench in any district the case will be transferred under the orders of the High Court to an other district.

(1) See a learned article on "Criminal jurisdiction over European British subjects" in 27 O. W. N. clixix.

(2) Cf. *Dawson v. Emperor*, 18 Cr. L. J. 986-42 I. C. 602-2 Pat. L. W. 79, decided under the unamended Code.

this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a Police Officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

Definition of "complainant".—This section defines who is to be deemed a complainant for the purposes of s. 443. In relation to case of which the Magistrate takes cognizance under Cl. (b) of s. 190 sub-s. (1) "complainant" means any person who has given information relating to the commission of an offence within the meaning of s. 154 of the Code(1).

Proviso.—The proviso is intended to exclude generally from the application of the definition of "complainant" in this section, Public prosecutors and public servants, etc., who make complaints or lodge information before the police in their official capacity as such Public Prosecutors or public servants, etc., irrespective of whether or not they have a personal knowledge of the facts or a personal interest in the case(2). Where a public servant makes a complaint under the orders of Government as such public servant, this Chapter has no application(3): A British Indian subject cannot claim to be tried under Chapter XXXIII in a criminal prosecution launched against him by a European employee on behalf of a railway administration(4).

445. (1) Where a Magistrate or a Sessions Judge Procédures in summons cases, decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons-case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case.

(2) Where the Magistrates constituting the bench by which a case is tried under this section differ in opinion, the case together with their opinions thereon

(1) See *In re Ganesh*, 18 B. 600.

(2) *Burchell v. Emperor*, 95 I. C. 306=27 Cr. L. J. 770=1926 S. 230=20 S. L. R. 123.

(3) *Emperor v. Zahir Haider*, 97 I. C. 17=7 Pat. L. T. 367=27 Cr. L. J. 1041=A. I. R. 1926 Pat. 8 566.

(4) *Joseph v. Lammond*, 26 Cr. L. J. 190=83 I. C. 874=1924 R. 373.

shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.

(3) Any person convicted by a bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.

(4) In any case in which it is impracticable to constitute a bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like bench to such other district as the High Court may, by general or special order, direct.

(5) Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.

Procedure in summons-cases.—If the claim under section 443 is allowed, the European British subject or Indian British subject will, in summons-cases be tried by a mixed Bench of two Magistrates of the first class of whom one is an European and the other an Indian. On a difference of opinion the case will be sent, under sub sec. (2), to a Sessions Judge who may be an Indian(1).

Sub-section (3).—On conviction by a mixed bench in summons cases an appeal will lie to the Court of Sessions (and may be heard by an Indian Sessions Judge) and on conviction by the Sessions Judge an appeal will lie to the High Court(2).

Sub-section (4).—In case it is impracticable to constitute a mixed bench in any district the case will be transferred under the orders of the High Court to an other district.

(1) See a learned article on "Criminal jurisdiction over European British subjects" in 27 C. W. N. cxxxii.

(2) *Cf. Dawson v. Emperor*, 18 Cr. L. J. 986-42 1. C. 602=3 Pat. L. W. 79, decided under the unamended Code.

Sub-section (5).—This sub-section was thus justified by the framers of the Bill in the Statement of Objects and Reasons: "The Local Government and High Courts were consulted on these proposals of the Committee, (i. e., as regards the new section 445); from the opinions received it is clear that in many areas in India these proposals will be impracticable, and it is considered that in any case the adoption of the procedure proposed for similar warrant cases (sec. 445), namely, commitment to and trial in a Court of Session by Jury, would not be more expensive than the proposals of the Committee. Accordingly, it is proposed (in analogy with the powers given to Local Governments by sec. 269) to permit Local Governments to direct that in particular districts such cases shall be triable according to the provisions laid down for the trial of similar warrant-cases."

446. (1) Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this chapter and the case is a warrant-case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that court.

(2) Where an accused is committed to the Court of Session under sub section (1), the court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly:

Provided that where the trial before the Court of Sessions would in the ordinary course be with the aid of Assessors, and the accused, or all of them jointly, require to be tried in accordance with the provisions of sec. 284-A, the trial shall be held with the aid of Assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans, or, in the case of Indian British subjects, be Indians.

Trial of warrant cases.—For warrant cases which would normally be triable under the provisions of Chapter XXI of the Code, if it is found that the case ought to be tried under the provisions of this Chapter a Magistrate is required if he does not discharge the accused, to commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court(1), he must consider whether

(1) Statement of Objects and Reasons, A 483 (484)=113 J. C. 764=1929 AIL 84= Para 11; *Empress v. Banarsi Das*, 61 1929 A. L. J. 168; *Rashid Ahmad v*

shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.

(3) Any person convicted by a bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.

(4) In any case in which it is impracticable to constitute a bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like bench to such other district as the High Court may, by general or special order, direct.

(5) Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.

Procedure in summons-cases.—If the claim under section 443 is allowed, the European British subject or Indian British subject will, in summons cases be tried by a mixed Bench of two Magistrates of the first class of whom one is an European and the other an Indian. On a difference of opinion the case will be sent, under sub sec. (2), to a Sessions Judge who may be an Indian(1).

Sub-section (3).—On conviction by a mixed bench in summons cases an appeal will lie to the Court of Sessions (and may be heard by an Indian Sessions Judge) and on conviction by the Sessions Judge an appeal will lie to the High Court(2).

Sub-section (4).—In case it is impracticable to constitute a mixed bench in any district the case will be transferred under the orders of the High Court to an other district.

(1) See a learned article on "Criminal jurisdiction over European British subjects" in 27 O. W. N. clxxxii.

(2) Cf. *Dawson v. Emperor*, 18 Cr. L. J. 986-42 I. C. 602-2 Pat. L. W. 79, decided under the unamended Code.

Sub-section (5).—This sub-section was thus justified by the framers of the Bill in the Statement of Objects and Reasons: "The Local Government and High Courts were consulted on these proposals of the Committee, (i. e., as regards the new section 445); from the opinions received it is clear that in many areas in India these proposals will be impracticable, and it is considered that in any case the adoption of the procedure proposed for similar warrant cases (sec. 445), namely, commitment to and trial in a Court of Session by Jury, would not be more expensive than the proposals of the Committee. Accordingly, it is proposed (in analogy with the powers given to Local Governments by sec. 269) to permit Local Governments to direct that in particular districts such cases shall be triable according to the provisions laid down for the trial of similar warrant-cases."

446. (1) Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this chapter and the case is a warrant-case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that court.

(2) Where an accused is committed to the Court of Session under sub-section (1), the court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly:

Provided that where the trial before the Court of Sessions would in the ordinary course be with the aid of Assessors, and the accused, or all of them jointly, require to be tried in accordance with the provisions of sec. 284-A, the trial shall be held with the aid of Assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans, or, in the case of Indian British subjects, be Indians.

Trial of warrant-cases.—For warrant cases which would normally be triable under the provisions of Chapter XXI of the Code, if it is found that the case ought to be tried under the provisions of this Chapter a Magistrate is required if he does not discharge the accused, to commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court(1), he must consider whether

(1) Statement of Objects and Reasons, A. 483 (484)=113 I. C. 764=1929 All. 84 = Para 11; *Empress v. Banarsi Das*, 51 1929 A. L. J. 188; *Rashid Ahmad v*

there are grounds for discharging the accused under section 209 or section 253 of the Code(1). But the provisions of this section are mandatory and a Magistrate, after once deciding that a case ought to be tried under the provisions of this Chapter, cannot assume jurisdiction over Indians by discharging the European British subject(2). This section takes away from the Magistrate a case tried, under the special provisions of this Chapter, the powers given him under section 213 (2). So, if the Magistrate has framed a charge against the accused person, the Magistrate cannot thereafter cancel the charge and discharge him, but must commit him to the Court of Session(3).

Trial to be by Jury or Assessors.—When an European British subject or an Indian British subject has been committed to the Court of Session under the provisions of sub section (2), the trial must be by Jury and a majority of the Jury shall, if, before the first Juror is called and accepted, the accused person so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and in the case of an Indian British subject of Indians. But where in the ordinary course the trial would be with the aid of Assessors the accused has the right to claim to be tried with the aid of Assessors, all of whom shall be (a) Europeans, Americans or (b) Indians, according to the category within which the accused comes. By "ordinary course" is meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Chapter XXXIII of the Code or in the absence of a notification by the Local Government under the provisions of section 269(4). Where in a trial of a European British subject under Chapter 33, only two at most of the five Jurors are Europeans or Americans, the convictions and sentences should be set aside(5). Sub-section (2) renders final a decision by a Magistrate that the case is one to which Ch. 33 applies(6). An accused who when he was committed to Sessions had the right to be tried by Jury before Act XII of 1923, Criminal Procedure (Amendment) Act came into force cannot be deprived of, the right which is substantially one by reason of passing of the Amending Act which has not retrospective effect(7).

447. If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall

Court to inform accused persons of their rights in certain cases.

Rich, 53 A 690=A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

(1) *English v. Emperor*, 1931 A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

(2) *English v. Emperor*, 1931 A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

(3) *English v. Emperor*, 1931 A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

(4) *English v. Emperor*, 1931 A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

(5) *English v. Emperor*, 1931 A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

(6) *English v. Emperor*, 1931 A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

(7) *English v. Emperor*, 1931 A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 526.

(4) *Brooy v. Crown*, 5 Lab. 515=A. I. R. 1925 Lab. 236=85 I. C. 380=26 Cr. L. J. 540.

(5) *Guthrie v. Emperor*, A. I. R. 1934 Pat. 500=15 Pat. L. T. 82=13 Pat. 177=1934 Cr. C. 384=148 I. C. 933=35 Cr. L. J. 837.

(6) *Armstrong v. Emperor*, A. I. R. 1932 Lab. 490=83 P. L. R. 578=33 Cr. L. J. 529=137 I. C. 763

(7) *Crown v. Maurice*, 26 P. L. R. 415=2 Lab. Cas. 21.

(3) *Rashid Ahmad v. Rich*, 53 A 690=A. I. R. 1931 A. 366=39 Cr. L. J. 866=12 L. R. A. Cr. 111=16 A. I. Cr. R. 122=1931 Cr. C. 622=132 I. C. 132=29 A. L. J. 111.

forthwith inform the accused person of his rights under this Chapter.

Duty of court to explain rights.—When an accused is found to be a European British subject, his rights as such subject should be carefully explained to him so as to enable him to exercise his choice and judgment as to whether he would claim those rights or waive them(1). A European British subject can relinquish his right to be dealt with as such(2).

Omission of Magistrate to inform accused of his rights under Cl. 33.—An omission by a Magistrate to inform an accused person of his right under Ch. XXXIII as required by this section is absolutely cured by the provisions of s. 534 of the Code(3).

448. For the purpose of the trial in Rangoon of any person under the provisions of this Chapter, references to the Sessions Judge shall be construed as references to the High Court of Judicature at Rangoon.

References to Sessions Judge to be construed as references to High Court in Rangoon.

449. (1) Where—

- (a) a case is tried by Jury in a High Court or Court of Session under the provisions of this Chapter, or
- (b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by Jury in the High Court, or
- (c) a case is tried by Jury in the High Court in a presidency town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency town, have been triable under the provisions of this Chapter;

then, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained in the

(1) *Emperor v. Nuliy*, 11 I. C. 620 = 7 N. L. R. 93 = 12 Cr. L. J. 486.

(2) See the case cited in the last note and *Empress v. Grant*, 12 B. 561; *Barindra Kumar v. Emperor*, 37 C. 467 = 7 I. C. 359 = 11 Cr. L. J. 453.

(3) *Zagriya v. Emperor*, 89 I. C. 459 = 4 Bar L. J. 44 = A. I. R. (1925) Rang. 239 = 8 Rang. 220 = 26 Cr. L. J. 1971; *Scott v. Emperor*, A. I. R. 1935 Rang. 67; *Shilling v. Empress*, 18 P. R. 1883 Cr.

there are grounds for discharging the accused under section 209 or section 253 of the Code(1). But the provisions of this section are mandatory and a Magistrate, after once deciding that a case ought to be tried under the provision of this Chapter, cannot assume jurisdiction over Indians by discharging the European British subject(2). This section takes away from the Magistrate a case tried, under the special provisions of this Chapter, the powers given him under section 213 (2). So, if the Magistrate has framed a charge against the accused person, the Magistrate cannot thereafter cancel the charge and discharge him, but must commit him to the Court of Session(3).

Trial to be by Jury or Assessors.—When an European British subject or an Indian British subject has been committed to the Court of Session under the provisions of sub section (2), the trial must be by Jury and a majority of the Jury shall, if, before the first Juror is called and accepted, the accused person so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and in the case of an Indian British subject of Indians. But where in the ordinary course the trial would be with the aid of Assessors the accused has the right to claim to be tried with the aid of Assessors, all of whom shall be (a) Europeans, Americans or (b) Indians, according to the category within which the accused comes. By "ordinary course" is meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Chapter XXXIII of the Code or in the absence of a notification by the Local Government under the provisions of section 269(4). Where in a trial of a European British subject under Chapter 33, only two at most of the five Jurors are Europeans or Americans, the convictions and sentences should be set aside(5). Sub-section (2) renders final a decision by a Magistrate that the case is one to which Ch. 33 applies(6). An accused who when he was committed to Sessions had the right to be tried by Jury before Act XII of 1923, Criminal Procedure (Amendment) Act came into force cannot be deprived of, the right which is substantially one by reason of passing of the Amending Act which has not retrospective effect(7).

447. If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall

Court to inform accused persons of their rights in certain cases,

Rich, 53 A 690—A. I. R. 1931 A. 366—32 Cr. L. J. 866—12 L. R. A. Cr. 111—16 A. I. Cr. R. 122—1931 Cr. C. 622—132 I. C. 332—29 A. L. J. 526.

(1) *Keshan v. Emperor*, 12 Pat. 707—A. I. R. 1933 Pat. 677—14 Pat. L. T. 726—146 I. C. 879—35 Cr. L. J. 174.

(2) *Emperor v. Benarsi Das*, 51 A 483 (484)—113 I. C. 764—A. I. R. 1929 A. 84—33 Cr. L. J. 218—(1929) A. L. J. 188.

(3) *Rashid Ahmad v. Rich*, 53 A 690—A. I. R. 1931 A. 366—32 Cr. L. J. 866—12 L. R. A. Cr. 111—16 A. I. Cr. R.

122—1931 Cr. C. 622—132 I. C. 332—29 A. L. J. 526.

(4) *Bray v. Crown*, 5 Lab. 515—A. I. R. 1925 Lab. 236—85 I. C. 390—26 Cr. L. J. 540.

(5) *Gulhris v. Emperor*, A. I. R. 1934 Pat. 500—15 Pat. L. T. 62—13 Pat. 177—1934 Cr. C. 364—148 I. C. 933—35 Cr. L. J. 327.

(6) *Armstrong v. Emperor*, A. I. R. 1932 Lab. 490—33 P. L. R. 578—33 Cr. L. J. 529—137 I. C. 763.

(7) *Crown v. Maurice*, 26 P. L. R. 415—2 Lab. Cas. 21.

the High Court will not interfere unless it is shown that the verdict of Jury is wholly unreasonable as perverse, lose much of their force and have very little application. But where a case triable under the provisions of Chapter 33 has been actually tried at the High Court sessions under this Chapter without a claim on the accused's part under section 275 for a trial under this Chapter, an appeal would lie only under section 418, and not under this section(1). An order passed by a Magistrate that an accused should be tried under s. 443 cannot, when no steps have been taken to have it set aside or corrected, be disputed by the Crown at the appellate stage(2).

Right of vakils to act in appeals from the High Court Sessions.—

The proper and the only permissible course in cases under this section is for this right to be exercised, so long as the present rules remain unchanged, in the way laid down by the Rules of the original side of the High Court, viz., on the footing that it is part of the business of the Court from which, as the Rules stand, vakils are excluded(3).

Leave to appeal—Clause (c) gives an absolute right of appeal when the applicant for leave to appeal shows that the case would, if it had been tried outside a presidency town, have been triable under Chap. XXXIII(4). The Court to which an application for leave to appeal is made has to consider only the question of status under section 443, and not whether there are other circumstances rendering the case a fit one for the grant of permission(5). An accused person is not obliged to put forward his claim to be dealt with as an European British subject either before a Magistrate holding an inquiry or trial in a Presidency Town or before the High Court during the trial of the case. The fact that he omits to do so does not debar him from relying on his right for the purposes of appeal under clause(c). (6). Leave to appeal under cl. (c) should not be granted *ex parte* and notice of the application should be given to the Crown to show that circumstances do not exist justifying an appeal(7). An application for leave to appeal under cl. (c) should be made to the trying Judge(8). But in another case of the same court it has been held that on general grounds it is desirable that such applications should be made to a Divisional Bench rather than a single Judge(9). An application for leave to appeal by a European British subject is governed for purposes of limitation by Art. 155, Limitation Act and must be filed within 60 days from the date of the sentence appealed from(10).

23 C. W. N. 876; *Reg v. Khanderav*, 1 B. 10; *Emperor v. Walker*, 26 Bom. L. R. 610.

(1) *Zagariya v. Emperor*, 8 Rang. 220=89 I. C. 459.=4 Bur. L. J. 44=A. I. R. (1925) B. 239=26 Cr. L. J. 1871.

(2) *Singleton v. Emperor*, 26 Cr. L. J. 662=86 I. C. 88=29 C. W. N. 260=41 C. L. J. 87=A. I. R. 1925 Cal. 501.

(5) *Ibid*.

(6) *Martindale v. Emperor*, 52 C. 347=29 C. W. N. 477=26 Cr. L. J. 401=A. I. R. 1925 C. 14=84 I. C. 1041=40 C. L. J. 256.

(7) *Ibid*.

(8) *Ibid*.

(9) *Turner v Emperor*, 52 C. 639.

(10) *Gallagher v. Emperor*, 101 I. C. 657=54 C. 52=1927 C. 307=28 Cr. L. J. 481; *Thomas v. Emperor*, 98 I. C. 248=27 Cr. L. J. 1304=53 C. 746=A. I. R. 1926 C. 1293.

Letters Patent of any High Court, the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-section (1).

(3) An appeal under sub section (1) or sub-section (2) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court.

Scope.—This section gives the right of appeal against the decision of a High Court in three classes of cases. This first class is of cases tried by jury in a High Court under the provisions of this Chapter, and can only apply to High Court outside a presidency town. The second class of cases are those which would otherwise be tried under the provisions of this Chapter, but are, under this Code, committed to, or transferred to, the High Court and tried by the Jury in the High Court. In these two classes of cases an absolute right of appeal is given. In the third class of cases, namely, those referred to in cl. (c) the right of appeal is dependent on the condition of granting of leave to appeal. In such cases the question of "status" is to be decided by the High Court before leave to appeal is granted, and, if that is decided in the accused's favour, he is entitled as of right to an appeal(1).

Clause (a): Right of appeal.—The right of appeal under cl. (a) depends, not upon whether in certain circumstances the accused might have been tried under the provisions of Ch. 33, but whether he was in fact so tried. Before it can be held that there has been a trial by a jury in the High Court under the provisions of Ch. 33 within the meaning of cl. (a), it is incumbent upon the appellant to satisfy the court that he had duly preferred a claim before the Magistrate that the case ought to be tried under the provisions of Ch. 33 before he was committed for trial, and that upon such claim having been made, the Magistrate had recorded a finding(2).

Appeal admissible on fact and law both—Although in ordinary cases tried by a jury there is no appeal except on a matter of law, *vide* section 418 of the Code, since the amendment of the Code by Act XVIII of 1923, an appeal is competent in cases tried by jury under the provisions of Chapter XXXIII "on a matter of fact as well as on a matter of law" *vide* section 449, and consequently the High Court in dealing with a reference made by a Sessions Judge in such a case under section 307 can go into the facts of the case(3). The following authorities(4) which lay down that

(1) *Turner v. Emperor*, 52 C. 636 (640-641)=29 O. W. N. 458=41 C. L. J. 345=A. I. R. 1925 C. 678=86 I. C. 659. As to transfer of a case to the High Court, see *Emperor v. Robert*, 29 B. 575.

(2) *Scott v. Emperor*, A. I. R. 1935 Rang. 67=13 Rang. 104.

(3) *Crown v. Bimal Pershad*, 6 Lah. 98=A. I. R. 1925 Lah. 401=83 I. C. 837=26 P. L. R. 263=26 Cr. L. J.

1241, *Supdt. a. d. Rem. v. Bagirath*, A. I. R. 1934 C. 610=38 C. W. N. 854=59 C. L. J. 484 (The appeal against acquittal is governed by Art. 157, Limitation Act whatever may have been the form of trial and whatever may be the scope of the appeal).

(4) *Queen v. Ram Churn*, 20 W. R. Cr. 33, *Queen v. Sham Bagdee*, 20 W. R. Cr. 73, *Emperor v. Sircarnamoyee*, 41 C. 621; *Emperor v. Ghulam Qadar*,

CHAPTER XXXIV

LUNATICS

464. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other Medical Officer as the Local Government directs, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.

(1-A) Pending such examination and inquiry the Magistrate may deal with the accused in accordance with the provisions of section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

Amendment explained.—This section has been amended by section 120 of Act XVIII of 1923. Sub section (1-A) has been newly added and the words "shall record a finding to that effect" have been inserted in sub-section (2). The reason has been thus stated. "The first amendment is consequential on the amendment in section 466. The second requires the Magistrate to record a finding if he is of opinion that the accused is of unsound mind and incapable of making a defence"(1).

Scope.—The provisions of this Chapter are subsidiary provisions for dealing with an exceptional class of persons, charged with offences, and are not to be construed to override the general rules of procedure except in so far as the special provision is clearly incompatible with the general provisions(2). A Magistrate must be satisfied after inquiry that there is a *prima facie* case against the accused, before making the inquiry prescribed by this section, as to whether the accused is of unsound mind and consequently incapable of making a defence, and reporting to Government as required by s. 466 *infra*(3).

(1) Statement of Objects and Reasons P. R. 1894 Cr (1914).

(2) *Empress v. Makhan Singh*, 11 (3) *Ibid*.

450-463 (Repealed).

Of sections 450-463, sections 453, 454, 455 and 459 are re-enacted by Act XII of 1923 as sections 528-A, 528-B, 528-C and 528-D respectively. Sections 456-458 are incorporated by the same Act in s. 491 and s. 491-A respectively. S. 460 is included in s. 284-A, sub-section (2) and s. 462 is merged in s. 326. The remaining sections are repealed(1).

Right to be tried by Jury under unamended Code.—Under the unamended code, the right of an European British subject to be tried by Jury was a substantive right and not a mere matter of procedure. Therefore, a person who was under the unamended Code entitled to be tried by Jury and had claimed the right of such trial before the committing Magistrate could not by the subsequent amendment of the Code be deprived of such right(2).

(1) Woodroffe's Cr. P.C. p. 524

(2) *Crown v. Fitzmaurice*, 6 Lah.

262=27 Cr. L. J. 421=93 I. C. 149=26

P. L. R. 415

order of the Magistrate cannot be sustained(1).

Course to be pursued.—Whenever an accused person appears, upon the medical evidence, to be of unsound mind and incapable of making a defence, the court should stay further proceedings in the case. It cannot proceed to acquit the accused(2). When an accused person is found to be insane before the completion of his trial, the Judge should postpone the trial under s. 389, and report the case to the Local Government instead of trying the accused when he is incapable of making his defence, and acquitting him under s. 394, on the ground that he committed the offence charged when he was incapable of knowing that he was doing wrong(3). If on examination, the accused appears to be insane and unable to understand questions and to return intelligible replies, the Magistrate should act under sections 464 and 466 of the Code and not under section 341(4). But if the accused though not insane cannot be made to understand the proceedings, the court may proceed with the inquiry or trial, but in case of a court other than a High Court, if such inquiry results in a commitment or a conviction the proceedings must be forwarded with a report of the circumstances of the case to the High Court(5).

465. (1) If any person committed for trial before a Court of Session or a High Court appears to the court at his trial to be of unsound mind and consequently incapable of making his defence, the Jury or the court with the aid of Assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Jury or court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the case, and the Jury, if any, shall be discharged.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the court.

Amendment explained.—The words "and the Jury if any shall be discharged" have been added at the end of sub-section (1) by section 121 of Act XVIII of 1923. The reason has been thus stated. "This amendment provides for the discharge of the Jury in the event of the Court of Session or the High Court being satisfied that the accused is

(1) *Narain Shankar v. Empress*, A. I. R. 1933 S. 267=146 I. O. 850=35 Cr. L. J. 200.

(2) 2 Weir. 581.

(3) *Reg v. Noor Khan*, 1 W. R. Cr. 11; 2 Weir 581; *Romon v. Audhee-karee, In re*, 10 W. R. Cr. 37; *Em-*

press v. Ratti, (1882) A. W. N. 106

(4) *Empress v. Kasima*, Rat. Un. Cr. G. 832.

(5) *Queen v. Jugo Mohun*, 24 W. R. Cr. 5; see *Empress v. Venkatasami*, 12 M. 459 and *Empress v. Lakshman*, 10 B. 512.

Inquiry into present unsoundness of mind.—It is only in cases where the accused appears to be incapable, by reason of mental infirmity, of taking his trial, that this issue of insanity must be tried before the trial for the offence is proceeded with(1). A Magistrate who finds that an accused person was of unsound mind both when he committed the offence and at the time of the trial, should not continue the trial but pass orders under ss. 464 and 466. It is not a trial in which a verdict of guilty could be legally pronounced(2). The Magistrate should as soon as he sees reason to believe that the accused is of unsound mind and consequently incapable of making his defence, proceed according to ss. 464 and 466. Again, he should take evidence as to his unsoundness of mind at the time of committing the offence before he proceeds to acquit him on the ground that he did not know the nature of the act, or that he was doing what was either wrong or contrary to law(3). Where there is any reason for supposing that an accused person may be of unsound mind and consequently incapable of making his defence, it is imperatively necessary that this question should be inquired into or tried under the provisions of section 464 or section 465 before the court proceeds to inquire into or try the substantive charge against the accused(4).

Examination by Civil Surgeon—A Magistrate cannot act on his own unprofessional opinion, but must have before him the deliberate statement of a Medical Officer reduced into writing(5). And when the Medical Officer's evidence is not decisive the Magistrate should examine other witnesses and, question them regarding the accused persons habits, behaviour and his demeanour both before and after commitment of the offence(6). The section cannot be regarded as directing that the inquiry shall be limited to an examination by Civil Surgeon, or other Medical Officer, of the person concerned. An opportunity should be given to rebut the evidence given by the Civil Surgeon(7). A mere certificate of a Medical Officer that the prisoner is of unsound mind and incapable of making the defence is not sufficient evidence of the prisoner's insanity. The Medical Officer should be called as a witness and carefully examined(8). The mandatory provisions of this section require the Magistrate not only to have the accused examined by the Civil Surgeon of the district or such other Medical Officer as the Local Government directs but to examine such officer as a witness. Hence where a Magistrate fails to examine the Civil Surgeon as a witness but examines the House Surgeon who is not empowered in that behalf, the

(1) *Crown v Bahadur*, 9 Lah 371 = 106 I. C. 796 = 29 Cr. L. J. 204

(2) (1900) A. W. N. 47.

(3) U. B. R. (1892-1896), Vol. 1, p. 50, *Santokh v Emperor*, 7 Lah. 315 = 27 Cr. L. J. 552 = 93 I. C. 1048

(4) *Emperor v. Jhalbu*, 42 A. 137, *Santokh v. Emperor*, 7 Lah. 315 = 27 Cr. L. J. 552 = 93 I. C. 1048, *Crown v*

Bahadur, 9 Lah 371 = 106 I. C. 796 = 29 Cr. L. J. 204

(5) 1 Bur. J. R. 87

(6) *Emperor v. Vaimbile*, 5 C. 826

(7) *Onkar Dat v Emperor*, 144 I. C. 1031 = 10 C. W. N. 719 = 6 R. O. 81 = A. I. R. 1933 C. 862 = 34 Cr. L. J. 914 = 1933 Cr. Cas. 1042

(8) *Queen v Ram Rattan*, 9 W. R. Cr. 23, 2 Weir 580

tried(1). A Sessions Judge has no power to stay proceedings and to direct an inquiry to be made into the state of an accused's mind because it appears to him "problematic" whether the accused is capable of making a defence(2).

Onus of proving mental soundness and capacity to understand the proceedings.—In an inquiry under sub-section (1) the *onus* is on the prosecution to show that the accused is the at the time of sound mind and capable of making his defence(3). The Crown must begin and establish such soundness and capacity(4).

Inquiry about prisoner's sanity.—Where a court entertains doubts as to the sanity of the accused, the court should not merely put questions to the accused but should try the fact of such unsoundness of mind by examining the Civil Surgeon or some other Medical Officer and by taking such evidence as might have been procurable from the village at which the accused resides, with the view of ascertaining whether the accused had, at any time, prior to the commission of the crime, exhibited symptoms of insanity(5). Where a Zilla Surgeon reports that the prisoner is capable of making his defence after the trial is once adjourned on account of prisoner's unsoundness of mind, the Judge should find, with the aid of Assessors whether the prisoner is capable of making the defence, and cannot act merely on the letter of the Surgeon(6).

Non-compliance.—Provisions of this section are mandatory and their non-compliance vitiates the trial(7). A conviction cannot be sustained in the absence of a proper trial and finding as to the question of the accused's capacity to make his defence under this section(8).

Postponement of trial.—Whenever an accused person appears upon the medical evidence, to be of unsound mind and incapable of making a defence, the court should stay further proceeding in the case. It cannot proceed to acquit the accused(9). When a prisoner is found to be insane at the time of trial and also proved to be insane at the time of committing the offence he cannot be acquitted but the procedure under ss. 466 and 467 ought to be followed(10).

Sub-section (2).—Sub-section (2) is merely an enabling enactment giving the court, if any, which subsequently tries the accused person, power to take into consideration the earlier proceedings as if they were a part of the record in the trial, without the necessity of formal proof(11). The subsequent trial of an accused person whose trial has been postponed by reason of unsoundness of mind is not illegal merely on account

(1) *Ghinua v. Emperor*, 3 Pat. L. J. 291 (297-298) F. B. = (1918) Pat. 67-19 Cr. L. J. 135-4 Pat. L. W. 14-43 I. C. 423 F. B.

(2) 2 Weir 127-2 Weir. 582.

(3) *Shib Das v. Emperor*, 51 C. 584 = 25 Cr. L. J. 1051-81 I. C. 827.

(4) *Emperor v. Gopi Mohan*, 51 C. 827.

(5) *Reg v. Hira Punja*, 1 Bom. H. C. R. 83.

(6) 2 Weir 582.

(7) *Santok Singh v. Emperor*, 27 Cr. L. J. 552-93 I. C. 1018-A. I. R. 1026

Lah. 498-7 Lah. 315; *Pala Singh v. Emperor*, 54 P. B. 1905 Cr.=169 P.L.R. 1905-3 Cr. L. J. 80.

(8) *Ram Nath v. Emperor*, 125 I. C. 767-A. I. R. 1930 A. 450-31 Cr. L. J. 699-Ind. Rul. (1930) All. 751-1930 Cr. C. 670.

(9) *Queen v. Shah*, 3 W. R. Cr. 70; *Queen v. Kalai*, 8 W. B. Cr. 57; *Reg v. Noor Khan*, 1 W. R. Cr. 11.

(10) *Queen v. Ram Rattan*, 9 W. R. Cr. 23.

(11) *Ghinua v. Emperor*, 3 Pat. L. J. 291.

of unsound mind and incapable of making his defence"(1).

Unsoundness of mind at the time of trial.—Under this section the question whether the accused is of unsound mind and consequently incapable of making his defence should be tried by the Court with the aid of Assessors and a conviction cannot be sustained in the absence of a proper trial and finding as to the question of the accused's capacity to make his defence under this section(2). Where doubt exists as to the soundness of mind of an accused who has been committed to the Court of Sessions for trial the court should act under this section and try the fact whether on the date on which the accused was called on to plead, he was or was not of unsound mind and capable or incapable of making his defence(3).

Jury or court with the aid of Assessors should try the question.—The Jury or the court with the aid of Assessors should, in the first instance, try the fact of unsoundness or incapacity of the accused(4). This question is quite separate from the question whether at the time when it is alleged that the accused committed the offence of which he is charged, he was of sound mind(5). If as the result of such trial the court is satisfied that the accused is capable of making his defence the trial shall proceed upon the charge on which the accused stands committed(6).

Trial as a preliminary issue.—The issue as to whether the accused was of unsound mind at the time of the trial and incapable of properly making his defence is a preliminary issue and must be determined before proceeding with the trial(7). Where in the course of his examination under section 364 of the Code the accused said that he was not in his sense when he tried to rob, it was held that the Court of Session should have acted under this section and tried the fact whether on the date the accused was called on to plead, the accused was or was not of unsound mind and capable or incapable of making his defence(8). The preliminary inquiry is not a trial in the sense of ascertaining whether the accused is guilty or not of the offence charged. Its object is to ascertain whether the accused is then in a fit state to be

(1) Statement of Objects and Reasons (1914)

(2) *Ram Nath v. Emperor*, 125 I.C. 767—A. I. R. 1930 A. 450—31 Cr. L. J. 899—Ind. Rul. (1930) All 751—1930 Cr. C. 670; *Santokh Singh v. Emperor*, 7 Lab. 315—27 P. L. R. 454—27 Cr. L. J. 552—93 I. C. 1048—A. I. R. 1926 Lab. 498—2 Lab. Cas. 939.

(3) *Jagdeo v. Emperor*, 18 Cr. L. J. 470—39 I. C. 310—15 A. L. J. 239; *Pala Singh v. Emperor*, 54 P. R. 1905—3 Cr. L. J. 60—169 P. L. R. 1905; *Santokh Singh v. Emperor*, 7 Lab. 315—27 Cr. L. J. 552—93 I. C. 1048; *Nabi Ahmad v. Emperor*, A. I. R. 1932 O. 190—1932 Cr. C. 373—9 O. W. N. 355.

(4) *Queen v. Bheekoo*, 10 B. L. R. App. 10; *Reg. v. Doorjodhun*, 19 W. R. Cr. 26.

(5) *Jagdeo v. Emperor*, 18 Cr. L. J.

470—39 I. C. 310—15 A. L. J. 239; *Reg. v. Hira Punja*, 1 Bom. H. C. R. 33; *Emperor v. Niaz Ali*, (1905) A. W. N. 2—2 Cr. L. J. 31; *Reg. v. Doorjodhun*, 19 W. R. 26 Cr.

(6) *Jagdeo v. Emperor*, 15 A. L. J. 239 (940)—99 I. C. 310—18 Cr. L. J. 470; *Ghinua v. Emperor*, 3 Pat. L. J. 291 (298)—19 Cr. L. J. 135—43 I. C. 423 F. D.

(7) *Reg. v. Doorjodhun*, 19 W. R. Cr. 26; *Emperor v. Jhabbu*, 42 A. 137; *Shib Das v. Emperor*, 51 C. 594—25 Cr. L. J. 1051—81 I. C. 827—1924 C. 713; *Emperor v. Gopi Mohan*, 51 C. 827—84 I. C. 340—26 Cr. L. J. 276—A. I. R. 1925 C. 479; *Nabi Ahmad v. Emperor*, A. I. R. 1931 O. 355.

(8) *Jagdeo v. Emperor*, 15 A. L. J. 239—39 I. C. 310—18 Cr. L. J. 470; *Emperor v. Niaz Ali*, (1905) A. W. N. 2.

released " provided a responsible gentleman comes forward to take care of the accused outside Karachi " it was held that the order cannot be sustained(1). As soon as an accused declared to be lunatic is transmitted to the place of safe custody appointed by the Local Government, the authority of the criminal court over him ceases. It can only be revived under the circumstances mentioned in s. 473(2). But the amendment permits the accused to be kept in custody by the court itself.

Discharge of accused on report of Civil Surgeon held irregular.—When, upon the report of the Civil Surgeon that an accused person was of weak intellect, a Magistrate discharged the accused and made him over to his brother for safe custody, it was held that the proceedings were illegal, because if the order was made under s. 466, the Civil Surgeon should have been examined, and if it was made under section 470, the accused should have been detained in custody and the case reported to Government(3).

Person incapable of making defence not to be tried.—Where a Magistrate finds that the accused under trial is of unsound mind, but instead of staying the trial and acting under this section proceeds with it and acquits under s. 84 of the Penal Code, the procedure is irregular(4).

467. (1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or court, as the case may be, may, at any time, resume the inquiry or trial and require the accused to appear or be brought before such Magistrate or court.

(2) When the accused has been released under s. 466, and the sureties for his appearance produce him to the officer whom the Magistrate or court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

Postponed trial should be commenced *de novo*.—Where a trial is postponed under s. 464 or s. 465 on the ground of insanity of the prisoner and consequent incapacity to make his defence, it should not be resumed at the point at which it was previously stopped but should be commenced *de novo*, when the court finds him capable of making his defence(5). The subsequent trial of an accused person whose trial has been postponed by reason of unsoundness of mind is not illegal merely on account of the fact that the Judge and Assessors at the subsequent trial are not the same as at the time of the preliminary investigation under section 465(6).

(1) *Narain Shanker v. Emperor*, A. I. R. 1933 S. 267=35 Cr. L. J. 200=146 I. C. 850=1933 Cr. O. 941.

(2) *Empress v. Joy Hari*, 2 C. 856.

(3) 2 Welr. 580.

(4) *Emperor v. Ratti*, (1882) A. W. N. 106.

(5) *Re Kunnukan*, 2 Welr. 582.

(6) *Ghinua v. Emperor*, 3 Pat. L. J. 291.

of the fact that the Judge and Assessors at the subsequent trial are not the same as at the time of the preliminary investigation under this section(1).

466. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or court as the case may be, whether the case is one

Release of lunatic pending investigation or trial.

in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or court or such officer as the Magistrate or court appoints in this behalf.

(2) If the case is one in which, in the opinion of the Magistrate or court, bail should not be taken or if sufficient security is not given, the Magistrate or court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the local Government :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

Amendment explained.—This section has been substantially amended by section 122 of Act XVIII of 1923. The changes introduced are thus explained in the Statement of Objects and Reasons (1914) "This section is so amended as to allow bail to be granted at the discretion of the court, in any case in which the accused is a lunatic and the amendment also permits the accused to be kept in custody. The object in view is to delegate the power of the Local Government and to do away with the existing distinction in procedure between bailable and non-bailable cases(2)."

Release of lunatic pending investigation or trial.—The only power vested in the Magistrate under sub section (1) is to order the release of the accused "on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other persons, and for his appearance when required before the Magistrate or court or such officer as the Magistrate or court appoints in this behalf". He is not empowered to add any other condition not mentioned in sub-section (1) in ordering release of the accused. Where a Magistrate orders that the accused be

(1) *Ibid.*

(2) Statement of Objects and Reasons, 1914.

When accused appears to be sane.—Where the Magistrate is of opinion that the accused is sane at the time of trial he has no alternative but to proceed in accordance with the provisions of this section(1). Where a Magistrate finds, after examination of some of the prosecution witnesses, that the accused committed the offence while he was suffering from temporary insanity, he should act under sections 470, 471 of the Code. He is not competent to discharge him under s. 253, if it does not appear that the accused is of unsound mind at the trial(2). Conversely, where a Magistrate finds that the accused under trial is of unsound mind, but instead of staying the trial and acting under this section, proceeds with it and acquits under s. 84 of the Penal Code, the procedure is irregular(3). A Magistrate rightly commits for trial at the Sessions a prisoner charged with murder, whom he finds to be sane at the time of the preliminary investigation, although he was insane when he committed the act(4).

Presumption of sanity.—The law presumes every person at the age of discretion to be sane unless the contrary is proved; and, even if a lunatic has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed during derangement(5). Partial delusions on the mere existence of mental disease does not necessarily exempt a person from criminal responsibility. The proved unsoundness of mind of the sort described under s. 84 is a complete defence; and mental weakness caused by disease is an extenuating circumstance affecting the sentence(6). The policy of the law is to exercise control not only on the sane, but, so far as is possible, also the insane. Therefore, it is not every person mentally diseased who *ipso facto* is exempted from criminal responsibility. Such exemption is allowed only to the limited extent stated in s. 84, Penal Code, which concisely reproduces the English law as to non-punishable insanity(7).

470. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Acquittal on ground of lunacy.—Where a court acquits, under this section, a criminal lunatic of the offence charged, it has the power under section 471 of the Code to order that he be detained in custody in the jail where he then is, until the further orders of Government, and that the case be reported to Government for further orders(8). A

(1) *Crown v. Bahadur*, 9 Lab. 371 = 29 Cr. L. J. 204 = 106 I. C. 796.

(2) 2 Weir, 582.

(3) *Empress v. Ratti*, (1882) A.W.N. 106.

(4) *Queen v. Ram Rattan*, 9 W. R. Cr. 23.

(5) *Empress v. Balu*, Rat. Un. Cr. O 172.

(6) *Empress v. Nepal*, Rat. Un. Cr. C. 229.

(7) 17 G. P. L. R. 113.

(8) *Emperor v. Samya Hirya*, 20 Bom. L. R. 629.

Resumption of inquiry or trial.—Where a Magistrate has kept in custody an insane prisoner, and reported the case to Government, his successor, instead of striking off the case, is bound to resume the investigation under this section(1).

468. (1) If, when the accused appears or is again brought before the Magistrate or the court, as the case may be, the Magistrate or court considers him capable of making his defence, the inquiry or trial shall proceed.

Procedure on accused appearing before Magistrate or court.

(2) If the Magistrate or court considers the accused to be still incapable of making his defence, the Magistrate or court shall again act according to the provisions of sec. 464 or s. 465, as the case may be, *and, if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.*

Amendment explained.—The addition of the italicised words at the end of sub section (2) is in consequence of the change in sub-section (2) of s. 466, *supra*.

Procedure when person of unsound mind becomes capable.—Ss. 467, 468 and 473 provide for the trial of an accused person when he is found to be capable of making a defence, and if tried under the former of these sections, he might be acquitted under s. 470(2). The trial should not be resumed at the point at which it was previously stopped, but should be commenced *de novo*, when the court finds him capable of making his defence(3).

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

When accused appears to have been insane.

(1) *Queen v. Raghuva*, 6 W. R. Cr. 3.

(3) 2 Weir, 581.

(2) 2 Weir, 581.

the Magistrate or court thinks fit, and shall report the action taken to the Local Government :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

(2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provision of section 466 or this section, to discharge all or any of the functions of the Inspector-General of Prisons under section 473 or section 474.

Power of Local Government to relieve Inspector-General of certain functions.

Changes introduced.—This section has been amended by section 124 of Act XVIII of 1923. By this amendment, the word "finding" has been substituted for the word 'judgment,' and the word 'detained' for the word 'kept'; the words 'and shall report the action taken to the Local Government' and the proviso have been newly added. The reason for the proviso is given by the Select Committee of 1916 as follows: "We have also made it clear that a detention order must be in accordance with the rules made under the Lunacy Act 1912"(1).

Formerly the court had to report the case for orders and could not itself send the lunatic to an asylum or jail. The words "and shall report the case for the orders of the Local Government" in sub section (1) of section 471 were however repealed by the Repealing and Amending Act X of 1914(2). In this case it appeared to the court that omission of these words made no substantial change in the law relating to lunatics under the Code, and that the powers of the court and of the Government were not altered by the repeal of those words. But as the section contains no direction that the court should report the case for the orders of the Local Government, there is no reason why the court should continue to follow the old procedure(3). The court, in a case where it finds that an offence has been committed by a lunatic, must confine itself to making an order that he should be kept in safe custody in such place and manner as the court thinks fit. It is then for the Government to decide under their own powers future fate of the person concerned(4).

Scope and application.—This section, as amended by Act X of 1914, no longer requires that the court should report the case of a lunatic accused for the order of the Local Government and that the court can itself issue a direction for his detention in a lunatic asylum, or if

1923 Bom. 261=1 A. I. C. L. T. 387=84 I. C. 652.

(4) See the case cited in the last note and *Emperor v. Maiku*, 22 O. C. 263; also *Anandi v. Emperor*, 71 I. C. 689; 1923 A. 327=45 A. 329=24 Cr. L. J. 226

-10 I. C. 691

(3) *Emperor v. Imam Hasan*, 25 Bom. L. R. 286 (287)=26 Cr. L. J. 348=

common form of finding of acquittal on the ground of insanity is the following :—" The court, concerning with the Assessors, finds that, did kill.....by striking him on the head with a club, but that, by reason of unsoundness of mind, he was incapable of knowing that he was doing an act which was wrong or contrary to law, and that he is not therefore guilty of the offence specified in the charge, viz., and the court directs that the said . . . be acquitted, and that ; under the provisions of section 471, Criminal Procedure Code, the said . be kept in safe custody in the . pending the orders of the Local Government "(1).

Proof of insanity.—As the plea of insanity is an exception when such a defence is set up it must be proved affirmatively by the defence that the prisoner is insane before he can ask the Jury to acquit him ; if that fact be doubtful and the commission of the crime charged in the indictment is proved it is their duty to convict(2). Where the plea of insanity is taken on behalf of an accused person, the question that arises is not whether at the time of the trial the man was of unsound mind, but whether he was so at the time of the commission of the deed, and whether by reason of that unsoundness of mind he was incapable of distinguishing between right and wrong(3). It is not because a man commits a very horrible murder, or because he commits it while labouring under strong passions and feelings, that therefore the world is to assume that he must have been insane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved(4).

Order for safe custody.—Where a court acquits an accused under this section, on the ground of his lunacy, it should simultaneously pass orders under section 471(5). When an accused person is acquitted on the ground of lunacy, it is the duty of the court to decide whether or not, at the time the act constituting the offence was committed, the accused was capable of understanding the nature of his act, and if the court is satisfied that he was not, an absolute duty is imposed on it to make an order to declare him to be a criminal lunatic within the meaning of Act IV of 1912, and direct him to be kept in safe custody, even if he is not of unsound mind on the date of his acquittal, inasmuch as the fact that he has become comparatively well or sane is not a matter which concerns the court(6).

471. (1) Whenever the finding states that the

Person acquitted
on such ground to
be kept in safe cus-
tody.

accused person committed the act alleged, the Magistrate or court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as

(1) C. H. R. and O. Vol. 1, Chl.

(2) Per Rolfe, B. in Stokes (1848) 3 C. and K. 185 (1849).

(3) *Ghaffur Pramanik v. Emperor*, 28 C. 613 (616).

(4) *Queen v. Nobin Chunder*, 20 W. R. Cr. 70 (71); *Empress v. Balu*, Rat. Up. Cr. C. 1172.

(5) *Mahammed v. Emperor*, 65 I. C. 423 = (1922) M. W. N. 10 = 90 M. L. T. 74 = 42 M. L. J. 72 = 23 Cr. L. J. 71.

(6) *Anandi v. Emperor*, 71 I. C. 689 = 1923 A. 317 = 45 A. 329 = 24 Cr. L. J. 223; See 2 Weir 582; 17 C. P. L. R. 113.

This section has been amended by section 125 of Act XVIII of 1923. By this amendment, the word "detained" has been substituted for the word "confined". This amendment is only a drafting amendment.

474. (1) If such person is detained under the provisions of section 466 or section 471, and such Inspector-General or Visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the Local Government may thereupon order him to be released or to be detained in custody, or to be transferred to a public lunatic asylum, if he has not been already sent to such an asylum; and in case it orders him to be transferred to an asylum, may appoint a commission, consisting of a Judicial and two Medical Officers.

(2) Such commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government, which may order his release or detention as it thinks fit.

This section has been amended by section 126 of Act XVIII of 1923. By this amendment the word "detained" has been substituted for the word "confined" and the word "released" for the word "discharged". These amendments are drafting amendments.

475. (1) Whenever any relative or friend of any person detained under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody, the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall—

- (a) be properly taken care of and prevented from doing injury to himself or to any other person, and
 - (b) be produced for the inspection of such officer, and at such times and places, as the Local Government may direct, and
 - (c) in the case of a person detained under section 466, be produced when required before such Magistrate or court,
- order such person to be delivered to such relative or friend.

there is no accomodation in it, in jail or some other place of a safe custody in British India(1). Where the accused is a deaf and dumb man unable to understand the proceedings of the trial he should be treated as lunatic and dealt with under this section(2).

Detained in safe custody.—"Detained in safe custody" in this section does not mean "detained in the custody of friends and relations". When, therefore, a person is found to be guilty under section 302, Indian Penal Code, of committing murder and is acquitted on the ground that he was at the time of commission of crime, insane and incapable of knowing what he was doing, the Judge shall under this section, order him to be kept in safe custody, and report the matter to the Local Government. The Local Government and not the Judge, can, if satisfied, deliver the accused to any relative or friend of him for safe custody(3). But in one case it has been held that this section should not be interpreted as compelling a court to send the accused to a lunatic asylum. All that is necessary is to see that safeguards are taken as would keep the accused from mischief and it is permissible to order the accused to be kept under the control and custody of his parents(4).

Power of High Court in revision.—A trial court's omission to pass an order under this section will not preclude a High Court from passing such an order in revision. Such an order is in the nature of a consequential or an incidental order within the meaning of section 423 (1) and does not amount to an alteration of the finding of acquittal into one of conviction(5).

472. (Repealed by the Indian Lunacy Act, 1912).

473. If such person is detained under the provisions of section 466, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors

Procedure where lunatic prisoner is reported capable of making his defence

of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or court, as the case may be, at such time as the Magistrate or court appoints, and the Magistrate or court shall deal with such person under the provisions of section 468; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

(1) *Emperor v. Maiku* 22 O. C. 269= 21 Cr. L. J. 46=54 I. O. 254; *Emperor v. Imam Hasan*, 25 Bom. L. R. 286 =26 Cr. L. J. 348=84 I. O. 652=1923 B. 1111.

P. R. 1911 Cr.=12 I. C. 989=39 P. W. R. 1911=12 Cr. L. J. 613; *Emperor v. Gahna*, 37 P. R. 1889 Cr.

(3) *Superintendent Remem v. Srish Chandra*, 48 C. L. J. 148; 2 Weir 580.

(4) *Muhammad v. Emperor*, 65 I. C. 423=(1922) M. W. N. 10=30 M. L. T. 74=42 M. L. J. 72=23 Cr. L. J. 71.

(5) *Ibid.*

CHAPTER XXXV

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE.

476. (1) When any civil, revenue or criminal court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate, or, if the alleged offence is non-bailable, may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate :

Procedure in cases mentioned in section 195.

Provided that, where the court making the complaint is a High Court, the complaint may be signed by such officer of the court as the court may appoint.

For the purposes of this sub-section, a * * * Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200. * * *

(3) Where it is brought to the notice of such Magistrate, or any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

Amendments explained.—The extensive amendments to this section are consequential upon the amendments introduced into

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in subsection (1), clause (b), certifies at any time to the Magistrate or court that such person is capable of making his defence, such Magistrate or court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or court; and, upon such production, the Magistrate or court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.

This section has been entirely recast. "The new sub s. (2) simplifies the procedure under which a person accused of an offence, whose trial has been postponed by reason of his unsoundness of mind, is again produced before the Court on the certificate of the inspecting officer as to his recovery"(1).

(1) Statement of Objects and Reasons (1914).

been radically altered. Under the old Code a court could give sanction on an application to prosecute and that sanction could be made the subject of an appeal. This has been swept away and it is for the court itself in all cases whether on its own accord or on an application to make a complaint and an appeal lies in all cases and does not depend upon any special circumstances of an application having been made(1). Under this section as it now stands a court must make a complaint and cannot directly order prosecution. That complaint must set forth offence, the precise facts on which it is based and the evidence available for proving it(2). Under the provisions of this section, as amended, a civil court has only authority to make a preliminary enquiry and record a finding in the case of an offence covered by cls. (b) and (c) but not cl. (a). In the case of an offence covered by cl. (a) the presiding officer of a civil court is in the position of an ordinary public servant and exercises no *quasi* judicial functions of any kind, while in the case of an offence covered by cl. (a) the presiding officer of a civil court is in the position of an ordinary public servant and exercises no *quasi* judicial functions of any kind, while in the case of an offence covered by cls. (b) and (c) he is in the position of a presiding officer of a court and exercises *quasi* judicial functions(3). If it appears to a court that any of the offences enumerated in cls. (b) and (c) have been committed "in or in relation to a proceeding in that court", it has jurisdiction to proceed under s. 476. The mere fact that in the appellate court the parties agreed to compromise the matter, or to get it decided by reference to arbitration, or in accordance with the statement of a referee, cannot take away the jurisdiction vested in the trial court to make a complaint under this section provided, that court is satisfied that "it is expedient in the interest of justice that such a complaint should be made"(4). Sections 195 and 476 must be read together. The reference in section 476 to offences referred to in section 195 is not merely to offences under certain section, but to such offence when committed by a party to the proceedings(5).

Scope and object of section.—This section prescribes the procedure to be adopted when a complaint has to be made in respect of offences mentioned in clauses (b) and (c) of s. 195 (6). What a court has to decide under this section is (a) whether an offence of the kind contemplated appears to have been committed and (b) whether it is expedient in the interests of justice that it should be further inquired into. In order to arrive at a decision the court may if it thinks fit, hold such preliminary inquiry as it considers necessary(7). As has been held in many cases, a court in making a

(1) *Emperor v. Ram Prasad*, 49 A. 752=25 A. L. J. 639=8 A. I. Cr. B. 49=28 Cr. L. J. 543=102 I. C. 351.

(2) *Dore Sap v. Emperor*, 103 I. C. 409=4 O. W. N. 640=28 Cr. L. J. 681=A. I. R. (1927) Nag. 333.

(3) *Narain Das v. Emperor*, 49 A. 792=102 I. C. 485=25 A. L. J. 589=28 Cr. L. J. 549=7 A. I. Cr. R. 534=1. R. 8 A. 81 Cr.

(4) *Narain Das v. Emperor*, 49 A.

792=102 I. C. 485=25 A. L. J. 589=L. R. 8 A. 81 Cr.=28 Cr. L. J. 549=7 A. I. Cr. R. 534.

(5) Per Brown, J., in *Guruswamy v. Ebrahim*, 2 Rang. 374=84 I. C. 439=1928 R. 28=26 Cr. L. J. 295.

(6) *Dwarka Prasad v. Makund Sarup*, 24 A. L. J. 122 (123)=L. R. 5 A. Cr. 218; *Crown v. Qadar Bakhsh*, 6 Lah. 34 (39).

(7) *Raja Rao v. Emperor*, (1927) M. W. N. 63.

s. 195. Prior to the amendments section 195 and section 476 referred to two different things. Section 195 required, a sanction or complaint by the court for the prosecution of certain offences; section 476 gave the court a quite independent power to direct a prosecution of its own authority and send the case for trial on the merits to a first class Magistrate. As the Code now stands, both the sanction by a court and the direct order by a court directing a prosecution are done away with, and the procedure, in all cases, is one of complaint by the court. Section 195 describes the offences in respect of which a complaint is necessary, and section 476 prescribes the procedure under which a complaint is to be made(1). The section as originally drafted was animadverted upon by those to whom the Bill was sent for approval. They made the following further amendments and justified them as follows: "The changes that we have made in the proposed s. 476 are not of great importance. We have provided that a court can act on application made to it or *suo motu* and after such preliminary inquiry if any, as it thinks necessary. For the words "committed before it or brought under its notice in the course of a judicial proceeding" we have substituted "may make a complaint" for "shall make a complaint" and in view of the criticism of the words "nearest first class Magistrate" we have provided that a complaint should be sent to a first class Magistrate having jurisdiction. For the words "if he thinks fit" in order to give effect to the decision arrived at, in our consideration of clause 114, that proceedings under s. 476, etc., should be subject to revision, we have introduced words "which will make it necessary for the court to record an order"(2). The proviso to sub-section (1) has been added by the Cr. P. Code Amendment Act II of 1926. The word "Chief" which occurred in the third para. of sub-section (1) has been deleted by the same Amendment Act.

Effect of amendment.—Since the amendment of this and s. 195 by Act XVIII of 1923, which came into force on 1st September 1923, no court can take cognizance of an offence punishable under any of the sections of the Indian Penal Code enumerated in s. 195 when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, except on the complaint in writing of such court or some other court to which such court is subordinate(3). The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they shall be continued under the new procedure from the time when the new procedure came into force(4). An analogy which is to be drawn between the terms of the present sections 476 and 195 and those of the corresponding sections of the old Code is likely to be misleading inasmuch as the procedure has

(1) *Duarka Prasad v. Muland Sarup*, 24 A. L. J. 122 (123)=L. R. 5 A. Cr. 213

(2) Report of the Joint Committee (1922).

(3) *Jawahar Lal v. Jaggu Mal*, 6 Lab. 41=26 Cr. L. J. 1163=58 I. C. 522=A. I. R. 1925 Lab. 392.

Court following *Abdul Khadar v. Meera Sahib*(1), but a different view has been held in the Bombay High Court(2) and in the Calcutta High Court(3). The last cited case was considered in *Jadu Nandan Singh v. Emperor*(4) and distinguished on the ground that the former referred to an offence under section 195 (1) (c) and the latter to an offence under clause (b) of the same, but was not dissented from. In the Madras Court there is a dictum of Sankaran Nair, J., in *Aiya Kannu Pillai v. Emperor*(5), that offences in clause (c) of section 195 must be committed by a party, while the scope of section 476 is not so restricted. And therefore it is competent to a court to order prosecution for forgery of a person who was not a party to the proceeding in court(6). It seems to follow from the decisions of the Allahabad High Court and the Punjab Chief Court that a court in taking action under section 476 is not restricted, as regards the persons against whom an order may be made, to the parties to a proceeding pending before it(7). It is competent to a court to proceed under section 476 against a party who has filed a forged document, whether such document has been actually given in evidence or not(8).

Relation of section 476 to section 195.—The recent amendment in sections 195 and 476 has resulted in connecting the two sections more closely together(9). It is not, therefore, open to a court to make a complaint under section 476 in respect of any person other than persons who are parties to the proceedings before it(10). The words "the offence" referred to in section 195 sub section (1), clause (b) or clause (c) in section 476 must be read in conjunction with the wording of section 195 (1) (c). The only offence which section 195 (1) (c) bars from the cognizance of the Magistrate without a complaint by the Court is when such offence is alleged to have been committed by a party to any proceeding before that court, and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in section 195 is(11). The court can exercise its powers under s. 476 only against those who were parties to the suit before it(12). A person who possibly forged a document which was produced in court cannot be proceeded against under this section if there be no grounds for supposing that he did so for the purpose of using it in court and there is nothing to show that it was he

(1) 15 M. 214.

(2) *In re Derjai*, 18 B. 581; *In re Keshav Narayan*, 14 Bom. L. R. 968.

(3) *Akhil Chandra v. Empress*, 22 C. 1004.

(4) 37 C. 250=14 C. W. N. 330=10 C. L. J. 564=11 Cr. L. J. 37=42 I. C. 710.

(5) 32 M. 49.

(6) *In re Devaji*, 18 B. 581; *In re Keshav*, 14 Bom. L. R. 368; *Behari Lal v. Emperor*, 20 C. L. J. 630; *Ejaz Ali v. Emperor*, 24 O. C. 367.

(7) *Ganga Ram v. Emperor*, 40 A. 24; *Emperor v. Khushali*, 40 A. 116; *Jamal Khan v. Empress*, 12 P. R.

1897 Cr.; *Akhil Chandra v. Empress*, 22 C. 1004.

(8) Per Brown J. in *Guruswamy v. Ibrahim*, 2 Rang. 374 (381, 382)=26 Cr. L. J. 295=84 I. C. 439.

(9) *Guruswamy v. Ibrahim*, 2 Rang. 374=26 Cr. L. J. 295=84 I. C. 439.

(10) Per Robinson C. J. in *Ibid*, at p. 380.

(11) *Shwe Phwe v. Ma Me Hinole*, 3 Rang. 48=3 Bur. L. J. 344=26 Cr. L. J. 500=85 I. C. 244.

(12) *Baheraddy v. Emperor*, 28 C. W. N. 880.

complaint, should exercise proper judicial discretion and see that it is necessary in the interest of justice. It should be made when there is a clear *prima facie* case against the accused and the court is satisfied that in all probability a conviction will follow(1). It is easy to imagine the inconvenience which might be caused if a Munsif or a Subordinate Judge or a Judge were to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution, and this section has been enacted to obviate the difficulty. The Legislature thought it desirable that the procedure to be followed in cases of complaint by a court should be different from that which has to be observed by an ordinary complainant(2). Under section 195, it is open to the Court, before which the offence was committed, to prefer a complaint for the prosecution of the offender; and section 476 prescribes the procedure as to how that complaint may be preferred(3). This section can only apply to cases where by reason of a provision in the Code the Magistrate requires a complaint by a court in order that he may take cognizance of the charge(4).

Section 476 is supplementary to section 195.—Section 195 is not complete in itself and has to be read along with section 476 which prescribes the procedure to be adopted when a complaint has to be made in respect of offences mentioned in clauses (b) and (c) of s. 195(5). Both under the old Code and the new Code, s. 476 is corollary of s. 195(6). The reasoning of the Full Bench of the Madras High Court in *Govinda Iyer v. Rex*(7), is unanswerable upon this point. The qualifications mentioned in section 195 are to be treated as incorporated in the provisions of this section(8). Hence proceedings under section 476 cannot be taken against a person who is neither a party nor a witness in a suit in respect of abetment of forgery of a document exhibited in the suit(9). Under section 195 (1) (c) the offence must have been committed by a 'party'. If therefore the offence has been committed by a person not a party, section 195 (1) (c) is inapplicable, and it follows that section 476 is also inapplicable. This view has been approved in *In re Ramalingam*(10) by a Bench of the Madras High

(1) *Surendara Nath v. Kumeda Charan*, 126 I C 416=51 C.L.J. 209 =A.I.R. 1930 C 352=Ind Rul. (1930) 2 L J 728.

(2) *Or. C. 895; Namberumal v. Nainappa*, 3 Mad Lr Cas 370; *Nouvabali Khan*

L. J. 883-35 C.-W. N 98=Ind. Ru!
(1931) Cal. 561

(5) See a learned article in (1926) M. W. N. cxxiv.

(6) *Balgaunda v. Emperor*, 55 B 461 (466) = A I R 1931 B 305 = 31 Bom. L. R 296 = 1931 Cr. C 561 = 32 Cr. J. 1017 = 1931 I. C. 269

(7) 42 M. 540-50 I. C. 824-20 Cr.
L. J. 844-9 L. W. 421-36 M. L. J.
448-(1919) M. W. N. 459-26 M. L. T.
92 F. R.

(8. *In the matter of a Vakil*, 1st Cr L.
J 638-46 I & 638, *Girinda Iyer v.*
Res., 42 M 540 F R.

(2) *Garinda Iyer* *Rez* 42 M 510
F. B. = 50 I C. 814-20 Cr L J 314-3
L. W. 422-35 M. L. J 448-(1919)
M. W. N. 459-26 M. L. T. 91 F. B.

Certificate Officer acting under section 6 of Bengal Act I of 1895 (Public Demands Recovery Act)(1); as also a Village Munsiff trying a case under Regulation IV of 1816(2); as also a Deputy Commissioner acting under s. 5 (ii) or 5 (iii) of the Rules under sec. 240 of the Punjab Municipal Act (III of 1911)(3); as also a Registrar of the Presidency Small Cause Court(4); as also a Mamlatdar holding an inquiry relating to Record of Rights(5); as also a Judge receiving and dealing with a petition under s. 83 of the Transfer of Property Act(6).

What are not courts.—An officer in the Collectorate directing refund of the surplus sale proceeds is not a court(7). A Registrar acting under s. 93 of the Indian Registration Act is not a court(8), though there is authority to the contrary also(9). The Official Assignee does not become a civil court merely because he has wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent, or because persons aggrieved by decisions of his can appeal to the court from those decisions(10). The Land Acquisition Collector or Deputy Collector is not a court(11); nor is an Excise Collector(12); nor is a Collector to whom an application is made to replace a damaged stamp(13); nor a Commissioner appointed for the examination of a witness(14); nor is an arbitrator appointed by the court(15). A member of Governor's Executive Council dealing with an appeal presented to His Excellency the Governor-in-Council by a lessee of forest against the order of a Forest Officer is not a court even though procedure analogous to that of a legal tribunal is observed(16). An Assistant Collector holding a departmental inquiry under the Bombay Land Revenue Code into the misconduct of a Subordinate is not a court(17). A Naib-Tahsildar acting in the exercise of powers under Chapter IV of the Punjab Land Revenue Act is a Revenue Officer and not revenue court(18), but when a Deputy Tahsildar acts in his judicial capacity as a "revenue court" a complaint is necessary for parties to proceedings

provisions of section 69, sub section (9);
Lakshan v Naranaram, 23 Cr. L. J.
231=66 I. C. 71.

(1) *Sundar v. Sital*, 28 C. 217.

(2) *Empress v. Venkayya*, 11 M
375

(3) *Karimulla v. Emperor*, 22
Cr. L. J. 125=62 I. C. 413.

(4) *Balchand v. Taraknath*, 18 C.
W. N. 1323=16 Cr. L. J. 151=27 I. C.
215.

(5) *Emperor v. Narayan Gangaya*,
89 B 310.

(6) *Chamari v. Public Prosecutor*,
4 Pat. 24=6 Pat. L. T. 225=26 Cr. L. J.
170.

(7) *Jharu Lal v. Mahanth*, A. I.
R. 1923 Pat. 410=1 A. I. C. L. T. 443=2
Pat. 257.

(8) *Empress v. Ram Lal*, 15 A. 141=
(1893) A. W. N. 59; *Kalechand v*
Emperor, 11 O. C. 358=9 Cr. L. J. 54;
Empress v. Tulji, 12 B. 36.

(9) *In re Venkatachala*, 10 M. 134=

2 Weir. 170; *Atchayya v. Gangappa*,
15 M. 138.

(10) *Beardsell v. Abdulghani*, 37 M.
107.

(11) *Galstoun v. Banku Behary*, 104
I. C. 249=31 C. W. N. 825=1927 C
621; *Ezra v. Secretary of State*, 30
C. 36=7 C. W. N. 249

(12) *Mahadeo v. Narayan*, 10 C. W.
N. 210.

(13) *Queen v. Gourmohan*, 11 W. R.
Cr. 48.

(14) *Saadat Ali v. Emperor*, 11 C.
W. N. 909.

(15) *Puttiah v. Veerasami*, 17 M. L. J.
420; *Mula Mal v. Chiranji Lal*, 3 P.
R. 1914 Cr.=15 Cr. L. J. 358

(16) *Legal Remembrancer v. Daulat*
Ram, 36 C. W. N. 505=A. I. R. 1932 C.
390=59 C. 1233=33 Cr. L. J. 685=139
I. C. 705.

(17) *In re Cholelal*, 22 B. 936.

(18) *Crown v. Lehna Singh*, 14 P.
R. 1915 Cr.

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who used the document in court(1).

Civil, criminal and revenue court.—This section authorises any civil, revenue or criminal court, where it is of opinion that it is expedient in the interest of justice that an inquiry should be made into certain offences, to make a complaint thereof in writing(2). The expression "court" in s. 195 is of a wider scope than the expression "civil, revenue or criminal court" in this section. This is made particularly clear by the amendment of section 105 (2) which was made by Act XVIII and (c) of sub section (1)" the term "criminal court." Obviously, therefore, the court is of a wider meaning(3). There are courts outside the criminal, civil and revenue court. The Election Commissioners constitute such a court(4). The Income-Tax Commissioners are such a court(5). The officers appointed as special Commissioners under Act XXXVII of 1850, to hold an inquiry regarding the conduct of a public servant, constitute a "court" within the meaning of s. 195(6). The Calcutta High court in the case of *Galstaun v. Banku Behary*(7), however, took the view that although the word used in section 195, sub section (2), Cr. P. C., is "includes" the courts under that section are restricted to those detailed in section 476. According to that court the Land Acquisition Deputy Collector is not a court and he cannot therefore make a complaint under s. 195(8). A civil court exercising jurisdiction under s. 476 does not cease to be a civil court(9).

What are courts.—For the purposes of this section a Magistrate holding an inquiry under section 23 of the Legal Practitioners Act is a court(10). A District Judge when acting under section 22 of the Bombay District Municipal Act, is a "court" within the meaning of cl. (b). So a prosecution for attempting to fabricate false evidence before the District Judge when acting in this capacity cannot be without a complaint under this section(11). An Income-Tax Collector also is a Revenue Court within the meaning of clauses (b) and (c) of this section(12). A Tahsildar, when holding an inquiry as to whether a transfer of names in a land register should be made or not, is a court(13), as also a Collector or Deputy Collector exercising the powers of a Collector under ss. 69 and 70 of Bengal Tenancy Act(14); as also a

(1) *Baheraddy v. Emperor*, 28 C. W. N. 880

(2) *Ranjit Narain v. Ram Bahadur*, 5 Pat. 262=7 P. L. T. 114=27 Cr. L. J. 641=94 I. C. 593.

(3) *Kanhैया Lal v. Bhagwan Das*, 48 A. 60 (65)=89 I. C. 1054=L. R. 6 A. 153, Cr.=23 A. L. J. 956=26 Cr. L. J. 1485=A. I. R. (1926) All. 90.

(4) *Prasad v. Emperor*, 1929 A. 774.
(5) *Gauri Shankar v. Emperor*, 13 I. C. 1006=9 A. L. J. 156=13 Cr. L. J. 190.
(6) *In re Nanchand*, 87 B. 565=15 Bom. L. R. 45=18 I. C. 408=14 Cr. L. J. 72.

(7) *Al. M. Khan v. Crown*, 12 Lab. 391=A. I. R. 1931 Lab. 662=82 Cr. L. J. 1252=134 I. C. 818=32 P. L. R. 939=1931 Cr. C. 924.

(8) 31 C. W. N. 825=1927 O. 621=1927 C. 621=104 I. C. 249=28 Cr. L. J. 809.

(9) *Ibid.*
(10) *Karimullah v. Rameshwar Prasad*, 51 A. 344=27 A. L. J. 55=10 L. R. A. Cr. 121=111 I. C. 595=A. I. R. 1919 A. 774.

(11) *Gauri Shankar v. Emperor*, 13 I. C. 1006=9 A. L. J. 156=13 Cr. L. J. 190.

(12) *In re Nanchand*, 87 B. 565=15 Bom. L. R. 45=18 I. C. 408=14 Cr. L. J. 72.

(13) *Al. M. Khan v. Crown*, 12 Lab. 391=A. I. R. 1931 Lab. 662=82 Cr. L. J. 1252=134 I. C. 818=32 P. L. R. 939=1931 Cr. C. 924.

(14) *Al. M. Khan v. Crown*, 12 Lab. 391=A. I. R. 1931 Lab. 662=82 Cr. L. J. 1252=134 I. C. 818=32 P. L. R. 939=1931 Cr. C. 924.

document was filed should be the only Judge that can file a complaint under this section. It is a continuing offence and any court seized of the case can send a complaint to a Magistrate under this section(1). A successor in a Court is the same court as his predecessor in that court, and therefore, the predecessor who has departed for another court can no longer be held to be a presiding officer of the first court(2).

Power after transfer.—The proper authority to make a complaint under this section, is not the court which took cognizance and issued process but the court which tried and disposed of the original case(3). The only court which can exercise the power conferred under this section, is the court which has jurisdiction over the suit in which the alleged offence has been committed, whether such suit was instituted in such court or came to its file by transfer from any other court or otherwise(4). But in an Allahabad case it has been held that the circumstances that a case has passed out of the hands of a court, as, for instance, by an order of transfer, after it has been partly heard does not deprive the first court of its jurisdiction to take proceedings against a witness under this section, nor is that jurisdiction taken away by the circumstances that the second court may have formed a different opinion as to the veracity of the witness(5).

Transfer of Judge.—A Magistrate who after trying a case, has been transferred from the charge of the particular court in which the case was tried to some other duty in the same district, is not competent to make a complaint in respect of a case which he tried as the presiding officer of that court(6). In such an event the only officer who can order the prosecution is his successor in office in that court. The predecessor who has departed for an other court can no longer be held to be a presiding officer of the first court(7).

Complaint by District Magistrate.—It is not legal for a District Magistrate to make a complaint under s. 211 I. P. C., when the inquiry has been made by another officer, and the matter has not come to his notice in the course of a judicial proceeding(8). This principle was affirmed in *Mofizuddin v. Basanta Kumar*(9), where a Deputy Magistrate who had tried the case was transferred from the district and the complaint was made by the District Magistrate before whom

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(1) *Mattoyya v. Emperor*, 3 Cr. Law Mad. 40.

(2) *Emperor v. Baldeo Prasad*, 46 A. 551=82 I. C. 285=22 A. L. J. 772=25 Cr. L. J. 1277=1924 A. 770.

(3) *Tarakeswar v. Emperor*, 53 C. 488=27 Cr. L. J. 648=94 I. C. 600=80 O. W. N. 504=A. I. R. 1926 C. 788;

12=84= npe-
ror, v A. I. C. J. 5, 140.

(4) *Gerimal v. Shewa Ram*, 95 I. C. 316=27 Cr. L. J. 780=20 S. L. R. 90=1926 S. 215.

(5) *Emperor v. Sundar Lal*, 44 A. 642=68 I. C. 827=20 A. L. J. 656=(1099) A. 222=92 Cr. L. J. 602

(6) *Emperor v. Baldeo Prasad*, 46 A. 851=82 I. C. 285=22 A. L. J. 772=25 Cr. L. J. 1277=1924 A. 770=L. B. 5 A. 121 Cr.

(7) *Habibul Khan v. Emperor*, 33 C. 80(32)=8 Cr. L. J. 125=10 O. W. N. 30 but see *Delan Singh v. Emperor*, 40 C. 260=13 Cr. L. J. 526=17 I. C. 570

(8) 15 Cr. L. J. 610=30 I. C. 464.

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before him to be proceeded against with reference to a forged document filed before him, even though inquiry in those proceedings was conducted through the Revenue Inspector(1). A District Magistrate has no jurisdiction to lodge a prosecution for perjury in respect of an affidavit sworn before him as a District Magistrate(2). A Magistrate passing an order under section 144 of the Code does so only as a "public servant," and not, a "court"(3). A District Registrar before whom a forged document was produced for registration is not a civil, criminal or revenue court, within the meaning of this section; but in his capacity as District Magistrate he can take cognizance of the offence (section 471, I. P. C.) under section 190 (1) (c) of the Code(4).

Successor in-office—The term "court" as used in this section is not confined to the Judge who tried the case or the appeal as the case may be, but also means and includes the successor-in-office of such Judge(5). A complaint under this section by such successor is valid in law and is not defective for want of jurisdiction(6). Sections 195 and 476 make reference to the "court" and not to the "Judge" or even the "presiding officer" of the court. It is clear that, whether the Judge or the presiding officer is the same or a different person, the court remains the same and it is the court that is competent to make the complaint(7). The same reasons, apply where a court is composed of several Judges and the particular Judge who heard the case is absent(8). But where there are several Deputy Magistrates at a place and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor-in-office of the outgoing Magistrate(9). This case is not parallel with that in *Ram Ajodhya v. Emperor*(10), where it is held that the complaint can only be made by the court in question before whom the offence is alleged to have been committed, and not the particular public servant concerned who made the inquiry. The word "court" in this section includes the successor or to whose notice the commission of it was brought in the course of a judicial proceeding(11). It is not necessary that the Judge before whom a forged

(1) *In re Mathaur Shikra*, 71 I. C. 63=16 L. W. 534=1923 M. 87=24 Cr. L. J. 15.

(2) *Dina Nath v. Nek Ram*, 74 I. C. 75=21 A. L. J. 88=1923 A. 176=24 Cr. L. J. 747.

(3) *Nataranja v. Rangasami*, 44 M. L. J. 328.

(4) *Chakrabarti v. Emperor*, 1924 F. 104.

(5) *Chakrabarti v. Emperor*, 1924 F. 104.

(6) *Chakrabarti v. Emperor*, 1924 F. 104.

(7) *Chakrabarti v. Emperor*, 1924 F. 104.

(8) *Chakrabarti v. Emperor*, 1924 F. 104.

(9) *Chakrabarti v. Emperor*, 1924 F. 104.

(10) *Chakrabarti v. Emperor*, 1924 F. 104.

(11) *Chakrabarti v. Emperor*, 1924 F. 104.

Me Hmoke, 3 Rang. 48=8 Bur. L. J. 844=85 I. C. 244=26 Cr. L. J. 500=A. I. 1008.

Behram v. Emperor, 95 I. C. 818=7 Lah. 108=19.6 Lah. 805=27 Cr. L. J. 776=27 P. L. R. 314; *Barakat Ali v. Ghulam Hussain*, A. I. R. 1926 Lah. 394=27 Cr. L. J. 527=93 I. C. 991; *Purna Chandra v. Dhalu*, A. I. R. 1930 C. 721=52 C. L. J. 87=31 C. W. N. 914; *In re Lalit Mohan*, 5 Cr. L. J. 106=5 C. L. J. 176; *Bequ Singh v. Emperor*, 31 C. 551; *Dharmdas v. Sajore*, 11 C. W. N. 119.

(7) *Faqir Singh v. Emperor*, A. I. R. 1928 Lah. 759(2)=103 I. C. 120=29 Cr. L. J. 1018; *Karam Baksh v. Mul Chand*, 29 P. R. 1679 Cr.

(8) *Molla v. Emperor*, 33 C. 193; *Bahadur v. Eradatullah*, 37 C. 642 F. B.; *In re Nawab Singh*, 34 A. 394.

(9) *Girish v. Emperor*, 41 C. 667.
(10) 23 Cr. L. J. 49=23 Bom. L. R. 1296

(11) *Khan Muhammad v. Crown*, 4 Lah. 58; *Bahadur v. Eradatullah*, 37

permanent one with a perpetual succession of Judges and consequently complaint under section 195 cannot be made in regard to an offence committed before his predecessor(1),

Court abolished and re-established.—A court once abolished but re-established two years later with its territorial limits somewhat curtailed, is not "such court" within the meaning of clause (1) (b), and the latter court has no jurisdiction to make a complaint in respect of an offence committed before the former(2).

No delegation of power.—A complaint by the Public Prosecutor is not equivalent to a complaint by the court, and it is doubtful whether the latter can delegate the duty of filing the complaint(3).

Power of High Court.—This section gives the High Court as a superior court full powers to lay a complaint in any or every case in which it appears expedient in the ends of justice to do so, and there is nothing in the Code to justify the contention that power and jurisdiction is taken away because in case of a complaint or refusal to lay complaint by some subordinate court under this section, an appeal is allowed(4). Under the unamended section, it was not competent to the High Court, acting under this section, to direct the prosecution of a person for the offence of forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a probate case(5). The question has been dealt with in the case of *Emperor v. Qader Baksh*(6) and the following extract from the judgment of Sir Shadi Lal, C.J. may be quoted with advantage. "The procedure of the new section 476 in its application to the High Court is open to serious objections. It is hardly consistent with the dignity of a Judge of the High Court that he should have to make and sign a complaint which is to be inquired into by one of his subordinates, and that he should be treated and regarded as a complainant throughout the proceedings, the only exception being that his examination in support of the allegations in the complaint has been dispensed with by proviso (aa) of section 200. Nor is it fair to the accused that he should be arraigned in a case which has been instituted on a complaint made by a Judge of the highest tribunal and is to be tried by a judicial officer who is subordinate to the complainant. There can be no doubt that the circumstances that the complainant has been convicted of the offence are a foregone conclusion." In deference to these remarks the proviso has been added which lays down that a complaint by a High Court need not be signed by the Judge himself but may be signed by an officer of the court.

Presidency Magistrate.—The unamended section did not provide for the case of an offence before a court in a Presidency town. It empowers a court to send a case for enquiry or trial to the nearest Magistrate,

(1) *Jia Lal v. Phogmal*, 22 P. R. 1918 Cr.

(2) *In re Appualla*, 16 Cr. L. J. 787 = 81 I. C. 643.

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(5) In the matter of a Vakil, 19 Cr. L. J. 638 = 45 I. C. 686.

(6) 6 Lah. 34 = 26 P. L. R. 158 = 27 Cr. L. J. 95 = A. I. R. 1925 Lah. 312 = 91 I. C. 530.

all cases pending before the Deputy Magistrate were placed. But the decision in *In re Ramarao*(1) goes the other way. In that case an abetment of perjury was committed in the course of an inquiry before a committing Magistrate (who was a first class Magistrate). While the proceedings were pending before him the Magistrate was transferred and was succeeded by a second class Magistrate (who had no power to commit). The outgoing Magistrate therefore sent the proceedings to the District Magistrate. It was held that the District Magistrate has jurisdiction to make a complaint in respect of the offence, for he was "such court" referred to in clause (1) (b) of s. 195 and was the officer on whom devolved the disposal of committal of cases in the district. A joint Magistrate after dismissing the complaint in a case became the District Magistrate; and then ordered the prosecution of the complainant for perjury under s. 193 I. P. C. It was held that the order of the joint Magistrate as a District Magistrate was bad and should be set aside(2).

Power of superior court to make complaint as an original court.—The offence under s. 193 I. P. C., is complete when the false statement is made in the Court of first instance and it is not recommitted in the appellate court by the production of the record or otherwise in appeal, so as to entitle the appellate court to make a complaint(3). But a complaint may be made in the first instance by the superior court, even though no complaint was made by the subordinate court before which the offence was committed(4). The High Court having jurisdiction over the Magistrate's court has power to make the necessary complaint and to direct that the order in the case should issue as the complaint(5).

New court whether successor of original court.—The court contemplated by sections 195 and 476 is the court before which the offence the inquiry of which is contemplated is committed. The circumstance that a district is taken out from a particular Sessions Division and constituted a new Sessions Division under the provisions of the Cr. P. Code, does not give the newly constituted Sessions Court power to make a complaint relating to an offence committed at a trial before a Sessions Judge of the original Sessions Division(6).

Court acting in a different capacity.—A District Magistrate *qua* District Magistrate has no jurisdiction to take cognizance of an offence under section 471 of the Penal Code committed by a party to a proceeding in the revenue court of the Collector in respect of a document given in evidence in the course of an appeal(7).

Temporary court.—The court of the City Magistrate is not a

(1) 42 B. 190-20 Bom. L. R. 117.

(2) *Mallu Khan v. Emperor*, 1 A. L. J. 888.

(3) *Kompella v. Emperor*, 41 M. 767; see also *Wajid Ali v. Emperor*, A. J. R. 1934 O. 314 (2)-8 Luck. 638-11 O. W. M. 490-1934 O. L. R. 436-148 I. C. 1075-85 Cr. L. J. 891.

(4) *Palanisappa v. Annamalai*, 27 M. 223; *Bhadeswar v. Kamla Prasad*, 35 A. 90-11 A. L. J. 11.

(5) *Syed Khan v. Nagoor*, 3 Bur.

L. J. 141-26 Cr. L. J. 262; *Ponnusami v. Chockalinga*, 25 M. L. J. 593-14 Cr. L. J. 624-21 I. C. 672-1918 M. W. N. 1602-14 M. L. J. 512; *Gudala v. Jamal*, 16 Cr. L. J. 740-31 I. C. 840.

(6) *In re Maneklal*, 93 I. C. 81-29 Bom. L. R. 1290-A. I. R. 1927 Bom. 47-28 Cr. L. J. 40.

(7) *Emperor v. Ram Sahai*, 40 A. 141-16 A. L. J. 69-19 Cr. L. J. 201-48 I. C. 617.

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(6) 6 Lah. 24 = 26 P. L. R. 158 = 27 Cr. L. J. 98 = A. I. R. 1925 Lah 312 = 91 I. C. 520.

namely the Presidency Magistrate, was not a Magistrate of the first class(1). The section as amended makes it clear that a Presidency Magistrate is a Magistrate of the first class for the purposes of this section, *vide* para. 3 of sub-section (3). In this para., as originally framed by the Amendment Act of 1923 the words were "Chief Presidency Magistrate," but the word 'Chief' has been omitted by the Cr. P. Code Amendment Act, 11 of 1926. The reason of omitting the word 'Chief' is thus stated in the Statement of Objects and Reasons(2): "This amendment proposes to make all Presidency Magistrates, Magistrates of the first class for the purpose of section 476 (1). At present, if a Chief Presidency Magistrate wishes to take action, it is necessary for him to send the case to the first class Magistrate outside the presidency town, because the other Presidency Magistrates are not first class Magistrates for the purpose of this section." Such a difficulty arose in the case of *Mackay v. Emperor*(3). In this case the Chief Presidency Magistrate, Calcutta, being of opinion that a witness in a trial before him had been guilty of perjury made a complaint in writing under s. 476, Cr.P.C., and forwarded the same to himself as the Chief Presidency Magistrate, and immediately afterwards transferred the same to the third Presidency Magistrate for disposal, who committed the accused to the High Court Sessions for trial. It was held that although technically the Chief Presidency Magistrate made a mistake, the procedure adopted by him was substantially correct as he made the complaint and received it, and in the absence of any prejudice caused to the accused, it was nothing worse than an irregularity which could be disregarded. A Presidency Magistrate may make a complaint as required by s. 195 by virtue of this section where the same offence has already been made the subject-matter of a complaint mentioning other persons(4).

Complaint at the instance of private person, when to be made.—Since 1923 proceedings under this section are taken by the court only in the interests of justice when it thinks fit to do so. It is not now open to a private person to take proceedings after taking the sanction of the court under s. 195. A private person may move the court but it is for the court to decide whether to take action and initiate the proceedings(5). Proceedings under this section should not be undertaken on the application of private persons unless the prosecution is clearly in the interest of the state and is reasonably certain to result in a conviction(6). A complaint in respect of a forged document may

(1) *Mackay v. Emperor*, 11 Cr. L. J. 1174=127 I. C. 152=81 P. L. R. 840; (such person can not make an application for transfer); *Baijoo v. Empress*, 1 C. 450; *Kali v. Queen*, 23 W. R. 89 Cr.; *Mahomed v. Empress*, 23 C. 532; *Govindan v. Empress*, 7 M. 224.

(2) Gazette of India, 1925, Part V, p 216.

(3) 88 C. 850=80 O. W. N. 276=27 Cr. L. J. 885=93 I. C. 33=A. I. R. 1926 Cal. 470=43 C. L. J. 810

(4) *Sayyaduddin v. Emperor*, 83 C. W. N. 343=30 Cr. L. J. 1034=119 I. C. 381=A. I. R. 1929 Cal. 242=Ind. Rul. (1929) Cal. 790.

(5) *Ram Sarup v. Mehr Dil*, A. I. R. 1930 Lah. 873=1930 Cr. C. 917=

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(6) *Shankar Sahai v. Emperor*, 125 I. C. 639=31 Cr. L. J. 934=A. I. R. 1930 O. 401=7 O. W. N. 638; *Jadunandan v. Emperor*, 87 C. 250; *Mandar v. Emperor*, 74 I. C. 655=24 Cr. L. J. 623; against a particular person named; *Amar Nath v. Mamraj*, 2 Lah. 63.

be made by the court under this section, even when it is moved to do so by a person who was not a party to the proceedings in which the document was used. The court is authorised to take action either on application or otherwise(1). But though the court allows it, it is very reprehensible to allow a party to a civil litigation to prosecute his opponent for forgery in respect of a document produced in the civil case(2). A private complaint can be made against a person who abets an offence for which the court's sanction should in the first place be obtained under s. 195(3). A person may be called upon under this section to show cause why he should not be prosecuted in respect of an offence to which this section is applicable even though a previous proceeding under this section at the instance of a party has been dismissed for non-prosecution(4). A Magistrate is not bound down for ever, if on the request of a particular individual he does not feel inclined to proceed against a witness who has perjured himself. He may *suo motu* take action or another person may be able to induce him to take proceedings(5).

Complaint by court, when to be made.—The power conferred by this section on courts should be exercised with great caution and care and with due regard to the evidence on which the order is sought to be based. An order under this section directing the prosecution of a person for forgery should not be made on the basis of a piece of evidence which is inadmissible and which cannot be legally regarded as evidence at all, especially when there is positive legal evidence against it(6). Exceptionally strong reasons are required to justify an order under this section in cases where the complainant has not been allowed to adduce the whole of his evidence in support of his complaint(7). Before a court is justified in making an order under this section it ought to have before it direct evidence fixing the offence upon the person whom it is sought to charge; it is not sufficient that the evidence in the earlier case may induce some kind of suspicion about his guilt(8). An order under this section should not be passed unless there is a reasonable probability of conviction(9). Where a prosecution is bound to end in a failure, a court should not give its sanction to it under this section(10). Before a judge complains against a person under this section he must be convinced in his own mind that the trial will end in a conviction. It is not proper practice to adopt to

(1) *Harekrishna v. Emperor*, 8 Pat. 786—11 Pat. L. J. 75—2 Cr. Law. 532—1929 Pat. 242. As to effect of withdrawal of application under s. 476 as consideration for reference to arbitration, see *Hussain v. Ismail*, A. I. R. 1935 E 10.

(2) *Bhagiratti v. Ram Narain*, A. I. R. 1930 Pat. 191—120 I. O. 45—30 Cr. L. J. 1144.

(3) *Assudo Mal v. Isardos*, A. I. R. 1934 S 78(1).

(4) *Harekrishna v. Emperor*, 8 Pat. 786—11 Pat. L. T. 75—2 Cr. Law. 532—1929 Pat. 242.

(5) *Naubat Khan v. Emperor*, A. I. R. 1935 Feb. 1.

(6) *Peary Lal v. Emperor*, 75 I. O. 148—21 A. L. J. 399—1923 A. 601—24 Cr. L. J. 800.

(7) *Magbul Ahmad v. Crown*, 2 Lah. L. J. 239.

(8) *Adakibai v. Parbatibai*, 115 I. C. 174—30 Cr. L. J. 407.

(9) *Mandar v. Emperor*, 74 I. C. 855—24 Cr. L. J. 823, *Jadunandan Singh v. Emperor*, 37 C. 250—4 I. O. 710—10 C. L. J. 564—14 C. W. N. 830; *Chandan Lal v. Emperor*, 10 A. I. Cr. R. 238.

(10) *Sule Khan v. Emperor*, 1927 Lah. 852—26 Cr. L. J. 293—100 I. C. 373.

namely the Presidency Magistrate, was not a Magistrate of the first class(1). The section as amended makes it clear that a Presidency Magistrate is a Magistrate of the first class for the purposes of this section, *vide* para. 3 of sub-section (3). In this para, as originally framed by the Amendment Act of 1923 the words were "Chief Presidency Magistrate," but the word 'Chief' has been omitted by the Cr. P. Code Amendment Act, II of 1926. The reason of omitting the word 'Chief' is thus stated in the Statement of Objects and Reasons(2): "This amendment proposes to make all Presidency Magistrates, Magistrates of the first class for the purpose of section 476 (1). At present, if a Chief Presidency Magistrate wishes to take action, it is necessary for him to send the case to the first class Magistrate outside the presidency town, because the other Presidency Magistrates are not first class Magistrates for the purpose of this section." Such a difficulty arose in the case of *Mackay v. Emperor*(3). In this case the Chief Presidency Magistrate, Calcutta, being of opinion that a witness in a trial before him had been guilty of perjury made a complaint in writing under s. 476, Cr.P.C., and forwarded the same to himself as the Chief Presidency Magistrate, and immediately afterwards transferred the same to the third Presidency Magistrate for disposal, who committed the accused to the High Court Sessions for trial. It was held that although technically the Chief Presidency Magistrate made a mistake, the procedure adopted by him was substantially correct as he made the complaint and received it, and in the absence of any prejudice caused to the accused, it was nothing worse than an irregularity which could be disregarded. A Presidency Magistrate may make a complaint as required by s. 195 by virtue of this section where the same offence has already been made the subject-matter of a complaint mentioning other persons(4).

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(1) *Kedar Nath v. Emperor*, 3 Cr. L. J. 829—3 O. L. J. 857; *Emperor v. Aditram*, 9 Bom. L. R. 1160—6 Cr. L. J. 826.

(2) Gazette of India, 1925, Part V, p 216.

(3) 88 C. 850—30 O. W. N. 276—27 Cr. L. J. 885—93 I. O. 33—A. I. R. 19:6 Cal. 470—43 O. L. J. 810.

(4) *Syaududdin v. Emperor*, 33 C. W. N. 343—30 Cr. L. J. 1034—119 I. C. 381—A. I. R. 1929 Cal 242—Ind. Rul. (1929) Cal. 790.

(5) *Ram Sarup v. Mehr Dil*, A. I. R. 1980 Lah. 672—1980 Cr. C. 917—

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(6) *Shankar Sahai v. Emperor*, 125 I. C. 838—31 Cr. L. J. 934—A. I. R. 1930 O 404—7 O. W. N. 635; *Jadunandan v. Emperor*, 37 C. 250; *Mandar v. Emperor*, 74 I. C. 855—24 Cr. L. J. 823; against a particular person named: *Amur Nath v. Mamraj*, 2 Lab. 63.

have given a concurrent finding that a will is a forgery, it cannot be said that the court has not acted with due care and caution and without considering whether there is a probability of the prosecution ending in a conviction(1).

False claim.—However desirable it may be that persons who knowingly make false claims in court should be punished, as the law provides in s. 209 of the Indian Penal Code, there is need for discretion in directing prosecution(2). The mere dismissal of a suit in the absence of a clear finding that the suit was false and was brought with intent to injure the defendant, is not a justification for directing the prosecution of the plaintiff under this section(3). A complaint for a prosecution for bringing a false and fraudulent suit should not be granted when the plaintiff has been thwarted in his attempt to establish the correctness of his claim(4). A complaint for prosecution of a decree-holder under this section for failing to give credit in execution for a sum paid to him should not be withheld, merely on the ground that the judgment-debtor making the payment has not been prejudiced or that there is not satisfactory proof of the payment on the file(5). But no prosecution is called for if there is a mistake through misunderstanding and not fraud(6). Where a person after having a claim disallowed in one court obtains an *ex-parte* decree in respect of the same from another court, the institution of the second suit, and the obtaining of decree by fraudulent means, cannot be held to be an offence committed in relation to proceedings in the first court, so as to enable it to take action under this section. The action to be regular should be taken by the second court, or by the court to which both courts are subordinate(7).

Is of opinion.—It is absolutely essential to the validity of an order under this section that the court which passes the order should apply its mind to the matter upon its merits. Where a Sessions Judge in making an order under this section purported to act not of his own accord but at the direction of a Judge of the High Court, it was held that the order of the Sessions Judge was erroneous and the direction of the High Court amounted only to this that the Sessions Judge should look into the matter and order prosecution on his own initiative(8). So, also where a Munsif having been directed by the District Judge sanctioned prosecution of a party under this section, and it appeared that the case did not come before the Judge in the course of a judicial proceeding and that the offence was not committed before him, it was held that the order was without jurisdiction, inasmuch as the order was nominally his, but the "opinion" was the "opinion" of the District Judge(9). But

(1) *Thokala Seshamma v. Yellatri*, 27 Cr. L. J. 280 (1883)=92 I. C. 456=22 L. W. 863=A. I. R. 1926 Mad. 238.

(2) *Baisakhi v. Empress*, 38 P. R. 1688 Cr.

(3) *Chakauri Ram v. Emperor*, 54 I. C. 686=21 Cr. L. J. 158; *Public Prosecutor v. Ramnandan*, 61 I. C. 995=22 Cr. L. J. 467.

(4) *Khairati Ram v. Crown*, 3 Lah. L. J. 537.

(5) *Bur Singh v. Ishar Singh*, 18 Cr. L. J. 619=39 I. C. 987=53 P. L. R.

1917=4 P. W. R. 1917; see also *Chiman Lal v. Mohyuddin*, 59 P. L. R. 1911=59 P. W. R. 1911 Cr.

(6) *Daya Ram v. Emperor*, 23 I. C. 471=11 P. W. R. 194 Cr.=64 P. L. R. 1914=15 Cr. L. J. 263.

(7) *Wishnu Ram v. Emperor*, 90 I. C. 660=26 Cr. L. J. 1588=7 Lah. L. J. 341=A. I. R. (1925) 1 ab. 544=6 Lah. 445.

(8) *Ghanarm Rai v. Emperor*, 21 A. L. J. 930.

(9) *Reozul Hasan v. Emperor*, 6 A. L. J. 924.

prosecute persons under this section in mere matters of oath against oath(1). A court should not make a complaint for a prosecution under s. 211, I. P. C., where there are not sufficient materials before it to show that there is a *prima facie* case against the accused. The mere fact that a complaint was dismissed by a Magistrate summarily under section 203, Cr. P. Code, will not throw the burden on the complainant to prove that his complaint was a reasonable and honest one, and justify a complaint by the court for a prosecution for an offence under this section(2). The fact that the complainant fails to prove her case is by itself not sufficient to make a complaint under s. 211, I. P. C. It must be established satisfactorily in the mind of the Judge or Magistrate that the complaint was made with intent to cause injury or that it was false(3). Mere acquittal of the accused person against whom the charge was made is not sufficient for a prosecution under section 211, I. P. C.(4). But a Judge acting under this section is not debarred from making a complaint if satisfied that there is a *prima facie* case merely because an order was previously passed dismissing for non-prosecution the application of a particular party under this section (5).

Civil cases.—An order by a civil court directing the prosecution of both parties to a suit for forgery, without determining which of them is *prima facie* responsible for the forgery, is illegal(6). The power given by this section should be exercised with care and due consideration. It is not in every instance in which a party fails to prove his case, that the Judge who has decided against him is justified in exercising the powers conferred by this section. Judges should bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the civil suit; and they should be careful not to lend themselves to such suggestions too readily. The Judge should also recollect that when they proceed under this section, the responsibility for the prosecution rests upon the Judge entirely(7). Where a civil court initiates a criminal prosecution of its own motion, it should see that there is ground for inquiry. It is not necessary for the purpose that the court should go minutely into the evidence recorded in the suit. It is sufficient; if that evidence discloses a reasonable foundation for a criminal charge(8). Before a person is asked to stand his trial, it must be fairly clear to the sanctioning authority that there is a probability of a conviction being had(9). Where two courts

(1) *In re Venkataswami*, 105 I. C. 831=26 L. W. 479=9 A. I. Cr. R. 183=39 M. L. T. 414=A. I. R. 1927 M. 996=29 Cr. L. J. 1007.

Ind. Rul. (1930) Pat. 53=31 Cr. L. J. 143=11 Pat. L. T. 75.

(6) *Amar Nath v. Mam Raj*, 2 Lah 63=61 I. C. 57=22 Cr. L. J. 329.

(7) *Queen v. Baijoo Lal*, 1 C. 450 (455-456).

(8) *Secy. of State v. Sangili Vira*, 2 Weir. 587.

(9) *Emperor v. Kari Venkanna*, 31 M. L. J. 410 (454); *Muniswamy v. Rajaratnam*, 44 M. L. J. 774 at p. 778=72 I. C. 340=16 L. W. 465=A. I. R. 1923 M. 136=45 M. 918=21 Cr. L. J. 340.

374 (378)

(5) *Hore Krishna v. Emperor*, 120 I. C. 629=8 Pat. 786=1929 Pat. 242=

sufficient that the court arrives at such an opinion and also that there is a reasonable prospect of the conviction of the accused there being sufficient evidence to support prosecution. Whether the evidence is believed or not or will be sufficient to justify the conviction of the accused is quite another matter(1). Even though a Judge making a complaint omits to record a finding under this section that it was expedient in the interest of justice to complain, if the order making the complaint sets forth the particulars in respect of which he considers the false evidence was given and the nature of the proof that that evidence is in fact false, these particulars though embodied in the same document serve the double purpose of a finding and a complaint should be held sufficient to comply with the requirements of this section(2). In cases where the offence is of considerable gravity; it will be manifestly unreasonable to take the view that the court can have directed a complaint without considering whether it is expedient in the interest of justice so to do, merely because the court has failed to record a finding to the effect that it is so expedient(3). It is not expedient in the interest of justice to start any vague prosecution when there is absolutely not a shred of evidence to make out even a *prima facie* case (4).

Offence referred to in s. 195 (1) cls. (b) and (c).—Sub-section (1) of this section does not authorize a complaint with reference to offences described in section 195, sub-section (1), clause (a) committed in or in relation to a proceeding in a court. The jurisdiction to make a complaint under sub-section (1) is limited to such cases as are provided for in sub-section (1), clause (b) or clause (c) of s. 195 only(5). Therefore, the action of a Munsif in making a complaint of offences under sections 183 and 185 of the Indian Penal Code and purporting to have done so under this section is *ultra vires* and wholly without jurisdiction(6). The offence under s. 409, Penal Code, is not one of the offences referred to in s. 195 or s. 476 and so a civil court has no jurisdiction to take proceedings under s. 476, in respect of such an offence(7). An offence under s. 174 of the Penal Code is not one of the offences for which a court can make a complaint under this section(8). Nor does this section apply to an offence under s. 188, Penal Code(9) or under s. 403(10). Whether the offence be one mentioned in s. 195 (1) (b)

(1) *Naurang Rai v. Emperor*, A. I. R. 1930 Lah 347=127 I. C. 859=32 Cr. L. J. 60=1930 Cr. O. 395.

(2) *Namberumal Chetty v. Nainappa*, 32 L. W. 513=3 Mad. Cr. Cas. 370.

(3) *Nawabali v. Chandra Kanta*, 58 C. 963=A. I. R. 1931 C. 760=32 Cr. L. J. 1236=181 I. C. 914=1931 Cr. C. 1036.

(4) *Kishan Dutta v. Emperor*, A. I. R. 9134 O. 877=11 O. W. N. 1058=1934

(5) *Emperor v. Ram Nath*, 2 Luck. 395=3 O. W. N. 757.

(6) *Ibid.*

O. L. R. 707=151 I. C. 290; *Ali Nagi v. Bagridu*, A. I. R. 1934 A. 1065=4 A. W. R. 342=32 A. L. J. 870=152 I. C. 34=1934 All. L. R. 928

(7) *Indarjit Singh v. Emperor*, 96 I. C. 526=3 O. W. N. 618=27 Cr. L. J. 974=1 Luck 527.

(8) *Money v. Emperor*, 111 I. C. 672=6 Rang 549=29 Cr. L. J. 912=A. I. R. 1918 Rang. 296.

(9) *Din Muhammad v. Emperor*, 111 I. C. 461=29 Cr. L. J. 877=29 P. L. R. 647=1929 I. 378=10 L. 231.

(10) *Arumugam v. Vitya Lakshmi*, 2 Mad. Cr. Cas. 323.

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the proceedings are not vitiated by the mere fact that the District Judge has directed the Munsiff to institute the proceeding(1). Where a Subordinate Judge acting upon the report of a Bailiff, gave sanction for the prosecution of the persons who obstructed him in executing a warrant of attachment, without making an inquiry of his own it was held that although the Subordinate Judge would have done well had he complied with the requirements of this section, it was not necessary to interfere in revision(2).

"Expedient in the interest of justice."—In sanctioning a prosecution under this section the court has not only to consider whether there is a *prima facie* case, but also whether it is expedient in the interests of justice to sanction prosecution(3). A court should expressly find that "it is expedient in the interests of justice" that an inquiry should be made under this section(4). But the absence from the record of an express finding, that it was expedient in the interests of justice that an inquiry should be made, will not necessarily invalidate the complaint. The court need not repeat the exact words of the section. It is sufficient if the record shows clearly that the court has applied its mind to the question of expediency and has come to a conclusion that an inquiry is expedient. A finding that there is a *prima facie* case or that statements are contradictory may not be sufficient. But a finding that the evidence given was false, followed by a complaint might be sufficient to raise the inference that the Judge found that an inquiry was expedient(5). In some cases it has been held that there must be an express finding by the court that it is expedient "in the interest of justice" that an inquiry should be made into the offence(6). But the words "expedient in the interest of justice" are not a formula or incantation which must of necessity appear in every order made under this section. This section merely requires that the courts concerned should be of opinion that the interests of justice render it expedient that an inquiry should be made into any offence referred to in s. 195 (1) (b) or (c). It is

(1) *Awadh Behari Lal v. Emperor*, 20 Cr L J 274=50 I. O. 162

(2) *Emperor v. Sadashiv*, Rat. Un Cr Cas 701; *Nawab Ali v. Chandra Kantai*, 58 C 965=32 Cr L J 1236=131 I C 914=A I R 1931 C 760=Ind. Rul. (1931) C. 914

(3) *Hari Ram v. Emperor*, 1929 Lsh. 676=11 L. L. J 103=30 P. L. R. 392=116 I C 711=30 Cr L J 666

(4) *Keramat Ali v. Emperor*, 55 C 1312=A I R 1928 C 862; *Ramayya v. Emperor*, A I R 1933 M. 67 (1)=36 L. W. 636=(1931) M. W. N. 1081=140 I C 929=93 (r. f. J. 960=1933 Cr. C. 80=56 M. 157=69 M. L. J. 670; *Satish Chandra v. Emperor*, 51 C. L. J. 52; *Suraj Lal v. Sheoshankar*, A I R 1934 O. 272=1934 O. L. R. 473=11 O. W. N. 693=149 I C 201=6 R. O. 521=35 Cr. L. J. 908; *Mandi Lal v. Ram Adhin*, A I R 1935 O. 59.

(5) *Supdt and Remem v. Iqbalulla*,

58 C 1117=1931 C. 190=32 Cr. L. J. 842=131 I. C. 160=35 C. W. N. 400=53 C. L. J. 177=1931 Cr. C. 251; *Nawab Ali v. Chandra Kantai*, 58 C. 965=A I R 1931 C 760=32 Cr L J 1236=131 I C. 914=1931 Cr C 1006; *Naurang Rai v. Emperor*, 127 I C. 859=A I R 1930 L. 317=Ind. Rul. (1930) L. 891=33 Cr L. J. 60=1930 (r. C. 395; *Jani v. Emperor*, 1934 Cr. C. 1146=152 I C 539=46 Cr L J 27=A I R 1934 S. 154; *Suraj Lal v. Sheoshankar*, A I R 1934 O. 272=1934 O. L. R. 473=11 O. W. R. 683=149 I C 201

(6) *Surendar Nath v. Kumeda Charan*, 126 I C 416=51 C. L. J. 208=A I R 1930 C. 352; *Keramat Ali v. Emperor*, 55 C. 1312; *In re Chilkari Ramayya*, 56 M. 157; *Nabani Nath v. Emperor*, A I. R. 1933 C. 147=1933 Cr C 224=144 I C 159=34 Cr L. J. 684.

Officer and not in the course of a judicial proceeding (1). The most important element in this section is that the offences referred to in section 195 should either be committed in the course of a judicial proceeding, when that court may proceed as provided by this section (2). Where a witness for the prosecution sent a telegram to the District Superintendent of Police that the accused with certain others not charged stabbed the deceased and the telegram was exhibited in the murder trial the fact that it was exhibited and filed does not make the contents of it a matter 'in relation to the proceeding' so as to give the court jurisdiction to take action under this section against the witness of an offence under section 211, I. P. C., against those not charged (3). Where a complainant institutes a complaint under sections 392 and 384 of the Indian Penal Code against a number of persons including one A, and the court orders the police to make local investigation and on receipt of police report, transfers the case to a court of Bench Magistrates for trial of two persons only under section 384 of the Indian Penal Code and A is not the person to be tried in that proceeding, on the subsequent dismissal of the complaint by the Bench Magistrates against the two accused persons, the Bench Magistrates cannot entertain an application by A under this section asking for the prosecution of the complainant under section 211 of the Indian Penal Code for having falsely charged A of offences under sections 392 and 384 of the Indian Penal Code. It cannot be possibly said that so far as A is concerned any such offence as is referred to in this section was committed by the complainant in relation to any proceedings in the Court of Bench Magistrates (4). Where information of an offence laid before the police is followed by a complaint to the court based on the investigation made by the police, the court may proceed against the complainant on the complaint of the court which made the said investigation (5). The words "in relation to" in this section are sufficiently wide to cover a case where the offence complained of is actually committed for trial and the Sessions Court is, therefore, competent to make a complaint in respect of such offence under this section (6). A complaint under this section for the prosecution of a person for an

(1) *Maunga Ba Hla v. Emperor*, 18 Cr. L. J. 331=38 I. O. 443; *Tayab-ullah v. Emperor*, 43 C. 1152=20 C. W. N. 1765=24 C. L. J. 134=26 I. C. 845=18 Cr. L. J. 13; *Nand Kishore v. Emperor*, 5 Pat. L. T. 800

(2) Per Sharfuddin, J., in *Raj Kumar v. Emperor*, 18 Cr. L. J. 135=37 I. O. 487=1 Pat. L. J. 298=3 Pat. L. W. 33.

(3) *Registrar High Court v. Kodari*, (1930) M. W. N. 1130.

(4) *Ramji Lal v. Emperor*, 7 Luck. 232=A. I. R. 1931 O. 417=1931 Cr. C. 1038=8 O. W. N. 1086=33 Cr. L. J. 160=145 I. C. 377.

(5) *Brown v. Ananda Lal*, 44 C. 650=25 C. L. J. 59=20 C. W. N. 1347=36 I. C. 857=18 Cr. L. J. 25

(6) *Nazir Ahmad v. Emperor*, 100 I. C. 708=1927 C. 478=28 Cr. L. J. 324; *Daroga Gope v. Emperor*, 5 Pat. 33=88 I. O. 1045=6 Pat. L. T. 515=1925 Pat. 747.

or (c) it must appear to have been committed in or in relation to a proceeding before the court that makes the complaint(1). Under the old law, the offences which fell under this section were those which were committed before the court or were brought to its notice in the course of a judicial proceeding. The wording of the present section is now changed. Where an affidavit was filed before a Munsarim of court the statements in which the Judge held to be false or exaggerated, it was held that the matters contained in the so-called affidavit had not taken place before the Judge and he could not direct the prosecution of the deponent for perjury(2). Under the unamended section it was further held that the words "brought under its notice" were wide enough to cover an offence which may have been committed in another forum and on some previous occasion, but it must be an offence brought under the notice of the court holding the inquiry(3). Under the section as amended the offence need not have been committed before the court and it may have been committed before the proceedings began. But it is indispensable that it must in some manner have affected those proceedings or been designed to affect them or come to light in the course of them(4). This section is confined to the exact offences, referred to in s. 195 so that the offences in s. 195 (1) (c) must be offences alleged to have been committed by a party." The court has, therefore, no jurisdiction to sanction prosecution for offences referred to in s. 195 (1) (c) of a person who is not a party to any suit or proceeding before it(5). Any body, however, can complain against an abettor of the offences mentioned in s. 195 (1) (c) and there is no question of the court itself complaining *qua* court under s. 476 but then s. 200 (a) will not apply(6). In respect of offences enumerated in s. 195 (1) (b), the powers of the court to complain are not confined only to the parties before it(7).

In relation to.—An essential ingredient for the exercise of powers under this section by any court is that the offence should have been committed in or in relation to proceedings in that court(8). A District Magistrate has no jurisdiction to take action under this section in respect of an offence which is brought to his notice by a Police

(1) *Subbarayudu v Gapayya*, A. I. R. 1932 M. 290=55 M. 531=139 L. J. 482=17 A. I. Cr. R. 421=33 Cr. L. J. 788=62 M. L. J. 310=35 L. W. 319=(1932) M. W. N. 241

(2) *Mathra Prasad v Emperor*, 15 A. L. J. 517.

(3) *Girnar Prasad v Emperor*, 6 A. L. J. 392. *Emperor v Khushali*, 40 A. 116. *Raj Kumar v Emperor*, 1 Pat. L. J. 298

(4) *Sahbarayudu v Gapayya*, A. I. R. 1932 M. 290=62 M. L. J. 310=35 L. W. 319=(1932) M. W. N. 241.

(5) *Sengoda Goundan v Vayapuri Goundan*, 136 I. C. 48=33 Cr. L. J. 218=A. I. R. 1932 M. 129=61 M. L. J. 684. *Rurusicamy v Elrahim*, 84 I.

C 439=2 Rang. 374=1925 Rang. 28=26 (r. L. J. 295. *Emperor v Rahimiddino*, 9 A. I. Cr. R. 154. *Al Inye Bhan Vajankathesh*, 49 B. C08=91 I. C. 245=47 Bom. L. R. 607=A. I. R. 1925 B. 438=27 (r. L. J. 69

(6) *Sengoda Goundan v Vayapuri Goundan*, A. I. R. 1932 M. 129. *Emperor v Rahimiddino*, 9 A. I. Cr. R. 154

(7) *Emperor v Syed Khan*, 3 Rang. 303

(8) *Ramji Lal v Emperor*, 7 Luck. 222=8 O. W. N. 1056=A. I. R. 1931 O. 417=1931 (r. C. 1038=33 Cr. L. J. 100=185 I. C. 377. *Emperor v Baldeo Prasad*, 1924 A. 770=12 A. L. J. 772=L. R. 5 A. 121 Cr.=62 I. C. 255=25 Cr. L. J. 1277=46 A. 651

the charges preferred against the school master were untrue and also that *K* was responsible for the letters, ordered the prosecution of *K* under section 182, Indian Penal Code, after giving him time to show cause against the order, held that as proceedings which came before the Deputy Commissioner as Chairman of the District Board were not judicial proceedings, he could not be deemed to be acting under this section, and the order was bad and must be set aside(1). Where a District Magistrate called for the records of a case before a Sub-Magistrate in his executive capacity for the purpose of enabling him to ascertain whether an application for an inquiry into the conduct of a Police Officer should be granted or not, and sanctioned the prosecution of the Police Officer under s. 193, Penal Code, it was held that there was no judicial proceeding for the purposes of s. 476(2). Where a District Magistrate directed the prosecution under s. 211 of the Indian Penal Code, of a complainant, whose case had been heard and determined by a Magistrate of the first class, it was held that the order of the District Magistrate must be taken to have been made by him as head of the police in respect of an offence committed before a Police Officer, and, as such, was a good order. It could not be regarded as made under s. 476, that section only contemplating cases where an offence is committed before the court passing the order, or is brought before its notice in a judicial proceeding(3). In another case where a District Magistrate directed the prosecution under s. 211 of the Indian Penal Code, of a complainant whose case had been heard, and determined by a second class Magistrate, it was held that the order was illegal as the matter was not brought under the notice of the District Magistrate "in the course of a judicial proceeding"(4). In another case of the same court it was held that it was not competent to a Magistrate to treat as a complaint, and found thereon such procedure as would naturally follow on a complaint, including a prosecution under section 211 of the Indian Penal Code, a statement, which was made to him extra-judicially and without any intention or desire that it should be taken as a complaint, but merely in reply to a question asked by the Magistrate(5). An application for transfer of case was made to the District Magistrate on behalf of the accused through one *J*. Meanwhile *J* went to the District Magistrate's house and told him that he had given Rs. 1,500 to the Magistrate's father and had subsequently received the money back. The District Magistrate called *J* in court and recorded his statement ordered his prosecution under s. 476. It was held that the statement made by *J* was entirely unconnected with the application for transfer and the offence for which *J*'s prosecution had been ordered was not one committed before the District Magistrate or brought under his notice in the course of a judicial proceeding, and he was consequently not competent to pass an order under this section in respect of that statement(6).

(1) *Emperor v. Kunwar Bahadur*, 29 O. C. 136.

(2) *Sangillia Pillai v. District Magistrate*, 25 M. 659—2 Weir. 599.

(3) *Empress v. Ram Khilawan*, (1890) A. W. N. 167.

(4) *Kandu v. Balar*, (1884) A. W. N. 290.

(5) *Emperor v. Bhole Singh*, 38 A. 32.

(6) *Jiwan Singh v. Crown*, 3 Lab. L. J. 535.

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offence under section 193 of the Penal Code should not be made where there is nothing to suggest that the accused committed the offence complained of in or in relation to a proceeding in any court(1). The accused renders himself liable to prosecution for perjury if he makes a false statement in his affidavit which he files in court in support of his application for transfer of his case(2). The contrary view taken in the undernoted case(3) is no longer tenable. The words "in relation to any proceedings" in clause (b) are very general and wide enough to cover a complaint made to a court on which no proceedings may have been commenced by the Magistrate(4). Therefore, sanction (complaint) is necessary for the prosecution of a person for abetment of perjury, though, the main case in which the false evidence was intended to be given was not then commenced but was in contemplation(5). A complaint charging a person with offences under sections 193 and 471 Indian Penal Code, alleged to have been committed in proceedings before an arbitrator, under the order of reference made by a court cannot be entertained without the sanction of the court according to section 195(6).

Proceedings in court.—An offence committed in connection with an application for copies of the judgment and decree in a case, being an offence committed in connection with proceedings in a court, a complaint under ss. 195 and 476 from the court is necessary for the prosecution of the offender and the only court competent to file such a complaint is the court to which the application is made or a court to which it is subordinate(7). A proceeding within the meaning of this section need not necessarily be one between two parties actually litigating.

is not a proceeding in court(9). Where a person made a complaint to a District Registrar against the conduct of a Sub-Registrar, alleging that the latter had delayed to register a document presented by him, and the District Registrar, after holding a departmental inquiry, was satisfied as to the falsity of the complaint and sanctioned his prosecution for an offence under s. 182 I. P. C., it was held that the inquiry held by the District Registrar being a departmental inquiry, s. 476 did not apply(10). Where a Deputy Commissioner, after making departmental inquiries as Chairman District Board regarding certain anonymous letters received about a school master, and after calling for a report which showed that

(1) *Baheruddy v. Emperor*, 61 I. C. 919=28 C. W. N. 830=25 Cr. L. J. 1095.

(2) *Crown v. Qader Bahsh*, 26 P. L. R. 158.

(3) *Mathura Prasad v. Emperor*, 15 A. L. J. 517=41 I. C. 895=18 Cr. L. J. 883.

(4) *Chuhermal v. Emperor*, 117 I. C. 147=A. I. R. 1929 S. 131=23 S. L. R. 385=30 Cr. L. J. 732.

(5) *In re Vasudeo*, 24 Bom. L. R. 1153.

(6) *Mula Mal v. Cheranj Lal*, 3 P. Cr. P. C.—105.

R 1914 Cr.=23 I. C. 726=136 P. L. R. 1914=15 Cr. L. J. 353.

(7) *Emperor v. Raja Kushal*, 53 A. 804=A. I. R. 1931 A. 443=131 I. C. 225=32 Cr. L. J. 1105=1931 Cr. C. 715.

(8) *Tularam v. Emperor*, 100 I. C. 10.

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(10) *Munjal Lal v. Emperor*, 10 C. W. N. 222=2 C. L. J. 619=3 Cr. L. J. 112.

Where a person escaped from the lawful custody of a servant of a civil court the offence (escape from custody) was not committed in relation to any proceeding in court; consequently this section does not apply, and the proper procedure is that the servant of the court should file a complaint in the ordinary way(1). There are many such instances to which it may be convenient shortly to refer in the note below(2).

Proceedings held to be judicial proceedings.—Proceedings in execution of decree are "judicial proceedings", and therefore a court has jurisdiction to pass an order under this section, with reference to matters which have come to its knowledge in execution proceedings(3). The Collector acting under Chapter IV of the Income Tax Act is a revenue court, and his proceedings are judicial proceedings within the meaning of this section(4). Proceedings under unamended s. 195 of the Cr. P. Code were held to be judicial proceedings for the purposes of s. 476 as it stood prior to its amendment(5). A Magistrate making an inquiry before issue of an order under s. 144, Cr. P. Code, is acting in a stage of judicial proceeding and has, therefore, jurisdiction to take action under section 476, if he is of opinion that false evidence has been given before him(6). Mutation proceedings are judicial proceedings within the meaning of the Code(7). An inquiry conducted by a Magistrate into the truth of allegations against a subordinate official contained in a petition presented to a Deputy Commissioner is a judicial proceeding within the meaning of section 4 (m) of the Code(8). Where a case was sent up by one Magistrate to another for inquiry prior to the issue of process against the accused, and the latter Magistrate made the inquiry, in the course of which he examined witnesses and recorded evidence, and came to the conclusion that the case was false and therefore took proceedings under section 476 and committed the complainant

(1) *Emperor v. Madho Singh*, 47 A. 403=26 Cr. L. J. 865=23 A. L. J. 189=1925 A. 318=86 I. C. 801

(2) *Kachi Mador v. Emperor*, 21 M. L. J. 795. A preliminary inquiry under S. 202, Cr. P. C. See *Empress v. Peshwa*, 1925 A. 318=86 I. C. 801

(3) *Emperor v. Peshwa*, 1925 A. 318=86 I. C. 801
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(examination of witnesses after disposal of transfer application), *Chote Lal v. Emperor*, A. I. R. 1923 Pat. 542 (A private person's property, and stated on

Patwari on basis of departmental inquiry); *Dayanath v. Emperor*, 37 C. 72; *Nabu v. Emperor*, 84 O. 1 F. B. (order directing prosecution for using forged rent receipts in a proceeding before a Subordinate Magistrate, for keeping the

peace, and for abetment thereof); *Adhar Singh v. Abhakh Singh*, (1895) A. W. N. 145 (Depositing a mortgage deed in Court in pursuance of the procedure provided by s. 83 of the Transfer of Property Act); *Subranarayanaiah v. Emperor*, 28 M. 100 (Departmental inquiry for bribery); *Lachman Prasad v. Emperor*, 5 Luck 435=A. I. R. 1930 O. 58=G. O. W. N. 953,

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(4) *Emperor v. Rup Singh*, 3 Cr. L. J. 128=44 P. R. 1905=6 P. L. R. 615.

(5) *Bikaram Prasad v. Emperor*, 77 I. C. 435=1922 A. 291=25 Cr. L. J. 357.

(6) *Emperor v. Peshwa*, 1925 A. 318=86 I. C. 801

(7) *Emperor v. Peshwa*, 1925 A. 318=86 I. C. 801

making a complaint under this section, to hold a preliminary inquiry. Nor can it be laid down as a general proposition that it is even prudent to do so in every case, whether the complaint be made by the judicial officer who tried the original case or his successor although in a particular case the revising authority may hold that action was too hastily taken and that there should be some further investigation. Each case must depend on its own facts(1). This section does not make it imperative on a court to hold a preliminary inquiry before taking action under this section. To justify the court in initiating a prosecution it is necessary only to hold that it is expedient in the interests of justice that an inquiry should be made into an offence referred to in section 195(2). But the court is not bound to make a preliminary inquiry before making a complaint under this section, nor is it bound to record a finding that it is expedient in the interest of justice that an inquiry should be made(3). It is for the court acting in the matter to determine in the exercise of its discretion whether or not to make a preliminary inquiry(4). An order made under this section sending a case for inquiry to a Magistrate is not necessarily bad because the court did not make a preliminary inquiry before making such orders. The law requires only such preliminary inquiry as may be necessary(5). Where a Munsiff, being of opinion that both the parties to a suit tried by him had given false evidence therein on certain points, sent the case for inquiry to the Magistrate under this section with a proceeding embodying the facts of the case, and charging the parties respectively with giving false evidence on such points, and there was nothing to show that any inquiry that the Magistrate could have made was necessary or would have put the Magistrate into a better position for dealing with the case than he was in, it was held that the Munsiff's proceedings were not bad because he did not hold a preliminary inquiry(6). The language of this section is by no means imperative in regard to preliminary inquiries, when the record of the judicial proceeding, in the course of which an offence has been committed or brought to notice itself contains sufficient materials for thinking that a *prima facie* case is made against the accused; no preliminary inquiry is necessary(7). If, in the course of a proceeding, either civil or criminal, a Judge or a Magistrate finds clear ground for believing that either the parties to it or their witnesses have committed perjury, or any other offence against public justice, he is justified in directing criminal proceedings against such persons under this section without any further inquiry than that which he has already held in his court(8). In a prosecution for making a false

(1) *Purna Chandra v. Dhalu*, 34 C. W. N. 914.

(2) *Crown v. Qader Bukh*, 6 Lsh 84=26 P. L. R. 158=27 Cr. L. J. 98; *Baperam v. Gouri Nath*, 20 C. 474; *Begu Singh v. Emperor*, 34 C 551=5 C. L. J. 508=11 C W N 568=5 Cr. L. J. 398=2 M. L. T. 298; *Empress v. Matabadal*, 15 A. 392=(1693) A. W. N. 146; *Abdul Ghafur v. Rosa Husain*, 34 A 267.

(3) *K. C. V. Reddy v. Emperor*, 8 Rang 25=125 I. C. 266=31 Cr. L. J.

793=1930 B. 201.

(4) *Izharul Haq v. Empress*, 20 C. 349; *Baperam v. Gouri Nath*, 20 C 474.

(5) *Empress v. Juala Prasad*, 5 A 62; *Empress v. Matabadal*, 15 A. 392=(1693) A. W. N. 146.

(6) *Empress v. Juala Prasad*, 5 A. 62.

(7) *Subba Rao v. Govt. of Mysore* 9 Cr L J. 319.

(8) *In re Mutty Lal*, 6 C. 308

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under this section, is the time of delivering the judgment. In the case ordering prosecution of a defence witness under this section, for an offence under s. 193, Penal Code, at the time his evidence is recorded is bound to strike terror in the heart of defence witnesses(1). But it cannot be said to be an invariable rule that no proceedings should be taken until the conclusion of the case. The court is not bound to wait until the substantive proceedings are over, before it can initiate an action under this section, and its failure to do so does not constitute any material irregularity in the exercise of its jurisdiction(2). But it is premature to direct the prosecution of an accused suspected of fabricating false evidence in a case against him under s. 4, U. P. Adulteration Act, before a finding is arrived at that he did fabricate false evidence(3). The words "committed before it" in the unamended section were qualified by the words "in the course of a judicial proceeding." Where, therefore, an application for the return of a document was made after the suit in which the document was filed had been finally disposed of and there was nothing pending before the court, the latter had no jurisdiction to take action under section 476, if the signatures on the application turned out to be forged(4). Even where the facts of a judicial proceeding were fresh in the mind of a Judge, he could not take action under section 476, if the commission of an offence during the course of that proceeding was discovered by him only after the close of the proceeding(5). The power conferred upon a court under present s. 476 to make a complaint to a Magistrate when any of the offences referred to in s. 195, cls. (b) and (c), appears to have been committed in or in relation to a proceeding before it, is exercisable even after the termination of the proceeding in which the offence complained of is said to have been committed(6). Where, in the appeal which was preferred by the accused in the case in which the petitioner is alleged to have given false evidence and to have produced a fabricated document, the Sessions Judge has differed from the opinion of the Magistrate and the case has not yet been finally decided, proceedings under s. 476 should not be taken against the petitioner(7).

Preliminary inquiry.—Though under this section a preliminary inquiry is not legally necessary before making a complaint under the section, such an enquiry should in common prudence be held by every court before it makes a complaint(8). It is not obligatory on the court

4 Bom. L. R. 729; *Ramoo v. Emperor*, 21 Cr. L. J. 29; *Kalu v. Tikaram*, 26 Cr. L. J. 1959

(1) *Gopal Singh v. Emperor*, 105 I. O. 456—9 A. I. Cr. R. 426—1928 L. 180.

(2) *Emperor v. Venkanna*, 37 M. L. J. 440 F. B.; *In re Perumalla*, 44 M. L. J. 74.

(3) *Bhagirath Lal v. Emperor*, A. I. R. 1934 A. 1017—32 A. L. J. 1066—4 A. W. R. 535—1934 Cr. C. 1314

(4) *Giriya Nanda v. Emperor*, 71 I. O. 666—26 C. W. N. 660—24 Cr. L. J. 202.

(5) *In re Padmanabha*, 42 M. 422 F. B.

(6) *Thokala Sheshamma v. Gelatursi*, 92 I. C. 456—22 L. W. 663—27 Cr. L. J. 280—1926 M. 238.

(7) *Gandan Singh v. Emperor*, 3 C. L. J. 302—3 Cr. L. J. 303, *In re Shri Nana Maharaj*, 16 B. 729, *In re Mully Lal*, 6. C. 308, *Attar Singh v. Croton*, 29 P. R. 19'6 Cr. L. J. 73—26 Cr. L. J. 1166

(8) *Sarat Chandra v. Hari Charan*, 127 I. C. 265—A. I. R. 1930 C. 281—51 O. L. J. 45, see *Sajjad Husain v. Emperor*, A. I. R. 1935 O. 113 (It is not essential that the preliminary inquiry, if any should be made in the presence of the accused or after giving notice to him).

while he is in the position of an accused person, and is admissible in evidence against him under s. 30 of the Evidence Act(1).

Procedure in preliminary inquiry.—A person who is called upon to show cause under this section has a right to place his case before the court either by offering evidence on his own behalf or by cross-examining the witnesses on behalf of the opposite party(2). Where a court conducting an inquiry under this section refuses to allow the accused to cross-examine the witnesses examined on behalf of the opposite party, its order is liable to be set aside in revision(3). An order under this section directing the prosecution of a person upon evidence recorded in his absence, and without affording him an opportunity to cross-examine the witnesses cannot be justified(4). But in some cases it has been held that the accused has no right to cross-examine any witness in the preliminary inquiry(5). It is not even necessary that the preliminary inquiry should be conducted in the presence of the accused. All that the court making the inquiry has to do is to satisfy itself that there are *prima facie* grounds for sending the case for investigation to a Magistrate(6).

Power to take evidence on oath.—A court holding a preliminary inquiry under this section may legally take evidence on oath therein(7). There is no provision in the Code with regard to the manner in which the evidence in such inquiry should be recorded; but for future reference a summary of the statement of the witnesses examined should be made(8). It is not necessary to go minutely into the evidence or to see whether there is sufficient evidence to support a conviction. It is sufficient if the evidence discloses a reasonable foundation for a criminal charge(9).

Examination of person against whom inquiry is made.—The examination of a person against whom an inquiry under this section is made as a witness in the course of such proceedings is *ultra vires*(10). He can only be examined under section 342 of the Code to explain any circumstances appearing against him, not to elicit a statement as a foundation for ordering his prosecution(11).

Who can hold the inquiry.—An inquiry under this section is to be held by the court itself(12). If it so desires, an inquiry may be ordered

(1) *Anaji Venkatesh v. Emperor*, 67 I. O. 593=26 Bom. L. R. 614=A. I. R. 1924 B. 445=26 Cr. L. J. 993

(2) *Ganeswar v. Emperor*, 6 Pat. L. J. 146=2 Pat. L. T. 552=A. I. R. 1921 Pat. 176=61 I. O. 842=22 Cr. L. J. 458.

(3) *Ibid*

(4) *Lal Lokpal v. Emperor*, 19 A. L. J. 56=59 I. O. 655=22 Cr. L. J. 148

(5) *Emperor v. Baker*, 18 Bom. L. R. 284; *Abdul Ghofur v. Haza Husain*, 34 A. 257.

(6) 9 W. R. Cr. 3.

(7) *Abdullah Khan v. Emperor*, 37 O. 52; *Raghoobans Sahay v. Kchil Singh*, 17 O. 872, 675.

(8) *Emperor v. Jogendra Nath*, 42 C. 240 (243).

(9) 2 Weir 587.

(10) *Maung Po Nyun v. Mutu Kurpen*, 10 Bur. L. J. 32; *In re Sami Sastri*, 2 Weir 598.

(11) *Maung Po Nyun v. Mutu Kurpen*, 10 Bur. L. J. 32; But see 8 Bom. L. R. 589 which lays down that oath can be administered to the suspected person in the preliminary inquiry

(12) *Prabhatranjan v. Umashankar*, 58 C. 727; *Shabber Hasan v. Emperor*, 102 I. O. 810=L. R. 8 A. 147 Cr.=8 A. I. Cr. R. 381=26 A. L. J. 46=A. I. R. (1928) A. 21=105 I. O. 110; *Emperor v. Waman Dinkar*, 43 B. 300; *Pukla Singh v. Emperor*, 6 Pat. L. J. 178=20 Cr. L. J. 245.

charge under s. 211, I. P. C., it is not always necessary that there should be a preliminary inquiry under this section(1). When an order for prosecution of witnesses under s. 193, I.P. C., is made upon the very date or the day after the witnesses' cross examination is over and upon a clear statement by the witnesses after an opportunity has been given to them to explain the inconsistencies in their two statements, the Magistrate is not bound to issue notice or institute fresh inquiry(2),

Where necessary.—Where in a civil suit settled without any evidence being gone into, by confession of judgment the court had grounds for supposing that an offence referred to in s. 195 of the Criminal Procedure Code, namely an offence of false personation under s. 205 of the Penal Code, had been committed before it, held that the court before directing a prosecution would be competent to make a preliminary inquiry and travel outside the record, and thus satisfy itself whether a *prima facie* case had been made out for directing a prosecution(3). Where a summons was issued to a witness to give evidence in a criminal case who did not attend, whereupon the Magistrate issued notice to him under this section to show cause why he should not be prosecuted under s. 174 of the Indian Penal Code and who then appeared and put in an application asking for a regular inquiry which was rejected, it was held that a preliminary inquiry was necessary(4). Where a Magistrate dismissed a complaint without calling evidence, he should make an inquiry before charging the complainant with the offence of making a false charge(5).

Nature and extent of inquiry.—In a proceeding under this section the nature, method and extent of the preliminary inquiry being at the discretion of the court holding it, the inquiry need not be such as to satisfy the court that an offence has actually been committed, the court only having to decide (a) whether an offence of the kind contemplated by the section appears to have been committed and (b) whether in the interests of justice it should be further inquired into(6). The grant of a right of appeal against an order making a complaint under this section has not conferred any new right upon the person against whom a complaint is made and the extent of the preliminary inquiry to be made under this section is still left to the discretion of the court(7). An inquiry under this section is a judicial proceeding, and a person giving false evidence in the course of the proceeding is guilty of perjury under s. 193 of the Indian Penal Code(8). A confession made by an accused in the course of an inquiry under s. 476 is made by him

(1) *Surjya Hariant*: v *Emperor*, 6
C. W. N. 295

(2) *Ram Dhar v. Emperor*, 4 Pat L. W. 44—19 Cr L. J 169—43 I. C 585.

(3) *Shashi Kumar v. Shashi Kumar*, 19 C. 345

(4) *Lal Lokpal v Emperor*, 19 A L J. 56=22 Cr. L. J. 143=57 I C. 655.

(5) *Queen v Gore*, 16 W. R. 44

(6) *Raja Rao v. Emperor*, 50 M 660=A. I. R 1926 M 1108-57 M L J 931-24 L. W. 295-57 Cr L. J 1149-97 I. C. 669; *Abdul Ghafur v. Raja Husain*, 34 A. 257. A preliminary in-

quiry is discretionary under this section. In a case where a *prima facie* case has been made out a preliminary inquiry is not necessary. *Jamun Singh v. Laldhars*, A. I. R. 1934 Pat. 536.

(7) *Chumara Singh v. Public Prosecutor*, 4 Pat 484=4, 1, R 1925 Pat. 677=27 (r L J. 371=7 Pat. L. T. 372=92 I C 883

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while he is in the position of an accused person, and is admissible in evidence against him under s. 30 of the Evidence Act(1).

Procedure in preliminary inquiry.—A person who is called upon to show cause under this section has a right to place his case before the court either by offering evidence on his own behalf or by cross-examining the witnesses on behalf of the opposite party(2). Where a court conducting an inquiry under this section refuses to allow the accused to cross-examine the witnesses examined on behalf of the opposite party, its order is liable to be set aside in revision(3). An order under this section directing the prosecution of a person upon evidence recorded in his absence, and without affording him an opportunity to cross-examine the witnesses cannot be justified(4). But in some cases it has been held that the accused has no right to cross-examine any witness in the preliminary inquiry(5). It is not even necessary that the preliminary inquiry should be conducted in the presence of the accused. All that the court making the inquiry has to do is to satisfy itself that there are *prima facie* grounds for sending the case for investigation to a Magistrate(6).

Power to take evidence on oath.—A court holding a preliminary inquiry under this section may legally take evidence on oath therein(7). There is no provision in the Code with regard to the manner in which the evidence in such inquiry should be recorded; but for future reference a summary of the statement of the witnesses examined should be made(8). It is not necessary to go minutely into the evidence or to see whether there is sufficient evidence to support a conviction. It is sufficient if the evidence discloses a reasonable foundation for a criminal charge(9).

Examination of person against whom inquiry is made.—The examination of a person against whom an inquiry under this section is made as a witness in the course of such proceedings is *ultra vires*(10). He can only be examined under section 342 of the Code to explain any circumstances appearing against him, not to elicit a statement as a foundation for ordering his prosecution(11).

Who can hold the inquiry.—An inquiry under this section is to be held by the court itself(12). If it so desires, an inquiry may be ordered

(1) *Anaji Venkatesh v. Emperor*, 87 I. C. 593=26 Bcm. L. R. 614=A. I. R. 1924 B 445=26 Cr. L. J. 993.

(2) *Ganeswar v. Emperor*, 6 Pat. L. J. 146=2 Pat. L. T. 52=A. I. R. 1921 Lat 176=61 I. C. 842=22 Cr. L. J. 458.

(3) *Ibid*.

(4) *Lal Lokpal v. Emperor*, 19 A. L. J. 56=59 I. C. 655=22 Cr. L. J. 143.

(5) *Emperor v. Baker*, 18 Bcm. L. R. 284, *Abdul Ghofur v. Raza Husain*, 34 A. 257.

(6) 9 W. R. Cr. 8.

(7) *Abdullah Khan v. Emperor*, 37 C. 62; *Raghoobans Sahay v. Kichil Singh*, 17 C. 812, 675.

(8) *Emperor v. Jogendra Nath*, 42 C. 240 (245).

(9) 2 Weir 587.

(10) *Maung Po Nyun v. Mutu Kurpen*, 10 Bur. L. J. 32; *In re Sami Sastri*, 2 Weir 598.

(11) *Maung Po Nyun v. Mutu Kurpen*, 10 Bur. L. J. 32; But see 8 Bcm. L. R. 589 which lays down that oath can be administered to the suspected person in the preliminary inquiry.

(12) *Prabhatranjan v. Umashankar*, 58 C. 727; *Shabber Hasan v. Emperor*, 102 I. C. 810=L. R. 8 A. 147 Cr.=8 A. J. Cr. R. 381=26 A. L. J. 46=A. I. R. (1928) A. 21=105 I. C. 110; *Emperor v. Waman Dinkar*, 43 B. 300; *Hukta Singh v. Emperor*, 6 Pat. L. J. 176=20 Cr. L. J. 245.

by the police, but in such a case when the police papers arrive, the court has to determine whether it is necessary to take action against particular persons under this section and should record a finding to that effect against each individual person against whom complaint is made(1). It is for the court acting under this section to make any inquiry that is necessary and then to make a complaint against the person or persons who he is satisfied have committed an offence. The court must be satisfied that there is a *prima facie* case against each person sent to the Magistrate and then can lay a complaint under this section. It is not sufficient that the Magistrate to whom the complaint is made under this section is entitled to hold an inquiry under section 202 of the Code(2).

Notice to accused—Under this section issue of notice to the party to be prosecuted is discretionary with the court(3). It is not invariably necessary that the person to be proceeded against should receive notice to show cause against the proposed action against him(4). The want of notice is at best a mere irregularity in procedure(5). But a notice is necessary where the person proceeded against had no opportunity to cross-examine the witnesses on whose evidence his prosecution has been ordered, and it is a materially irregular exercise of a court's jurisdiction to direct such a serious step as a criminal prosecution without giving the person concerned any chance to know and meet the case against him(6). But in a recent case in the Calcutta High Court it has been held that the practice of giving an opportunity to be heard, to the person against whom an inquiry is directed, is generally to be deprecated, and it is not necessary to give notice to such person in an application

be given(8). Where in such proceedings the court held a preliminary inquiry and recorded additional evidence and took into consideration the result of an other independent private inquiry by the Circle Inspector and all this was done at the back of the accused, it was held that the proceedings must be set aside and the order directing prosecution of the accused quashed(9). If a preliminary inquiry is started, it must be a real inquiry and not merely a formal one, and the accused must be given ample opportunity to show cause why he should not be

(1) *Shabbir Hasan v Emperor*, 102 I. O. 810 = L. R. 8 A. 147 Cr. = 8 A. 1, Cr. R. 881 = 26 A. L. J. 46 = A. I. R. (1928) A. 21 = 105 I. C. 810, *Emperor v. Waman Dinkar*, 43 B. 300, *Rukta Singh v. Emperor*, 6 Pat. L. J. 178 = 20 Cr. L. J. 245.

(2) *Chamari Singh v. Public Prosecutor*, 4 Pat. 24 = 6 Pat. L. T. 225 = 26 Cr. L. J. 170 = 83 I. C. 730.

(3) *Jagat Singh v. Emperor*, 120 I. C. 687 = 31 Cr. L. J. 179 = 1930 Lab. 65, *Sajjad Husain v. Emperor*, A. I. R. 1935 O. 113.

(4) *Gura v. District Judge Akhbar*, 73 I. C. 976 = 1923 L. B. 79 = 24 Cr. L. J. 786 = 2 Bur. L. J. 113, *Nga San v. Sookaram*, (1915) U. B. R. 3rd Qr. 83, U. P.

Kyri, 3 Bur. L. T. 101 = 12 Cr. L. J. 85.

(5) See the cases cited in the last note.

(6) *In re Permulla*, 69 I. C. 440 = 16 L. W. 925 = 23 Cr. L. J. 712 = (1922) M. W. N. 811 = 44 M. L. J. 74 = 1923 M. 229.

(7) *Ganta v. Harcourt*, 58 C. 215.

(8) *Imani Ali v. Emperor*, L. R. 6 A. 5 Cr. = 1924 A. 495 = 77 I. C. 858 = 25 Cr. L. J. 488; *Bai Kasturba v. Vanmalidas*, 49 B. 710 = 27 Bom. L. J. 616 = 68 I. C. 709 = 26 Cr. L. J. 1189 = A. I. R. 1925 B. 436, *Rakhai Mohan v. Emperor*, 22 Cr. L. J. 233 = 60 I. C. 425; *Vankatavulbiah v. Emperor*, (1922) M. W. N. 812.

(9) *Imani Ali v. Emperor*, L. R. 5 A. 5 Cr. = 25 Cr. L. J. 488 = 1024 A. 437 = 77 I. C. 858.

prosecuted(1). A Magistrate does not exercise a proper discretion who, on receipt of a police report that the complaint is false, forthwith orders the complainant to be prosecuted under s. 211, I. P. Code. The complainant should be given a reasonable time and full opportunity to prove his case before sanction is given for the prosecution. He can proceed under this section and direct a prosecution(2). Where a court of small causes directed the prosecution of certain persons under this section without calling upon them to show cause why they should not be prosecuted, it was held that the court was wrong in ordering prosecution without giving the persons concerned an opportunity of showing cause against such an order(3).

Form of order.—Under this section as amended the court is directed to make a complaint in writing signed by the presiding officer of the Court and forward the same to a Magistrate of the first class having jurisdiction(4). A proceeding stating that a person had instituted a false case before the police against another with intent to cause them injury knowing that there was no just and lawful ground, which case on inquiry was found maliciously false, and sanctioning his prosecution under this section for an offence falling within section 211 of the Penal Code and sending the proceeding to the Sub-Divisional Officer for disposal, was held not to be a complaint as required by this section(5). Under this section as it now stands a court must make a complaint and cannot directly order prosecution. That complaint must set forth the offence, the precise facts on which it is based and the evidence available for proving it(6). A complaint merely quoting s. 193; but alleging fabrication of false evidence without any allegations of having given false evidence can in no sense be deemed to be a complaint for an offence of intentionally giving false evidence(7). It is absolutely necessary to assign in a complaint made under this section the particular false statements alleged to constitute the offence under s. 193, Indian Penal Code(8). A complaint relating to an offence under this section should set out with sufficient precision the passages in the deposition of the accused, which amount to fabricating false evidence(9). A District

(1) *Ajodhia v. Emperor*, 1 Pat. L. T. 342; *Ramoo v. Emperor*, 21 Cr. L. J. 29; *Chakauri v. Emperor*, 21 Cr. L. J. 158; *Ram Piare v. Emperor*, 10 A. L. J. 247—16 I. C. 515—13 Cr. L. J. 707; *Nga San v. Sookaram*, UBR (1915) 3rd Qr. 83; *Mathra v. Emperor*, 4 Pat. L. J. 475; *Imam v. Emperor*, 25 Cr. L. J. 488; 2 Weir 587.

(2) *Lalji Gope v. Giridhari*, 5 C. W. N. 106; *Queen v. Yendava* 7 M. 189; *In re Kachi*, 21 M. L. J. 795; *Govt. v. Karim*, 6 C. 496; *Empress v. Grish*, 7 C. 87.

(3) *Thakur Das v. Emperor*, 17 O. C. 25.

(4) *Somabhai v. Adit Bhai*, 48 B. 401—26 Bom. L. R. 292—25 Cr. L. J. 1123—81 I. C. 947—1924 Bom 347.

(5) *Durjodhan v. Emperor*, 52 C.

606—A. I. R. 1925 C. 1226=89 I. C. 1027=26 Cr. L. J. 1459.

(6) *Emperor v. Ram Prasad*, 49 A. 752.

(7) *Sathi Reddy v. Emperor*, 125 I. C. 530—A. I. R. 1930 Rang 153=31 Cr. L. J. 1060—Ind Rul. (1930) Rang. 308=(1930) Cr. Cas 585; *Kalyanji v. Ram Deen*, 48 M. 385=86 I. C. 449—A. I. R. 1925 M. 602=48 M. L. J. 290=21 L. W. 664=25 Cr. L. J. 801; *Kali Sudhan v. Nani Lal*, 52 C. 478=26 Cr. L. J. 1307=89 I. C. 251—A. I. R. 1925 C. 721=4 Pat. L. W. 44.

(8) *Kali Sudhan v. Nani Lal*, 52 C. 478=89 I. C. 251—A. I. R. 1925 C. 721=26 Cr. L. J. 1307; *Emperor v. Kashir*, 38 A. 695.

(9) *Salyanarayana v. Emperor*, 2 Cr. Law. 95=28 L. W. 774=1923 M. 71=83 Cr. L. J. 370=114 I. C. 831.

by the police, but in such a case when the police papers arrive, the court has to determine whether it is necessary to take action against particular persons under this section and should record a finding to that effect against each individual person against whom complaint is made(1). It is for the court acting under this section to make any inquiry that is necessary and then to make a complaint against the person or persons who he is satisfied have committed an offence. The court must be satisfied that there is a *prima facie* case against each person sent to the Magistrate and then can lay a complaint under this section. It is not sufficient that the Magistrate to whom the complaint is made under this section is entitled to hold an inquiry under section 202 of the Code(2).

Notice to accused.—Under this section issue of notice to the party to be prosecuted is discretionary with the court(3). It is not invariably necessary that the person to be proceeded against should receive notice to show cause against the proposed action against him(4). The want of notice is at best a mere irregularity in procedure(5). But a notice is necessary where the person proceeded against had no opportunity to cross-examine the witnesses on whose evidence his prosecution has been ordered, and it is a materially irregular exercise of a court's jurisdiction to direct such a serious step as a criminal prosecution without giving the person concerned any chance to know and meet the case against him(6). But in a recent case in the Calcutta High Court it has been held that the practice of giving an opportunity to be heard, to the person against whom an inquiry is directed, is generally to be deprecated, and it is not necessary to give notice to such person in an application under this section(7). But though in proceedings under this section a notice to the accused is not essential it is highly desirable that it should be given(8). Where in such proceedings the court held a preliminary inquiry and recorded additional evidence and took into consideration the result of an other independent private inquiry by the Circle Inspector and all this was done at the back of the accused, it was held that the proceedings must be set aside and the order directing prosecution of the accused quashed(9). If a preliminary inquiry is started, it must be a real inquiry and not merely a formal one, and the accused must be given ample opportunity to show cause why he should not be

(1) *Shabbir Hasan v. Emperor*, 102 I. C. 810 = L. R. 8 A. 147 Cr. = 8 A. 1. Cr. R. 881 = 26 A. L. J. 46 = A. I. R. (1938) A. 21 = 105 I. C. 810, *Emperor v. Waman Dinkar*, 43 B. 300; *Rukta Singh v. Emperor*, 6 Pat. L. J. 178 = 20 Cr. L. J. 245.

(2) *Chamari Singh v. Public Prosecutor*, 4 Pat. 21 = 6 Pat. L. T. 225 = 26 Cr. L. J. 170 = 83 I. C. 730.

(3) *Jagat Singh v. Emperor*, 120 I. C. 687 = 31 Cr. L. J. 179 = 1930 Lah. 55; *Sajjad Husain v. Emperor*, A. I. R. 1935 O. 113.

(4) *Gura v. District Judge Alkhab*, 73 I. C. 976 = 1923 L. B. 79 = 41 Cr. L. J. 736 = 2 Bur. L. J. 113, *Nga San v. Sookaram*, (1915) U. B. R. 3rd Qr. 83, U. P.

Kyun, 3 Bur. L. T. 101 = 12 Cr. L. J. 85.

(5) See the cases cited in the last note.

(6) *In re Permulla*, 69 I. C. 440 = 16 L. W. 925 = 23 Cr. L. J. 712 = (1922) M. W. N. 811 = 44 M. L. J. 74 = 1923 M. 228.

(7) *Ganta v. Harcourt*, 58 C. 215.

(8) *Imam Ali v. Emperor*, L. R. 5 A. 5 Cr. = 1924 A. 435 = 77 I. C. 888 = 25 Cr. L. J. 488; *Bai Kasturbai v. Vankar*, 49 B. 710 = 27 Bom. L. J. 616 = 68 I. C. 709 = 26 Cr. L. J. 1189 = A. I. R. 1925 B. 436, *Rakhal Mohan v. Emperor*, 22 Cr. L. J. 233 = 60 I. C. 426; *Vankarabhai v. Emperor*, (1922) M. W. N. 812.

(9) *Imam Ali v. Emperor*, L. R. 5 A. 5 Cr. = 25 Cr. L. J. 488 = 1924 A. 435 = 77 I. C. 888.

offence referred to in section 195, under sub-section (1) of this section is set aside, any proceedings taken under sub-section (2) should also cease(1). Thus, where in a suit on a registered bond alleged to have been executed by the defendant, the Munsiff held, notwithstanding the denial of the execution of the bond by the defendant that the bond was genuine, and directed his prosecution under this section for an offence under s. 193, I. P. C., and on appeal the judgment of the Munsiff was reversed by the Sub-Judge who held that the bond was not genuine and the defendant had not executed; it was held that the result of the judgment of the appellate court must be taken to be, that the order for the prosecution of the defendant was not maintainable, and that the conviction of the defendant by the criminal court ought to be set aside by the High Court, although he did not move the High Court to quash the proceedings against him as soon as the judgment of the Sub-Judge was pronounced(2). But where a Magistrate dismisses a complaint as the result of an inquiry under section 202, Cr. P. C., and at the same time orders the prosecution of the complainant under section 476, and the Sessions Judge in revision directs further inquiry without saying anything as to the order under section 476, the latter order does not cease to be operative without being quashed(3). An order setting aside an order under this section as not being in proper form will be no bar to proceedings being again instituted against him if the Magistrate thinks proper to make a complaint in proper form(4). No hard and fast rule can be laid down that in all cases an order for prosecution under this section must be set aside on the ground of delay. The section itself does not limit the time within which action should be taken(5).

First class Magistrate.—Under the section as amended the complaint is to be forwarded not to the nearest Magistrate, as before; but to the first class Magistrate having jurisdiction in the matter. But the provisions of the unamended section requiring the offender to be sent to the nearest Magistrate of the first class were held to be merely directory and not mandatory, and a trial of the offender by a Magistrate of the first class having local jurisdiction, who was not the nearest Magistrate, was held to be a mere irregularity curable under s. 537 (b)(6). But in some cases it was held that the case must be sent to the nearest first class Magistrate irrespective of local jurisdiction(7). To meet this difficulty the amendment has been made now. An omission to direct the accused to be taken before the nearest Magistrate is curable under s. 537(8). The court should specify the Magistrate to whom the case is sent(9).

Sub-section 2.—This sub-section lays down the procedure to be

(1) *San Tin v. Emperor*, 6 L. B. R. 49.

R. 1935 O. 119.

(6) *Imperator v. Newand*, 8 Cr. L. J. 209—18 L. R. 88.

(7) *Emperor v. Donaldson*, 43 C. 542; *Queen-Empress v. Nagappa*, 16 M. 461.

(8) *Re Suppaya Tharagan*, 37 M. 317.

(9) *Sundar v. Crown*, (1904) A. W. N. 90.

Magistrate passed an order directing prosecution for perjury or in the alternative for an offence under section 182, I. P. C. It was held that the option of that kind was not an order at all and therefore not valid(1). This section contemplates the sending of a person as an accused for inquiry or trial upon a clear finding that he has committed a particular offence. Where the District Judge sent two persons as an accused for inquiry or trial without a clear finding that one or the other had committed an offence, the order under this section must be set aside(2).

Order must disclose materials on which it is based.—An order under this section should disclose the materials upon which it is based; such an order is a judicial order and if it does not show the basis upon which it was passed, it is liable to be set aside in revision by the High Court(3). As an order under this section, directing a prosecution for offences under sections 193 and 196, Indian Penal Code, amounts to a complaint under section 200, Cr. P. Code, the court before making the order must hold an inquiry and must itself specify by its order (i) the witnesses to prove the complaint, (ii) the false evidence complained against and (iii) whether the person complained against knew that the evidence which he was using as genuine was false(4). An order which does not itself specify these matters but leaves them to be fished out by the trying Magistrate is liable to be set aside as illegal(5). The opinion of the existence of grounds for an inquiry on which action under this section is based must be a judicial opinion founded on evidence. If the court acts merely on fanciful grounds, on grounds so empty, so obviously wrong that it cannot be said to have formed a serious judicial opinion at all, then there has been no such basis for the action as this section contemplates(6). But the mere omission to refer in terms to section 120 B of the Penal Code in a complaint, under this section may not be material if upon a reading of the complaint it should appear that a charge under section 120-B was contemplated(7).

Power to award compensation and in addition to direct prosecution—A Magistrate before whom a false charge is brought is competent to order compensation to be paid to the accused and also to direct the prosecution of the complainant under this section(8). But in the following cases(9) it has been held otherwise.

Consequences following upon the setting aside of order.—It is only just and proper that, if an order directing an inquiry into any

(1) *Hasan Shah v Hardeo*, 25 A 234

(2) *Crown v. Perbhu Dayal*, 163 P. L. R. 1905

(3) *Brijnandan v. Emperor*, 1 Pat. L. T. 717

(4) *Kalyanji v. Ram Deen*, 48 M 895=48 M. L. J. 290=26 Cr. L. J. 601=86 I. C. 449=A. I. R. 1925 Mad 620=21 L. W. 664.

(5) *Ibid.*

(6) *Emperor v. Shiohankarpuri*, 10 N. L. R. 177.

(7) *Bhikhari Singh v. Emperor*,

13 Pat 729=A. I. R. 1934 Pat 561=15 Pat L. T. 523

(8) *Allah Bux v. Emperor*, 18 Cr. L. J. 414=88 I. C. 974=10 S. L. R. 162; *Adikhan v. Alogan*, 21 M. 237; *In re Tammi Reddi*, 27 M. 19, *Beni Mahesar v. Kumod Kumar*, 30 C. 123. But the two orders must be simultaneous. *Lalit v. Emperor*, 20 Cr. L. J. 226=49 I. C. 850

(9) *Baclu Lal v. Jagdam Sahai*, 26 C. 181, *Shub Nath v. Sarat Chander*, 22 C. 586

of justice require that the criminal court taking cognizance of the complaint should not pronounce judgment pending the decision of the appeal by the High Court(1). But where a Subordinate Judge, District Judge or Sessions Judge of experience makes an order that a party or witness in a civil case shall stand his trial under this section, the prosecution should not be stayed because of an appeal pending against the civil case, if the appeal is not likely to be decided soon. At the same time the decision arrived at by the Magistrate should not have any effect upon the court which may hear the civil appeal, rather the decision of the Magistrate in that matter is not relevant evidence to produce and bring before the appellate court.(2). Where a document produced in a case is found by the trial court to be a forged one and a complaint is made under this section against the party who had produced it, the question whether his prosecution should be stayed or not till the disposal of an appeal from the decision of the court of first instance depends on the balance of convenience in the circumstances of each particular case. If there is any likelihood of any important evidence vanishing or the inquiry being stifled, the prosecution may be allowed to proceed and the evidence may be recorded in it but final orders may be delayed till the disposal of the civil appeal(3). The court to which the application for stay of proceeding is presented, should not prejudge the appeal by making any declaration as to the correctness or otherwise of the order appealed against to determine whether the prosecution should be postponed or not, but should leave it to the court which has cognizance of the appeal staying proceedings meantime(4). When the court, has found a forged document used by a party before it, it is entitled to make a complaint and there is no reason why the complaint should be stayed till the final disposal of the appeal which may pass through more courts than one(5). An order refusing to stay the making of a complaint under this section till the undisposal of an appeal from the proceedings in which the offence was committed, is not a matter which comes under section 115, Civil Procedure Code(6).

Limit of time for taking action.—The power conferred by this section can be exercised by the court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence was committed. It has been so held by

(1) *Kalu Mal v. Emperor*, 9 A. I. Cr. R. 13.

(2) *Aurudh Kumar v. Emperor*, 23 Cr. L. J. 84=65 I. C. 436; *Raj Kunwar v. Emperor*, 43 A. C. 180=18 A. L. J. 1011=60 I. C. 428=22 Cr. L. J. 236, *Nagendra Nath v. Emperor*, 127 I. C. 64=Ind. L. J. 1930 Cr. O. 892.

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Harnam Singh v. Atri, 88 I. C. 626=A. I. R. 1925 Lah 323=26 Cr. L. J. 1166=7 Lah L. J. 73; *Kaloo Mal v. Em-*

peror, 96 I. C. 867=27 Cr. L. J. 1011=9 A. I. Cr. R. 13. The Judge has no jurisdiction to revoke an order of prosecution under section 476 merely because an appeal in the suit out of which the matter has arisen, is pending; *Hussain Ambalam v. Muhammad Hussain*, 3 Mad. Cr. Cas 14.

(4) *Debi v. Emperor*, 18 Cr. L. J. 125=37 I. C. 477=20 C. W. N. 1116.

(5) *Nagendra Nath v. Emperor*, 127 I. C. 64=31 Cr. L. J. 1154=A. I. R. 1930 C. 578=1930 Cr. O. 892.

(6) *Ibid.*

followed by the Magistrate on receipt of the complaint. The examination of the complainant in support of the allegations in the complaint has been dispensed with by proviso (aa) to section 200, Cr. P. Code(1).

Shall thereupon proceed according to law.—The Magistrate to whom a case is sent under this section is bound to investigate the case according to law(2). He is bound to proceed with the investigation of the complaint made to him by a civil court under this section(3). Even the court to which the court making the complaint is subordinate has no power to stop the inquiry, though, of course, the Magistrate can discharge the accused if the evidence does not warrant a commitment(4). The Magistrate receiving a case under this section has no power to order an investigation under section 202, as that section is not applicable to such a case. The expression "proceed according to law" in this sub-section requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed(5). If the order under this section is made without jurisdiction, the Magistrate is competent to dismiss the complaint(6), but he cannot return this case to the court which sent it(7). Nor can he order compensation to be paid when dismissing the complaint(8). Nor has he jurisdiction to question the validity of the initiation of proceedings(9). But a Magistrate who has legally taken cognizance of an offence on an order under this section has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in that offence, whether he was mentioned in the order under section 476 or not(10).

Sub-section (3).—This sub-section is framed in accordance with the judicial decisions(11). Proceedings in a criminal court initiated as the result of a complaint under this section should be stayed pending the disposal of an appeal against the order or decree in respect of which the order was passed under the section(12). Where a civil court after deciding a suit, makes a complaint under this section, of an offence committed in the course of the suit, but an appeal against the decree of the civil court is preferred to the High Court, and the subject matter of inquiry in the criminal case is also in issue in the appeal, the interests

(1) *Crown v. Qadir Balhsh*, 6 Lah 34 (40).

(2) *Reg. v. Ammta*, 7 Bom H C R (C.O.) 29, *In re Bal Gangadhar Tilak*, 26 B. 785=4 Bom. L. R. 618, *Emperor v. Arjan Pramanic*, 31 C. 661.

(3) *In re Bal Gangadhar Tilak*, 26 B. 785.

(4) *Empress v. Rachappa*, 13 B 109, *Reg v. Pandurang*, 5 Bom H. C. R. (C. C.) 41.

(5) *Devdin v. Narayanrao*, 21 Cr. L. J. 310=55 I. C 470.

(6) *Kulandas v. Ramasamy*, (1911) 2 M. W. N 431.

(7) *Queen v. Jan Mohammad*, 12 W. R Cr. 41.

(8) *In re Kisandas*, 14 Bom. L. R.

1106.

(9) *In re Bal Gangadhar Tilak*, 26 B. 785.

(10) *Girdhari Lal v Emperor*, 21 C W N. 950, *Crown v. Ajait Singh*, 34 P R. 1917 Cr., *Emperor v. Waman*, 43 B 300.

(11) *Debi v Emperor*, 18 Cr. L. J. 125=37 I. C 477=20 C W.N. 1116. *In re Shri Na'na*, 16 B 729; *Jader Lal v. Louis*, 11 C W. N. 712=5 Cr. L. J. 480=6 C. L. J. 531=34 C. 848, *Anna Ayyar v. Emperor*, 30 M. 226, *Brojo Baski v. Emperor*, 19 C W. N. 200.

(12) *Queen v. Jan Mohammad*, 12 W. R Cr. 41.

section(1), though there is authority to the contrary also(2).

Revision : Power of Sessions Judge.—A Sessions Judge can take up at the instance of a private person any revision of a Magistrate's order under this section(3). But he has no power to interfere with an order under this section, nor with a complaint under s. 195 (1) (b) made by a Deputy Magistrate(4). A Sessions Judge who makes a complaint under this section is a party to the proceedings initiated in pursuance of his complaint within the meaning of s. 556, Cr. P. Code, and is, therefore, disqualified from hearing an application to revise an order discharging the persons complained against(5). A Sessions Judge has no power to set aside an order passed by a Magistrate under this section. But the High Court has power to revise such orders, whether passed by criminal or a civil court(6).

Power of High Court.—The question whether the High Court, as a court of revision, has power, under section 439, of the Code of Criminal Procedure, 1898, to interfere when a court has taken action under section 476 of the Code of Criminal Procedure. Under the Code of 1882 a Full Bench of the Madras High Court had held(7) that the High Court acting under section 439, Criminal Procedure Code, has the power to revise an order passed under section 476, Criminal Procedure Code, and in two cases reported in Allahabad Weekly Notes of 1908, pages 22 and 27, the learned Judges of the Allahabad High Court have decided that such power is retained under the present Criminal Procedure Code. In *Eranholi Athan v. King-Emperor*(8), however, it is laid down that the legislature has now altered the law on the point by the addition of the words "and as if upon complaint made and recorded under section 200" in sub-section (2) of section 476. This view has not been accepted by any of the other High Courts(9), and in *Aiya Kanun Pillai v. Emperor*(10) the Full Bench treated the proceedings of the court taking action under section 476 as an order liable, if made without jurisdiction, to be revised by the High Court. In *Somayajipad v. Emperor*(11) it was held by a Full Bench of five Judges that the words "as if upon complaint made and recorded under section 200" introduced in the Code of 1898 were not intended to effect any change in the revisional power of the High Court and that it has power under s. 439 to interfere on grounds other than want of jurisdiction, when a criminal court has taken action under this section. The judgment in *Eranholi v. Emperor*(12) was overruled.

(1) *Attar Singh v. Crown*, 29 P. R. 1916 Cr.; see also *Gendan Singh v. Emperor*, 3 C. L. J. 302; *In re Shri Narow* 16 B. 729; *In re Muttu Lal*, 6 C. 308; *Khan Mohd. v. Crown*, 4 Lab. 58.

(2) *Nagendra Nath v. Emperor*, 127 I. C. 64=Ind. Ral. (1930) Cal 816=31 Cr. L. J. 1154=A. I. R. 1930 C. 578.

(3) *Pearey Lal v. Sagar Mal*, 1927 A. 38=24 A. L. J. 910=7 C. R. A. Cr. 176=97 I. C. 650=25 A. L. J. 42=27 Cr. L. J. 1130=49 A. 230.

(4) *Empress v. Ankanna*, 23 M. 205; *Emperor v. Gopal Barik*, 34 C. 42.

(5) *In re Mudkaya Andanaya*, 99 I. C. 85=28 Bom. L. R. 1902=1927 Bom. 35=28 Cr. L. J. 53.

(6) *Emperor v. Gopal Barik*, 34 C. 43.

(7) *Empress v. Srinivasulu*, 21 M. 124.

(8) 26 M. 98.

(9) *Emperor v. Gopal Barik*, 34 C. 42; *Mata Ratan v. Mahabir*, 7 Cr. L. J. 1=4 A. L. J. 603; *Abdul Hussain v. Emperor*, 9 N. L. R. 184; *Mama v. Emperor*, 4 Bar. L. T. 246=12 Cr. L. J. 521=12 I. C. 289.

(10) 32 M. 49.

(11) 33 M. 48.

(12) 26 M. 98.

the Lahore High Court(1) This view is in accord with that taken by the High Courts of Madras and Calcutta(2). But is opposed to that taken by the High Courts of Bombay(3) and Allahabad(4). According to Bombay and Allahabad courts there is nothing in this section which requires a court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. In the Calcutta case *Bhim Lal v. Bisa Singh*(5) there are certain observations in which a delay of a month and a half was adversely commented upon. No hard and fast rule can be laid down that delay is a ground for setting aside an order for prosecution. It may, under certain circumstances, be almost a sufficient ground in itself, but in other cases, it may be no ground at all. It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed(6). A delay of two months was considered too long(7), and a delay of three weeks was held to be too much under the circumstances of the case(8). The effect of the changes made in the Code by the introduction of sections 476-A and 476 B is to make it no longer necessary that a proceeding under this section should be a part of, or so soon after the termination of the judicial proceeding as to make it a part of the judicial proceeding(9). It is, however, desirable that action under this section should as far as possible be prompt and expeditious(10). A prosecution for false complaint under section 211, I. P. C., should be ordered as soon as the complaint is dismissed as false and not many months afterwards because the facts justifying the prosecution are known to the court at the time when the complaint is dismissed(11). When proceedings are commenced "in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding, in the course of which the offence was committed" any unreasonable delay in passing final orders will not invalidate the order. But it is open to the petitioner to ask for revocation of sanction on the ground of prejudice caused by the delay(12). Where an appeal is preferred against the original case, the court is justified in waiting till the disposal of the appeal before directing a prosecution under this

(1) *Chottu Ram v. Emperor*, 126 I. C. 791=A. I. R. 1930 Lah. 316=31 Cr. L. J. 1125=Ind. Rul. (1930) Lah. 791=(1930) 12 Cr. Cas. 348; *Attar Singh v. Crown*, 29 P. R. 1916 Cr.; *Gopal Singh v. Emperor*, 106 I. C. 456=29 Cr. L. J. 40=A. I. R. 1928 L. 180.

(2) *See* *Chottu Ram v. Emperor*, 126 I. C. 791.

(3) *See* *Chottu Ram v. Emperor*, 126 I. C. 791.

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(12) *See* *Chottu Ram v. Emperor*, 126 I. C. 791.

(1) *Chottu Ram v. Emperor*, 126 I. C. 791.

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(10) *See* *Chottu Ram v. Emperor*, 126 I. C. 791.

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(12) *See* *Chottu Ram v. Emperor*, 126 I. C. 791.

(1) *Chottu Ram v. Emperor*, 126 I. C. 791.

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(4) *See* *Chottu Ram v. Emperor*, 126 I. C. 791.

(5) *See* *Chottu Ram v. Emperor*, 126 I. C. 791.

(7) *Mauing Ba Hla v. Emperor*, 18 Cr. L. J. 331.

(8) *Lalji v. Emperor*, 20 Cr. J. 226=49 I. C. 850.

(9) *Seshamma v. Venkamma*, 22 L. W. 863=27 Cr. L. J. 280=92 I. C. 456=A. I. R. 1926 M. 238.

(10) *In re Jethmal* 7 S. L. R. 187.

(11) *Emperor v. Baldeo Prasad*, 46 A. 851 (852).

(12) *Venkatesubbayya v. Rex* 1919 M. W. N. 112=25 M. L. F. 18=9 L. W. 74=20 Cr. L. J. 172=49 I. C. 492.

complaint should be made, it is not desirable that the High Court should interfere with the order in revision(1). The High Court has power to revise proceedings under this section when such proceedings are null and void for want of jurisdiction(2) or when the lower court has proceeded upon merely fanciful grounds or grounds so obviously wrong that it could not be said to have formed a serious judicial opinion at all(3). It is, as a general rule, inadvisable for the High Court to interfere in revision with an appellate order refusing to withdraw a complaint(4).

476-A. The power conferred on civil, revenue

Superior court
may complain
where subordinate
court has omitted
to do so.

and criminal courts by section 476, sub-section (1) may be exercised, in respect of any offence referred to therein and alleged to have been committed in or

in relation to any proceeding in any such court by the court to which such former court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior court makes such complaint, the provisions of section 476 shall apply accordingly.

Scope.—This section is new and makes provision for a complaint being made by a superior court. In the absence of any provision such as is contained in the present section, there was a conflict of decision as to power of the superior court to make a complaint in the circumstances specified in the present section. On the one hand, it was held that the superior court could not take action in respect of an offence which was not committed before itself but before a subordinate court(5). On the other hand, it was held that the superior court had that power(6). The present section gives effect to the latter view. In any case in which such subordinate court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint, this section authorises a complaint to be made by the court to which such court is subordinate within the meaning of section 195(7).

(1) *Somabhai v. Adit Bhai*, 48 B. 401=26 Bom. L. R. 289; *Ranjit v. Ram Bahadur*, 5 P. 262=27 Cr. L. J. 641

(2) *Somabhai v. Aditbhai*, 48 B. 401=26 Bom. L. R. 289=81 I. O. 947=1924 B. 347; *Ranjit Narain v. Ram Bahadur*, 7 Pat. L. T. 114.

(3) *In re Alamdar*, 23 A. 249= (257); *In re Parshotamdas*, 25 Bom. L. R. 282; *Emperor v. Shishan-karpuri*, 10 N. L. R. 177.

(4) *Beliram v. Crown*, 7 Lah. 109= 27 Cr. L. J. 776=95 I. O. 312=A, I. R.

1926 Lah. 305=27 P. L. R. 314.

(5) *27 Cr. L. J. 641* 27
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Revision against complaints by civil or revenue courts.—All the High Courts are agreed that revision applications against orders passed under sections 475, 476 (A) and 476 (B) by civil courts do not come under section 439 of the Code, but the High Court can interfere only under sections 115 of the Civil Procedure Code or section 107 of the Government of India Act(1). This has not, however, been accepted by the Lahore High Court. According to that court the High Court is competent to revise an order under section 439 passed by a civil court(2). The High Court has no jurisdiction, under section 439 to entertain an application to revise an order passed by a revenue court, under this section. Such an order, however, is open to revision under section 115, Civil Procedure Code or section 107 of the Government of India Act(3). An application to revise an order under this section of the Judge of a Provincial Small Cause Court lies under s. 25 of Act IX of 1887 and not under section 439 of the Code(4).

When High Court will interfere and when not.—The High Court has power of revision in a proceeding under this section; that such power should only be exercised where there has been some error of law, irregularity, abuse or failure to exercise jurisdiction, and not merely because the court might form an opinion on the case different from that formed by the court below(5). The power should be exercised only in very exceptional cases(6). The question whether a complaint should be made under this section is almost invariably a matter of discretion and if the trial court or a court to which it is subordinate thinks that no

(1) *Purana Chandra v. Dhalu*, 53 C. 374=A. I. R. 1930 Cal 721 (24)=129 I. C. 561=1930 Cr. C. 1129=52 C. L. J. 87=34 C. W. N. 914, *Suendra Nath v. Sushil Kumar*, 59 C. 68, *Jagan Nath v. Rajagopalachari*, A. I. R. 1931 Pat 411=12 Pat. L. T. 671=1931 Cr. C. 999=83 Cr. L. J. 147=195 I. C. 560.

24 O. C. 367=23 Cr. L. J. 223=66 I. C. 68; *In re Guggen*, 7 L. B. R. 76, *Emperor v. Kashi*, 38 A. 635, *Babu Lal v. Emperor*, 16 N. L. R. 23; *Emperor v. Har Prasad*, 40 C. 477, *Mendi Lal v. Ram Adhni*, A. I. R. 1935 O. 59.

(2) *Har Ram v. Crown*, 116 I. C. 711=30 P. L. R. 392=A. I. R. 1929 L. 676=11 Lab. L. J. 103, *Lachman Singh v. Emperor*, A. I. R. 1931 Lab. 105=32 P. L. R. 46=1931 Cr. C. 163=131 I. C. 216=32 Cr. L. J. 617=16 A. I. Cr. R. 281, *Bishun Singh v. Amritsaria*, 103 P. L. R. 1909.

(3) *Rakhi Singh v. Emperor*, 1921 Pat. 240=6 Pat. L. J. 178=2 Pat. L. T. 609=61 I. C. 613=32 Cr. L. J. 403, *Emperor v. Muhammad Khan*, (1932) A. W. N. 201, *Emperor v. Ashraf Lal*, 39 A. 91, *In re Nataraja Iyer*, 36 M. 73 (per Sundara Ayyar, J.).

(4) *Valab Das v. Maung Ba Ihan*, 1 Rang 372, *Gajgero v. Emperor*, 20 I. C. 751=6 Bur. L. T. 144=7 L. B. R. 76=14 Cr. L. J. 493.

Cr. C. 832=31 Cr. L. J. 1154=127 I. C. 61, *Abdul Karim v. Emperor*, 10 Pat. L. T. 161, *Banchari Lal v. Jharkha*, 91 I. C. 454=27 Cr. L. J. 278=31 A. L. J. 217=A. I. R. 1926 A. 229, *Emperor v. Ram Narain*, A. I. R. 1926 A. 577=96 I. C. 877=27 Cr. L. J. 1011=7 L. R. A. Cr. 130, *Ko Maung Uyi v. Ma Ma*, 18 Cr. L. J. 121=37 I. C. 473=10 Bur. L. T. 13, *Ejaz Ali v. Emperor*, Cr. P. C.—106.

section 476-A, or against whom such a complaint has been made, may appeal to the court to which such former court is subordinate within the meaning of section 195 sub-section (3), and the superior court, may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate court might have made under section 476, and if it makes such complaint, the provisions of that section shall apply accordingly.

Scope.—This section contemplates an appeal from an order by the original court under section 476, or from an order by a superior court to which that court is subordinate under section 476-A(1). The jurisdiction of the court of appeal only arises under this section when a court subordinate to it has directed the filing of a complaint, or refused to make a complaint under section 476 or 476 A(2). The provisions of this section give a right of appeal to any person against whom a complaint has been made by a court acting under the provisions of section 476 or 476-A and it is immaterial whether the court acts *suo motu* or on an application made to it by some interested person(3). An appeal may be preferred under this section from an order making a complaint even though no finding has been recorded by the officer making the complaint that an inquiry is necessary in the interests of justice(4).

Complaint for offence under s. 174 or s. 182.—An order of a District Magistrate making a complaint for an offence under s. 174 of the Penal Code is not appealable under this section inasmuch as the offence under s. 174 of the Penal Code is not one of the offences for which a court can make a complaint under s. 476(5). An order by which a complaint is made by a court for an offence under section 182 or s. 188 of the Penal Code is not appealable, but a court to which the court making the complaint is subordinate may order withdrawal of the complaint(6).

(1) *Maon Khim v. N. K. M. Firm*, 9 A. I. Cr. R. 104.

(2) *Wajid Ali v. Emperor*, 8 Luck. 638=A. I. R. 1934 O. 344 (2)=11 O. W. N. 490=1934 O. L. R. 436=148 I. O. 1075=85 Cr. L. J. 824.

(3) *Thiraj v. Crown*, 11 Lab 55=119 I. C. 265=1929 Lab. 641=30 Cr. L. J. 1019; *Prabhu Dayal v. Emperor*, 127 I. O. 711=81 P. L. R. 153=82 Cr. L. J. 20=12 Lab. L. J. 29; *Emperor v. Ram Prasad*, 52 A. 79=28 A. L. J. 203=A. I. R. 1929 A. 899(1)=3 Cr. Law. All. 4=52 A. 79=120 I. O. 113; *Numberumal Chetty v. Maniappa Mudali*, 54 M. 311=A. I. R. 1931 M. 16=15 A. I. Cr. R. 387=3 M. Cr. O. 870=32 L. W. 513=59 M. L. J. 850=32 Cr.

L. J. 200=128 I. C. 719=(1930) M. W. N. 991; but see *Satto v. Emperor*, 113 I. C. 537=30 Cr. L. J. 163=12 A. I. Cr. R. 108=A. I. R. 1929 Lab. 9.

(4) *K. C. V. Reddy v. Emperor*, 8 Rang 25=125 I. O. 206=A. I. R. 1930 Rang 201=Ind. Rul. (1930) Rang 250=81 Cr. L. J. 793=1930 Cr. C. 651.

(5) *P. J. Moneu v. Emperor*, 111 I. C. 672=6 Rang 529=29 Cr. L. J. 912=A. I. R. 1928 Rang. 296.

(6) *Brajendra Nath v. Emperor*, 102 I. C. 48=L. B. 8 A. 101 Cr =28 Cr. L. J.

Neither made a complaint nor rejected an application for making such a complaint.—This section applies only to cases where the subordinate court has neither made a complaint *suo motu* nor rejected an application by a party for making such a complaint(1). The scheme of sections 476-A and 476-B is that, if the subordinate court has neither made a complaint under section 476 nor rejected an application for the making of a complaint, then the superior court may take action and make a complaint. But where the subordinate court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code, is by way of an appeal to the superior court(2). Where the trial court passes an order under section 476 the District Magistrate has no power to alter it(3). But where the complaint filed by a Magistrate under this section is invalid and *ultra vires* it is within the jurisdiction of the Sessions Judge in appeal to make a complaint himself under this section(4). Where the applicant prosecuted somebody under section 498 of the Penal Code before a Bench of Honorary Magistrates and the prosecution failed, it was held that under this section the District Magistrate had jurisdiction to take up the matter and order the prosecution of the applicant under section 193 of the Indian Penal Code(5). The pendency of an application for sanction before a lower court does not prevent a higher court from granting the sanction under this section(6). The word "rejected" as used in this section means rejected after consideration on the merits. Consequently an order allowing mere withdrawal of an application does not come within the purview of the word "rejected"(7).

Superior court not authorized to entertain appeals from subordinate court.—Where the subordinate Judge is not the court to which appeals from order of the Munsiff ordinarily lie, he is not authorized under this section to make a complaint with respect to matter before the Munsiff(8).

Deputy Commissioner as superior court can direct complaint being made.—The Deputy Commissioner in the exercise of his power as superior court under this section has authority to direct complaint being made in respect of an offence committed in the course of mutation proceedings in a court subordinate to him(9).

476-B. Any person on whose application any civil, revenue or criminal court has refused to make a complaint under section 476 or

Appeals

(5) *Moti Ram v. Emperor*, 85 I C. 710 = L. R. 6 A 44 Cr = 26 Cr. L. J. 566 = 1925 A. 410

(6) *Ramdas v. Emperor*, 26 Bom L. R. 713 = 82 I C. 359 = 1924 B. 511 = 25 Cr. L. J. 1257.

(7) *Vasudeomal v. Emperor*, 29 Cr. L. J. 1051 = 23 B. L. R. 37.

(8) *Fauzdar v. Narendra Nath*, A I R. 1934 Pat. 306 = 15 Pat. L. T. 303 = 150 I C. 239 = 35 Cr. L. J. 1061 = 1934 Cr. C. 793.

(9) *Sajjad Hussain v. Emperor*, A. I. R. 1935 O. 113.

jurisdiction and making a complaint under s. 476, an appeal lies to a Division Bench under this section, and limitation runs from the date of the actual complaint(1).

Appeal against order by a Judge of the Presidency Small Cause Court.—An appeal against an order of a Chief Judge of the Presidency Small Cause Court lies only to the appellate side of the High Court and not to the Full Bench of the Small Cause Court under s. 38 of the Presidency Small Cause Court Act or to the original side of the High Court(2).

Appeal against order by a Munsiff.—The Court of the District Judge is the only court to which that of the Munsiff is subordinate within the meaning of s. 195 (3) and an appeal under this section can be heard only by the District Judge and a Subordinate Judge cannot hear the same on transfer by the District Judge(3). As, however, under the notification, all appeals from the decree or order of the Munsiff lie to the court of Subordinate Judge of Sambalpur, the latter court is "the court to which appeals ordinarily lie" within the meaning of section 195 (3), and, therefore, it is the superior court which is empowered under this section to make a complaint which the subordinate court of Munsiff might have made(4).

Appeal against order by a Sub-Judge or Munsiff in exercise of small cause powers.—An appeal lies to the District Judge against an order under this section passed by a Subordinate Judge in the exercise of his powers of a Judge of a Small Cause Court(5). Where a Munsiff invested with small cause powers makes a complaint under s. 476 of the Code for the prosecution of persons in respect of offences under ss. 467 and 471 of the Penal Code, an appeal from such an order lies under this section to the Court of the District Judge and not to the Court of the subordinate Judge(6). But an appeal from order of the Court of Small Causes Saugor, under this section lies to the Additional District Judge, Saugor, and not to the District Judge, Jubbulpore(7).

Village Panchayat acting in civil cases.—A village Panchayat acting in a civil case having come to the conclusion that a person made a false statement and used a forged document in a case before it sent a report to the collector for his orders and the Collector apparently acting as a District Magistrate made a complaint; and it was held that the principal civil court of the district was the District Judge, and the complaint of the Collector or the District Magistrate was

(1) *Ramjan Ali v. Moolji Seeka & Co.*, 33 C. W. N. 329=56 C. 932.

(2) *Kalyanji v. Ram Deen*, 48 M. 395=48 M. L. J. 290=26 Cr. L. J. 801=86 I. C. 449=1925 M. 609=21 L. W. 681.

(3) *Dulari Koeri v. Faujdar Khan*, I. R. 1933 Pat. 161 (2)=142 I. C. 621=34 Cr. L. J. 410=14 Pat. L. T. 131=1933 Cr. C. 510 (2)=A. I. R. 1933 Pat. 179; *Mehdi Hasan v. Emperor*, A. I. R. 1935 A. 212; *Manphool v. Budhu*, A. I. R. 1935 A. 440.

(4) *Ramchandra v. Emperor*, 8 Pat. 428=117 I. C. 878=A. I. R. 1929 Pat. 367=80 Cr. L. J. 834.

(5) *Panchajanya v. Emperor*, 1931 C. 90.

(6) *Janneem v. Emperor*, 1911 C. 381=1 C. W. N. 845=A. I. R. 1925 O. 713=27 Cr. L. J. 83; *Ram Sarup v. Emperor*, A. I. R. 1935 A. 446 (2), even though he signed the order as Munsiff.

(7) *Lokman v. Halku*, A. I. R. 1934 Nag. 236=31 N. L. R. 90.

JUSTICE

Forum of appeal: Complaint by criminal court.—A Deputy Magistrate, empowered under clause (2) of section 407 of the Code to hear appeals from the sentences of subordinate Magistrates, is not competent to hear appeals under this section from the order of such Magistrates, not being a court to which appeals from such Magistrates ordinarily lie(1). An appeal under this section by the person against whom a complaint has been filed by the District Magistrate shall lie only to the Court of Sessions(2). An appeal under this section from an order under section 476 passed by an Assistant Sessions Judge lies to the Court of Sessions(3).

Complaint by civil or revenue court.—An appeal from the making or filing of a complaint by a civil court, under s. 476, lies to the court to which the former is subordinate, and the procedure relating to such appeals is governed by the civil and not by the Criminal Procedure Code(4). But the Lahore High Court in a recent Full Bench Case(5) has held that irrespective of whether the trial court be civil, criminal or revenue, the procedure on appeal under this section is a procedure under the Criminal Procedure Code. This view receives support from a recent Allahabad case(6). An appeal lies under this section against the order of a civil court passed under s. 476, even though the civil court in passing that order might have acted without jurisdiction(7). An appeal lies to the civil court from an order under s. 476 made by an Assistant Collector in a suit under the Agra Tenancy Act, even though the valuation of the suit is less than Rs. 200 and

subordinate to the District Judge when a complaint is filed in any suit of this nature whether the actual decree in that particular suit be appealable or not(9).

Complaint by a single Judge of the High Court.—Against an order of a single Judge of the High Court exercising original civil

(1) *Mohim Chandra v Emperor*, 83 C. W. N 285=116 I. C 638=30 Cr. L. J. 658=56 C 824=1929 C 172=2 Cr. Law. 211=49 C L J. 312

(2) *Pilalal v Emperor*, 25 N L R. 1=2 Cr. Law 309=1929 Nag. 97 F. B. =116 I. C 77=80 Cr. L. J. 550=12 A I Cr R. 345.

(3) *Nagendra Nath v Emperor*, 60 C. 596=A I R 1933 C. 192=37 C. W. N. 192=1933 Cr. C. 243=143 I. C. 703=84 Cr. L. J. 628.

(4) *Nasar-ud-din v Emperor*, 53 C. 827=28 Cr. L. J. 92=99 I. C. 124=A. I. R. 1927 C. 98; but see *Dhanpat Rai v. Balak Ram*, 195 I. C. 694=A. I. R. 1931 Lah. 761=1931 Cr. C. 1065=83 Cr. L. J. 178=33 P. L. R. 558=13 L. 342; Cf. *Mahendra Nath v. Emperor*, 124 I. C. 827=49 C. L. J. 374=31 Cr. L. J.

750=A. I. R. 1929 C. 428=Ind. Rul. (1930) C 43.

(5) *Dhanpat Rai v. Balak Ram*, 1931 Lah. 761=195 I. C. 594 followed in *Mendi Lal v. Ram Adhin*, A. I. R. 1935 C 69

(6) *Mehdi Hasan v. Emperor*, A. I. R. 1935 A. 212.

(7) *Bilas Singh v. Emperor*, 47 A. 934=23 A. L. J. 845=A. I. R. 1925 A. 737=89 I. C. 630; *Hudlal v Emperor*, 5 A. I. Cr R 608.

(8) *Ratan Lal v. Abdul Hai*, 195 I. C. 753=A. I. R. 1930 A. 407=31 Cr. C. L. J. 698=1930 A. L. J. 1010=Ind. Rul. (1930) A. 737=1930 Cr. C. 631.

(9) *Amanul Haq v. Girdhar Gopal*, A. I. R. 1934 A. 886=150 I. C. 775=4 A. W. R. 241=1934 All. L. R. 733=32 A. L. J. 667=35 Cr L J. 1135.

Duty of appellate court.—An appellate court in cases of appeals under this section should reconsider the entire matter on its merits(1). The powers of the appellate court under this section are limited. It can do no more than hear the parties, and direct the withdrawal of the complaint, or itself make the complaint as the case may be. It has no power to direct the lower court to rehear the application and to file a complaint(2), or to make a complaint in the light of the instructions given in the order(3), though there are authorities to the contrary also(4). The appellate court should apply its mind to the question whether or not it is expedient in the interests of justice that an inquiry should be made into the offence complained of, and that it should record its finding in writing on the point as a preliminary to the filing of the complaint(5). When a superior court reverses the order of the trial Magistrate refusing to take action under this section, sufficient reasons must be given showing the grounds on which the Magistrate did not in its opinion exercise his discretion properly(6). Where the District Judge, on an appeal under this section recorded a judgment merely stating that he had heard arguments for the appellants, read the reply of the Subordinate Judge (who had made the complaint under section 476), to the points on which a report was called for and was not prepared to interfere and ordered withdrawal of the complaint it was held that the judgment of the District Judge was defective, and that the appeal must be re-heard and a judgment passed in accordance with law (7).

Power to take additional evidence in appeal.—A court of appeal acting under this section has no power to take additional evidence(8).

Disposing of appeal summarily.—Appeals under this section are subject to all the provisions applicable to criminal appeals as laid down in section 419 and the following sections. It is, therefore, open to an appellate court to dismiss the appeal summarily under this section(9).

(1) *Jagabandhu v. Abdul Sobhan*, 57 C. 500=124 I. C. 68=33 C. W. N. 945=1929 Cr. C. 94=31 Cr. L. J. 612=A. I. R. 1929 C 460; *Ram Charan v. Emperor*, 88 I. C. 308=23 A. L. J. 515=26 Cr. L. J. 1125=A. I. R. 1925 A. 544

Emperor, 8 Rang. 25=125 I. C. 206=31 Cr. L. J. 793=A. I. R. 1930 Rang 201=I. R. 1930 (R.) 250=1930 Cr. C. 661.

(6) *Kalisadhan v. Nani Lal*, 52 C. 478=69 I. C. 251=A. I. R. (1925) C 721=26 Cr. L. J. 1307. Ordinarily the High Court will not interfere in appeal under this section: *Suderson Behara v. Emperor*, 8 Pat. L. T. 104=98 I. C. 111=27 Cr. L. J. 1263=A. I. R. 1923 Pat 87.

(7) *Hamid Ali v. Madhu Sudan*, 14 C. 355; *Netya Gopal v. Nani Gopal*, A. I. R. 1931 C. 454=35 C. W. N. 660=1931 Cr. C. 606=1931 I. C. 672=32 Cr. L. J. 1045.

(8) *Sami Vennia v. Periaswami*, 27 L. W. 265=(1928) M. W. N. 73

(9) *Muhammad Bayetulla v. Emperor*, 58 C. 402=A. I. R. 1931 C. 3=34 C. W. N. 923=1931 Cr. C. 35=129 I. C. 817=32 Cr. L. J. 325; *Baidya Nath v. Emperor*, A. I. R. 1931 Pat. 144=1931 Cr. C. 260=131 I. C. 536=12 Pat. L. T. 336=32 Cr. L. J. 735=16 A. I. Cr. R. 348.

(3) *Hamid Ali v. Madhusudan*, 31 C. W. N. 781.

(4) *Janardana Rao v. Lalshmi Narasamma*, 57 M. 177; *Mahendra Nath v. Emperor*, 124 I. C. 827=49 C. L. J. 374=A. I. R. 1929 C. 428=31 Cr. L. J. 710.

(5) *Ramchand v. Lilaram*, 134 I. C. 1007=33 Cr. L. J. 43=25 S. L. R. 68=I. R. 1931 S. 159=1931 Cr. C. 733=A. I. R. 1931 S. 115; *K. C. V. Reddy v.*

without jurisdiction(1).

Appeal against appellate order.—In the Lahore High Court, in *Muhammad Idris v. Emperor*(2), the question as to whether an appeal lies from an appellate order under this section has been discussed and decided by Martinie and Zafar Ali, JJ. In that case their Lordships held that no appeal lies under this section to the High Court from an appellate order of a District Judge making a complaint which the Sub-Judge might himself have made but refused to make. This view is supported by the following cases(3). In *Ranjit Narain v. Ram Bahadur*(4), however, their Lordships of the Patna High Court under similar circumstances held that the persons against whom the complaint had been made by the District Judge had a right of appeal. The same view has been taken also in other cases of the same court(5). But this view requires re-examination(6). Appeal however lies against an order passed under this section by the appellate court directing the withdrawal of the complaint(7).

Complaint cannot be called in question in appeal from conviction.—It is not open to a person who has not exercised his right to appeal from an order making a complaint against him under this section to contend before the Magistrate or Sessions Judge before whom he is placed for trial, that the plaint is not a good complaint or that it is not made by a proper officer(8). It was the intention of the legislature that the remedy open to a person aggrieved by a complaint made under this section, should be limited to an appeal under this section, and that it is not permissible to call the complaint in question in the course of an appeal against conviction(9).

(1) *Emperor v. Salig Ram*, 52 A. 1018 = A. I. R. 1931 A. 141 = 15 A. I. Cr. R. 471 = 32 Cr. L. J. 558 = 12 L. R. A. Cr. 67 = 130 I. C. 468 = 1931 Cr. O. 200 = 28 A. L. J. 1520.

(2) 6 Lah. 56 = 26 P. L. R. 199 = 26 Cr. L. J. 1168 = 88 I. C. 528 = 7 L. J. 584 = 1 L. C. 480 = A. I. R. 1925 Lah. 322

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Prasad v. Emperor, 120 I. C. 116 = 10 L. R. A. Cr. 147 = 30 Cr. L. J. 1148 = 13 A. I. Cr. R. 1 = 1929 Cr. C. 490 = A. I. R. 1929 A. 898 = I. R. (1930) A. 4

416 = I. R. 1931 Cr. C. 449 = A. I. R. 1931 A. 805 = 129 I. C. 264 = 29 A. L. J. 117 = 32 Cr. L. J. 367, *Ma On Khin v. N K M Firm*, 5 Rang. 523 = 28 Cr. L. J. 937 = 105 I. C. 457 = 1927 Rang. 313 = 9 A. I. Cr. R. 104; *Emperor v. Govinda Hari*, A. I. R. 1935 B. 157; *Bismillah Khan v. Shakir Ali*, 4 Luck. 155

(4) 5 Pat. 262 = 7 Pat. L. T. 114

(5) *Narayan v. Dhana*, 10 Pat. 446 = 12 Pat. L. T. 633 = A. I. R. 1931 Pat. 343 = 1931 Cr. C. 791 = 32 Cr. L. J. 1063 = 193 I. C. 683, *Fauzdar Rai v. Emperor*, A. I. R. 1926 Pat. 25 = 26 Cr. L. J. 1505 = 90 I. C. 445 = 7 Pat. L. T. 129

(6) *Ramchandra v. Emperor*, 8 Pat. 428 = 117 I. C. 678 = 20 Cr. L. J. 634 = 1929 Cr. C. 158 = A. I. R. 1929 Pat. 367

(7) *Somabhai v. Aditbhai*, 48 B. 401 = 26 Bom. L. R. 289 = 5 Cr. L. J. 1123 = A. I. R. 1924 B. 347 = 61 I. C. 947

(8) *Jahbar Ali v. Emperor*, 116 I. C. 632 = 1929 C. 203 = 49 Cr. L. J. 193 = 30 Cr. L. J. 656

(9) *Ali Ahmad v. Emperor*, A. I. R. 1932 C. 545 = 55 Cr. L. J. 326 = 1932 Cr. C. 545 = 140 I. C. 544 = 34 Cr. L. J. 32

1928 M. 506 = 55 M. L. J. 444; *Hikmat-ullah Khan v. Sakina Begum*, 53 A.

court in considering revisionally an appellate order made by a civil court under this section, acts under section 115 of the Civil Procedure Code and is limited by the terms of that section(1). But the Lahore High Court holds that revision lies to the High Court under s. 439 in all cases whether the court be civil, criminal or revenue(2). Where a criminal court takes proceedings under this section, the appellate order of the Sessions Judge can only be revised by the High Court under the provisions of this section(3). Interference in revision with appellate orders under this section withdrawing(4) or refusing to withdraw(5) complaints is ordinarily not desirable. Such order of the appellate court, if not objected by way of revision, is final between the parties in collateral proceedings. In the absence of any contravention of any express provision of law, section 537 of the Code cures the defect, if any(6).

477. (Repealed.)

Section 477 which empowered a Court of Session to charge a person for an offence committed before it, or under its own cognizance has been repealed by s. 129 of the Cr. P. Code Amendment Act. It has been repealed because it was not thought desirable that a court which has instituted the proceedings should dispose of the case(7).

478. (1) When any such offence is committed

Power of civil and revenue courts to complete inquiry and commit to High Court or Court of Session.

before any civil or revenue court, or brought under the notice of any civil or revenue court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such civil or revenue court thinks that it ought to be tried by the High Court or Court of Session, such civil or revenue court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purposes of an inquiry under this section the civil or revenue court * * may exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the

(1) *Purna Chandra v. Dhalu*, 34 C. W. N. 914.

(2) *Dhanpat Rai v. Balak Ram*, A. I. R. 1931 Lah. 761=1931 Cr. C. 1065=185 I. C. 594

(3) *Mendi Lal v. Ram Adhin*, A. I. R. 1935 O. 59.

(4) *Somabhai v. Adithai*, 48 B. 401=26 Bom. L. R. 289=25 Cr. L. J. 1123=81 I. C. 947=A. I. R. 1924 Bom. 347.

(5) *Balraj Vaid v. Purnima*, 203 C.

(6) *Balraj Vaid v. Purnima*, 203 C.

(7) *Balraj Vaid v. Purnima*, 203 C.

(8) *Balraj Vaid v. Purnima*, 203 C.

(9) *Balraj Vaid v. Purnima*, 203 C.

(10) *Balraj Vaid v. Purnima*, 203 C.

(11) *Balraj Vaid v. Purnima*, 203 C.

(12) *Balraj Vaid v. Purnima*, 203 C.

OF JUSTICE

Transfer of appeal.—The District Judge after receiving an appeal under this section from the order of a Munsiff, has jurisdiction to transfer the same to the Additional District Judge, who can, thereupon, hear the appeal and make a complaint under this section(1). He is also authorized to transfer such appeal to the court of a Subordinate Judge(2). But in one case it has been held otherwise(3).

Death of appellant.—The language of this section does not indicate that any legal representative of the deceased appellant may file an appeal in connection with the death of the appellant. Hence on the death

or an appeal under this section against an order refusing to file a complaint under s. 195 is the one provided by Art 155 and not Art. 156(5). Starting point of limitation for an appeal from an order making a complaint is the date on which the complaint is filed and not the date on which it is signed(6). But an appeal under this section is barred, under Art. 154 of the Limitation Act (XVI of 1908), if filed more than 30 days after the date of the order rejecting the application under s. 476(7).

Notice.—According to this section, notice is to be sent to the parties concerned. The court should issue notices to both the parties concerned in the matter(8). In an appeal against a refusal to make a complaint the parties entitled to receive notice will be the accused persons. But if the appeal were by the person against whom a complaint has been made, the opposite party is the Crown, as in all other criminal cases, and no notice to the complainant is necessary(9).

Separate appeal.—Where four petitions were presented against four persons and the Sessions Judge passed one order directing a complaint to be preferred and four complaints were accordingly preferred, a separate appeal should be preferred by each of the accused(10).

Revision.—A refusal to exercise its own discretion and to revise the exercise of discretion by the court of the first instance, is failure to exercise jurisdiction and is revisable by the High Court(11). The High

(1) *Lal Muhammad v. D. I G Police*, 57 C 831=125 I. C. 748=34 C W, N 80=A I. R. 1730 C. 361=31 Cr L. J. 921.

10. 9. 547. 11. 7 12. 7 13. 7 14. 7 15. 7 16. 7 17. 7 18. 7 19. 7 20. 7 21. 7 22. 7 23. 7 24. 7 25. 7 26. 7 27. 7 28. 7 29. 7 30. 7 31. 7 32. 7 33. 7 34. 7 35. 7 36. 7 37. 7 38. 7 39. 7 40. 7 41. 7 42. 7 43. 7 44. 7 45. 7 46. 7 47. 7 48. 7 49. 7 50. 7 51. 7 52. 7 53. 7 54. 7 55. 7 56. 7 57. 7 58. 7 59. 7 60. 7 61. 7 62. 7 63. 7 64. 7 65. 7 66. 7 67. 7 68. 7 69. 7 70. 7 71. 7 72. 7 73. 7 74. 7 75. 7 76. 7 77. 7 78. 7 79. 7 80. 7 81. 7 82. 7 83. 7 84. 7 85. 7 86. 7 87. 7 88. 7 89. 7 90. 7 91. 7 92. 7 93. 7 94. 7 95. 7 96. 7 97. 7 98. 7 99. 7 100. 7 101. 7 102. 7 103. 7 104. 7 105. 7 106. 7 107. 7 108. 7 109. 7 110. 7 111. 7 112. 7 113. 7 114. 7 115. 7 116. 7 117. 7 118. 7 119. 7 120. 7 121. 7 122. 7 123. 7 124. 7 125. 7 126. 7 127. 7 128. 7 129. 7 130. 7 131. 7 132. 7 133. 7 134. 7 135. 7 136. 7 137. 7 138. 7 139. 7 140. 7 141. 7 142. 7 143. 7 144. 7 145. 7 146. 7 147. 7 148. 7 149. 7 150. 7 151. 7 152. 7 153. 7 154. 7 155. 7 156. 7 157. 7 158. 7 159. 7 160. 7 161. 7 162. 7 163. 7 164. 7 165. 7 166. 7 167. 7 168. 7 169. 7 170. 7 171. 7 172. 7 173. 7 174. 7 175. 7 176. 7 177. 7 178. 7 179. 7 180. 7 181. 7 182. 7 183. 7 184. 7 185. 7 186. 7 187. 7 188. 7 189. 7 190. 7 191. 7 192. 7 193. 7 194. 7 195. 7 196. 7 197. 7 198. 7 199. 7 200. 7 201. 7 202. 7 203. 7 204. 7 205. 7 206. 7 207. 7 208. 7 209. 7 210. 7 211. 7 212. 7 213. 7 214. 7 215. 7 216. 7 217. 7 218. 7 219. 7 220. 7 221. 7 222. 7 223. 7 224. 7 225. 7 226. 7 227. 7 228. 7 229. 7 230. 7 231. 7 232. 7 233. 7 234. 7 235. 7 236. 7 237. 7 238. 7 239. 7 240. 7 241. 7 242. 7 243. 7 244. 7 245. 7 246. 7 247. 7 248. 7 249. 7 250. 7 251. 7 252. 7 253. 7 254. 7 255. 7 256. 7 257. 7 258. 7 259. 7 260. 7 261. 7 262. 7 263. 7 264. 7 265. 7 266. 7 267. 7 268. 7 269. 7 270. 7 271. 7 272. 7 273. 7 274. 7 275. 7 276. 7 277. 7 278. 7 279. 7 280. 7 281. 7 282. 7 283. 7 284. 7 285. 7 286. 7 287. 7 288. 7 289. 7 290. 7 291. 7 292. 7 293. 7 294. 7 295. 7 296. 7 297. 7 298. 7 299. 7 300. 7 301. 7 302. 7 303. 7 304. 7 305. 7 306. 7 307. 7 308. 7 309. 7 310. 7 311. 7 312. 7 313. 7 314. 7 315. 7 316. 7 317. 7 318. 7 319. 7 320. 7 321. 7 322. 7 323. 7 324. 7 325. 7 326. 7 327. 7 328. 7 329. 7 330. 7 331. 7 332. 7 333. 7 334. 7 335. 7 336. 7 337. 7 338. 7 339. 7 340. 7 341. 7 342. 7 343. 7 344. 7 345. 7 346. 7 347. 7 348. 7 349. 7 350. 7 351. 7 352. 7 353. 7 354. 7 355. 7 356. 7 357. 7 358. 7 359. 7 360. 7 361. 7 362. 7 363. 7 364. 7 365. 7 366. 7 367. 7 368. 7 369. 7 370. 7 371. 7 372. 7 373. 7 374. 7 375. 7 376. 7 377. 7 378. 7 379. 7 380. 7 381. 7 382. 7 383. 7 384. 7 385. 7 386. 7 387. 7 388. 7 389. 7 390. 7 391. 7 392. 7 393. 7 394. 7 395. 7 396. 7 397. 7 398. 7 399. 7 400. 7 401. 7 402. 7 403. 7 404. 7 405. 7 406. 7 407. 7 408. 7 409. 7 410. 7 411. 7 412. 7 413. 7 414. 7 415. 7 416. 7 417. 7 418. 7 419. 7 420. 7 421. 7 422. 7 423. 7 424. 7 425. 7 426. 7 427. 7 428. 7 429. 7 430. 7 431. 7 432. 7 433. 7 434. 7 435. 7 436. 7 437. 7 438. 7 439. 7 440. 7 441. 7 442. 7 443. 7 444. 7 445. 7 446. 7 447. 7 448. 7 449. 7 450. 7 451. 7 452. 7 453. 7 454. 7 455. 7 456. 7 457. 7 458. 7 459. 7 460. 7 461. 7 462. 7 463. 7 464. 7 465. 7 466. 7 467. 7 468. 7 469. 7 470. 7 471. 7 472. 7 473. 7 474. 7 475. 7 476. 7 477. 7 478. 7 479. 7 480. 7 481. 7 482. 7 483. 7 484. 7 485. 7 486. 7 487. 7 488. 7 489. 7 490. 7 491. 7 492. 7 493. 7 494. 7 495. 7 496. 7 497. 7 498. 7 499. 7 500. 7 501. 7 502. 7 503. 7 504. 7 505. 7 506. 7 507. 7 508. 7 509. 7 510. 7 511. 7 512. 7 513. 7 514. 7 515. 7 516. 7 517. 7 518. 7 519. 7 520. 7 521. 7 522. 7 523. 7 524. 7 525. 7 526. 7 527. 7 528. 7 529. 7 530. 7 531. 7 532. 7 533. 7 534. 7 535. 7 536. 7 537. 7 538. 7 539. 7 540. 7 541. 7 542. 7 543. 7 544. 7 545. 7 546. 7 547. 7 548. 7 549. 7 550. 7 551. 7 552. 7 553. 7 554. 7 555. 7 556. 7 557. 7 558. 7 559. 7 560. 7 561. 7 562. 7 563. 7 564. 7 565. 7 566. 7 567. 7 568. 7 569. 7 570. 7 571. 7 572. 7 573. 7 574. 7 575. 7 576. 7 577. 7 578. 7 579. 7 580. 7 581. 7 582. 7 583. 7 584. 7 585. 7 586. 7 587. 7 588. 7 589. 7 590. 7 591. 7 592. 7 593. 7 594. 7 595. 7 596. 7 597. 7 598. 7 599. 7 600. 7 601. 7 602. 7 603. 7 604. 7 605. 7 606. 7

(3) *Asignacion de un % sobre el Ali*,
114 I C 812=5 O W N 882=A I R
1928 O 491=Ind. Rul (1929) O 204=4
Lock. 155

(4) *Nihal Ahmad v Ramji Das*
47 A. 359=A I R 1925 A. 620=6 L R
A. Cr. 85=87 I. C. 609=26 Cr. L. J.
1008.

105). *Sheo Prasad v. Sheo Bans Rai*,
93 I. C. 851—24 A. L. J. 268—7 I. R. A.
Cr. 80—A. I. R. 1926 A 211, *Rajani
Kanta v. Bisoomoni Daso*, 101 I. C.
456—46 C. L. J. 40—8 A. I. Cr. R. 433—
28 Cr. L. J. 840—A. I. R. 1927 C 718.

(6) *Labha Mal v. Wasara Mal*.

29 P L R 128=29 Cr L J 72-106 I.
C 581; *Fitzholmes v Emperor*, 7
Lab 77=98 I C 893=27 Cr L J 1321=28 P R 232=A J R 1927 Lab 54,
Daq Dangj v Emperor, 52 B. 104=90 Rom L R 76=29 Cr L J 315-109
I C 26=I L T 40 B 41=1923 Rom 61
=9 A I Cr H 435

(i) *Chandia Kumar v Mathuria Debina*, 52 C 1099

(8) *Sarat Chandra v. Hari Charan*,
A. I. R. 1930 C 282=51 C L J. 45=127
1 C. 265=1930 Cr. C 262

(9) *Labha Mal* v. *Wasauca Mal*,
106 I C 584=9 A I Cr R 395=29 P.
L R 128=29 Cr L J 52

(10) *Maromma*, *In re*, I R 1933 M. 48=110 I C 756=31 Cr L J. 92= (1933) M W N 100=1933 Cr. C. 157=A. I R. 1933 M 125

(11) *Jaga Bandhu v Abdul Sabhan*,
57 C 200, Cl. Emperor v. Ram Nara-
yan, 5 A. 1 Cr. R. 545.

Preliminary inquiry and procedure.—A civil court has no power to order the commitment of persons for offences under sections 471, 465 and 193 of the Penal Code without holding the preliminary inquiry required by this section(1). A Court holding an inquiry under the latter portion of this section with a view to making a commitment to the Court of Sessions is bound to follow substantially the provisions of Chapter XVIII of the Code(2). Where the Magistrate incorporated as the main grounds for committing for trial the reasons which he had given in his judgment in the civil suit, with the result that there was nothing in any way resembling a proper record in the committing Magistrate's Court, it was held that the trial was illegal, there having been no proper proceedings before the committing Magistrate, the accused must be discharged(3). Where in such circumstances the court neither examines the witnesses in the presence of the accused nor explains the charge to them, the commitment will be quashed(4).

Proceedings which may be construed as falling under this section.—An Assistant Judge before whom a witness gave a false deposition, took cognizance of the case, as a District Magistrate, under section 190 (c), on the statement in the deposition. To this course, an objection was taken that sanction was required under section 195 of the Code and that action taken by the officer as District Magistrate was not tantamount to a sanction by him as a Civil Judge. It was held that the action taken by the officer was in effect action which as a Civil Judge he was perfectly competent to take under this section as the offence was brought under his notice as a civil court in the course of a judicial proceeding. As Civil Judge, he could either transfer the case to himself as a Magistrate for inquiry or completing the inquiry as a Civil Judge, commit the accused(5).

Power to commit after taking steps under s. 476.—A civil court, after starting proceedings under section 476 and then acting under this section is in no way debarred from committing a person who seems to have committed an offence before it to the Court of Session(6). But in one case it has been held otherwise(7).

Appeal.—If an order of commitment is made by the original civil side of the High Court under section 478, an appeal against the order of commitment may be preferred to the appellate side of the High Court(8).

Revision : Power of Sessions Judge.—Though certain Magisterial powers have been given to a District Munsiff under this section, for the purpose of investigating cases of contempt of court, he still remains, while exercising those powers, a civil court and is not an inferior

(1) *Queen v Rangatoonee*, 22 W. R. Cr. 52.

(2) *Emperor v. Basha Nand*, 1 A. I. O. L. T. 602=77 I. C. 893=1923 A. 610=25 Cr. L. J. 483; *Emperor v. Babu Prasad*, 40 A. 32.

(3) *Emperor v. Basha Nand*, 1 A. I. O. L. T. 602=77 I. C. 893=1923 A. 610=25 Cr. L. J. 483.

(4) *Emperor v. Bubu Prasad*, 40 A. 32 (33).

(5) *Emperor v. Rashid Karmalli*, 5 Cr. L. J. 201=9 Bom. L. R. 212.

(6) *Emperor v. Rameshwar Lal*, 49 A. 898=103 I. O. 204=25 A. L. J. 555=L. R. 8 A. 113 Cr.=28 Cr. L. J. 668=9 A. I. Cr. R. 85=1927 A. 571.

(7) *Emperor v. Moreshwar*, Rat. Un. Cr. C. 959.

(8) *Venkatagiri Ayyar v. N. M. Firm*; 43 M. 361.

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provisions of Chapter XVIII and of Chapter XXXIII in cases where that Chapter applies, and shall be deemed to have

been omitted and the italicised words at the end of sub-section (2) have been added, by section 28 of the Criminal Law Amendment Act, XII of 1923.

Scope.—A civil or revenue court has jurisdiction to take action under this section when an offence is committed before it in any proceedings, though when the offence is only brought to its notice the court has only jurisdiction when it is brought under its notice in the course of judicial proceeding(1). A Revenue Officer conducting mutation proceedings on a disputed succession under the provisions of s. 40 of the U. P. Land Revenue Act, 1901, acts as a revenue court within the meaning of s. 48 of the said Act and has power under this Section to commit to Sessions a person who has committed an offence before him in the course of such proceedings(2). The power of a civil court to commit a case to the Sessions, is limited to cases triable exclusively by the Court of Sessions, and to such cases only when the offence charged has been committed before the civil court itself or brought under its notice(3).

Any such offence.—It has been held by the High Courts of Calcutta(4), Bombay(5) and Allahabad(6) that the words "any such offence," in this section mean an offence referred to in s. 195, and not an offence qualified by the circumstances under which it is committed, that is, as described in cl. (c) of sub-section (1) of s. 195 by a party to any proceeding in any court, in respect of a document given in evidence in such proceeding. On the other hand, it has been held by the High Court of Madras that the words, "any such offence" in this section, relate to offences referred to in s. 195, and such of those offences as fall under ss. 403 and 471, Penal Code, must have been committed by a party to any proceeding in any court in respect of "a document given in evidence in such proceeding"(7). The former is no longer correct. "The recent amendments in sections 195 and 476 have resulted in connecting the two sections more closely together. Section 476 gives the court power with respect to any offence referred to in section 195. The offence referred to in section 195 (c) is not merely an offence under certain sections, but such an offence when committed by a party to the proceeding(8). This section must also be regarded as supplementary to s. 195.

(1) *Lachhman Prasad v. Emperor*, 124 I. C. 364—6 O. W. N. 953—A. I. R. 1930 O. 58—Ind. Rul. (1930) O. 220—31 Cr. L. J. 679—5 Luck 435—(1930) Cr. Cas. 154—3 Cr. Lawyer Oudh, 5.

(2) *Ibid*

(3) *Imperatrix v. Popat Nathu*, 4 B. 287; *Girwar v. Emperor*, 9 Cr. L. J. 219—1 I. C. 306—6 A. L. J. 392

(4) *Akhil Chandra v. Empress*, 22

C. 1004

(5) *In re Denji*, 18 B. 581.

(6) *Emperor v. Khushali Ram* 40 A. 116.

(7) *Aldul Khadar v. Meera Sahab*, 15 M. 224—2 M. L. J. 146.

(8) *Per Brown, J.*, in *Grusamy v. Ebrahim*, 2 Rang. 374, (381, 382)—26 Cr. L. J. 225.

in the section being those punishable under sections 175, 178, 179 and 180 of the Indian Penal Code. This section empowers a Magistrate to deal with the accused only when he is shown to have committed one of the offences enumerated in the section(1). The procedure prescribed by this section for punishing a contempt committed *in facie curiae* is of a summary character, and the court taking action under this section is, therefore required to record certain particulars mentioned in the next section. These particulars, if properly recorded would provide a safeguard against an abuse of the powers vested in the court and enable the appellate court to decide whether there was any material to warrant the conviction(2).

Offence described in s. 175, I.P.C.—The intentional non production of a document by a person legally bound to produce it is an offence under s. 175 of the Indian Penal Code(3). A person called upon by a Sub-Registrar to produce an original document, which was registered in his office, to enable him to compare it with the copy of the deed in Registration Office Register, which, it was suspected was tampered with, is not legally bound to produce it, and he cannot on his failure to do so, be convicted under s. 175(4). Non-production of the document by the accused does not amount to an offence under section 175(5). The omission to produce or deliver up a document must be intentional otherwise there is no liability to punishment under s. 175(6).

Offence described in s. 178, I. P. C.—Section 178, I.P.C., makes punishable any person who refuses to bind himself by an oath to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself. A mere omission does not amount to a refusal, which signifies a positive non-compliance with demand made(7). The refusal to take an oath is regarded in law as contempt of court for which this section provides with the summary remedy of punishing the recalcitrant witness on the spot. As, however, the repetition of the *Kalma* is not in accordance with the form prescribed by the Chief Court under the authority of section 7 of the Oaths Act, 1873, the conviction of a Muhammadan witness under section 178 of the Penal Code for not repeating the *Kalma* is illegal(8).

Offence described in s. 179 I. P. C.—Section 179, I. P. C., refers to what is a refusal to give evidence. Where a witness on being asked the name of his paternal grandfather replies that he does not remember it, it is not a refusal to answer the question, and the witness cannot be

(1) *In re Davuluri Veerajya*, 5 M. L. T. 286.

(2) *Dalip Singh v. Crown*, 2 Lah. 803=4 U.P.L.R. (Lah) 9=64 I. C. 377=23 Cr. L. J. 9=24 P. L. R. 1922.

(3) *In re Prem Chand*, 12 B. 63; *Secus*, where a summons is issued to a junior member of a joint Hindu family carrying on business as a partnership to attend in court and bring his *Bahi Khata*, the summons not specifying what *Bahi Khata*, was required; *Em-*

press v. Salig Ram, (1890) A. W. N. 171.

(4) *Asmatullah v. Emperor*, 2 O. L. J. 821=3 Cr. L. J. 114.

(5) *Ishwar Chandra v. Emperor*, 12 O. W. N. 1016=8 Cr. L. J. 224=8 O. L. J. 320; *Damri Ram v. Emperor*, 19 Cr. L. J. 216=13 I. C. 793=4 Pat. L. W. 65.

(6) *In re Prem Chand*, 12 B. 63.

(7) *Nelson's I. P. C.*, p. 300.

(8) *Bhai Khan v. Emperor*, 20 P. R. 1902 Cr.=47 P. L. R. 1902.

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criminal court within the meaning of s. 435. He is not, therefore, amenable, to the jurisdiction of the Sessions Judge. The Sessions Judge, therefore, has no jurisdiction to revise his proceedings(1).

Power of District Magistrate—Where a Revenue Officer passes no order under s. 476 either making a complaint or refusing to make a complaint but merely refuses to commit a person to the Sessions under this section, a District Magistrate has no jurisdiction to revise his order and commit the person to the Sessions(2).

479. When any such commitment is made by a

Procedure of civil or revenue court in such cases

civil or revenue court, the court shall send the charge with the order of commitment and the record of the case to the Presi-

dency Magistrate, District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session as the case may be together with the witnesses for the prosecution and defence.

480. (1) When any such offence as is described in

Procedure in certain cases of contempt.

section 175, section 178, section 179, section 180, or section 223 of the Indian

Penal Code is committed in the view or presence of any civil, criminal or revenue court, the court may cause the offender * * * to be detained in custody and at any time before the rising of the court on the same day, may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not, exceeding two hundred rupees, and, in default of payment to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) Nothing in section 29-A or in Chapter XXXIII shall be deemed to apply to proceedings under this section.

Amendment.—This section has been amended by the Criminal Law Amendment Act (XII of 1923). In sub-section (1) the words "whether he is an European British subject or not which occurred after the word "offender" have been omitted and in sub-section (2) the words and figures "section 29 A or in Chapter XXXIII" have been substituted for the words and figures "section 443 or 444".

Scope—This section gives an exceptional jurisdiction to a court to try a case of contempt of court, which may be otherwise dealt with under s. 223 of the Indian Penal Code. Other allied offences described

(1) *Ramachandra v Subbramania*. 5 M. L. J. 226.

(2) *Lachhman Prasad v. Emperor*.

124 I C 364=6 O. W. N 953=5 Luck 435=A. I. R. 1930 O. 15=Ind Kul 1930 O. 220=31 Cr. L. J. 679=1930 Cr C. 154

proceedings, under section 228, Indian Penal Code, even if the expression was actually overheard by the presiding officer(1).

Contempt of court.—There is no mention in s. 228, I. P. C., of "contempt of court"(2). But it is said that any act which interferes with the operation of the court itself, while engaged in the trial of cases, or which renders the court less able properly and with dignity to try cases, is a contempt of court(3). That use of vulgar language for purposes of emphasis does not constitute contempt of court(4). Nor is the mere fact that a person walked with creaking shoes on his feet near the court room a wilful act of contempt so as to be punishable under the section(5). Nor can a defendant, who, when examined, as a witness before a Magistrate, made certain statements which he afterwards retracted, be held guilty of a contempt of court(6). But an accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box, commits an offence under s. 228 Indian Penal Code(7). And so also a person who bids at a sale in execution of a decree knowing that he cannot deposit the earnest money(8). Prevarication by a witness may, though it does not necessarily, amount to contempt of court(9). But leaving court when ordered to remain or making signs from outside to a prisoner on his trial(10) or absence from court in disobedience to a summons(11) or listening to the evidence, having been directed to go away until required as a witness(12) or the walking out of court by a party when asked if he is going to call witness(13) are not offences under this section. An irrelevant question put to a witness in cross-examination, cannot be considered as an insult to the court; though a persistence in such irrelevant and vexatious questions after warning might amount to a contempt(14). But the use of objectionable or defamatory expressions in a petition presented in the court cannot be regarded as a contempt, justifying immediate action under s. 228 Indian Penal Code(15). The use of words distinctly implying that the court had acted with *zulm*, i.e., intentional oppression and the question put mockingly, whether this *zulm* was to be applied to Muhammadans as well as to the Hindus, being an obvious insinuation that the Magistrate was not acting impartially, amounts to an intentional insult to the Court, punishable under this section and s. 228 I. P. C.(16).

(1) *Jit Singh v. Emperor*, 15 I. O. 983=23 P. W. R. 1912 Cr.=13 Cr. L. J. 587.

(2) *Manghai Ram v. Emperor*, 20 Cr. L. J. 777=53 I. O. 617.

(3) See a learned article on "Contempt of Court Criminal and Civil" in 7 Cr. L. J. at p. 63 (Jour.)

(4) 1 Weir, 216.

(5) *In re Davuluri Veerayya*, 1 I. O. 560=5 M. L. T. 286.

(6) 1 Weir, 216.

(7) *Allu v. Emperor*, 45 A. 272=21 A. L. J. 72=21 Cr. L. J. 756=74 I. C. 260=(1913) A. 193.

(8) *In re Aloshesh Chunder*, (1861)

W. R. Mss. 3.

(9) *Devi v. Emperor*, 10 P. W. R. 100.

(10) 1 Weir 215.

(11) *Ibid*

(12) 1 Weir, 217.

(13) 1 Weir, 218.

(14) *Azeemoola v. Crown*, 41 P. R. 1867 Cr.

(15) *Crown v. Wahid Baksh*, 197 P. L. R. 1903.

(16) *Emperor v. Salig Ram*, 16 P. R. 1897 Cr.

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proceeded against under s. 179(1). A witness cannot be punished for not answering a question which he was not legally bound to answer(2). But a witness who persists in saying "He named no one" and refuses to give any further answer renders himself liable to punishment under s. 179, I.P.C.(3). Section 179, I. P. C. has nothing whatever to do with the conduct of accused persons in court. An accused person is not bound to answer any question put to him at all and can if he likes, decline to plead(4).

Offence described in s. 180, I. P. C.—A refusal to sign a deposition is an offence under s. 180 of the Indian Penal Code. A person under the legal obligation to sign any statement made by him, commits an offence if he refuses to sign it(5). There is no law which obliges a witness in a civil or a revenue case to subscribe to his statement and a witness cannot be convicted of contempt of court for refusing to sign such a deposition(6). And even when a statement is required to be signed all the preliminaries such as the reading over of the deposition and the like must be strictly complied with before the witness can be held guilty of an offence under this section(7).

Offence described in s. 228, I. P. C.—Section 228, I. P. C., prescribes punishment for contempt of court. The object which a court has in view in punishing for contempt of court is the protection of the public from the evil which will result if their faith in the authority and justice of tribunals of the land were impaired(8). But in cases coming under this section the court is both prosecutor and Judge and so the powers should be used only in exceptional cases. Courts taking action under this section ought not to give room for the impression that they are unduly sensitive(9). A Judicial officer is no doubt fully entitled to maintain the dignity of the court. But he should not be too sensitive and too ready to take offence where none is intended(10). In order to bring a case within s. 228, Penal Code, and this section it must be shown that an accused intentionally offered an insult to the court(11). A coarse expression used by a litigant but not addressed to the court can scarcely be treated as an intentional insult to the court and an interruption of its

(1) *Kallu v. Emperor*, 92 I. C. 428—A. I. R. (1926) Lah. 240—27 Cr. L. J. 252.

(2) *In re Ganesh Narain*, 13 B. 600; *Empress v. Hars Lakshman*, 10 B. 185; *Cheds Lal v. Emperor*, 11 O. I. J. 358—81 I. C. 951—10 O. & A. I. R. 144—25 Cr. L. J. 1127—81 I. C. 951.

(3) *Har Narain v. Emperor*, 81 I. C. 706—20 A. L. J. 1100—14 Cr. L. J. 14 Cr. 26—26 Cr. L. J. 353.

(4) *In re Thurumala Reddi*, 77 I. C. 422—46 M. L. J. 40—1924 M. W. N. 141—19 L. W. 292—25 Cr. L. J. 374—47 M. 806.

(5) *Emperor v. Fateh Ali*, 6 P. R. 1912 Cr.—37 P. W. R. 1912 Cr.—245 P. L. R. 1912—13 Cr. L. J. 713—16 I. C. 691.

(6) See the case cited in the last note and 6 M. H. C. R. App. XIV.

(7) *Empress v. Mabali Ram*, (1881) A. W. N. 43.

(8) *In re Satyabodha*, 23 Cr. L. J. 644—69 I. C. 81—47 B. 76—24 Bom. L. R. 928—A. I. R. (1922) B. 426, followed in *the matter of Habib*, A. I. R. (1926) Lah. 1 F. B.

(9) *In re Ramasami Goundan*, 29 M. L. J. 274—21 W. 656—20 I. C. 431—16 Cr. L. J. 610.

(10) *Parshotam Lal v. Emperor*, 93 I. C. 698—(1925) Lah. 210—27 Cr. L. J. 474.

(11) *Chhaganlal v. Emperor*, A. I. R. 1933 B. 418—35 Bom. L. E. 1025.

distinction in this respect between Presidency and non-Presidency High Courts(1).

In the view or presence of court.—The summary power conferred by this section only extends to offences in the nature of contempt, committed in the view or presence of the court. It may also extend to contempts committed in the precincts or offices of the court, but it does not extend to contempts committed outside the court(2). It will be observed that in the case of a court other than the High Court the power of the court to punish is confined only to contempts committed in its view or presence. It cannot punish for contempts not so committed(3). But the High Courts possess plenary powers of punishing contempts whether committed in its presence or otherwise(4). The use of objectionable or defamatory expressions in a petition presented to the court cannot be regarded as a contempt, justifying immediate action under s. 228, I. P. C., and this section(5).

Contempt shown to the Magistrate who was not at the time engaged in a judicial proceeding.—Where a Magistrate was conducting merely an inquiry into a case of a breach of the peace in order to ascertain whether he should make a report to his official superior, and possibly to satisfy himself whether he ought to act under s. 108, Cr. P. Code, he could not be considered to be exercising any powers conferred by the Code or conducting any proceeding in the course of which evidence might be legally taken. Therefore, a person behaving insolently towards him in such proceedings could not be proceeded against under this section(6). A *Tahsildar* or a *Naib-Tahsildar* has to perform various miscellaneous duties, most of which are of a non-judicial character and the mere fact that on a particular day he has to try a case does not necessarily lead to the conclusion that he is doing judicial work during the whole of that day. Where, therefore, in a case of a conviction under this section, all that appeared from the record was that the court (a *Naib-Tahsildar*) was engaged in conversation with two persons who were sitting in his room, it was held that the accused could not be summarily punished under this section, as there was nothing to show that the *Naib-Tahsildar* was then sitting in some stage of a judicial proceeding(7).

At any time before the rising of the court.—The provisions of

the High Court, 10 C. 109; *In the*

In the matter of Shashi Bhushen, 34 I. A. 41=29 A 95; *In the matter of Halib*, 6 Lab. 528; *In the matter of Muslim Outlook*, 103 I. C. 775; *Hadi Husain v. Nasir-ud-Din*, 48 A. 711=24 A. I. J. 849=A. I. R. (1926) A. 623=97 I. C. 108; *In re Cloridge*, 14 Bom. L.R. 231; *Weston v. Editor, Bengalee*, 15 C. W. N. 771; *In re Satyabodha*, 24 Bom. L. R. 928; *In re Banks*, 26 C. L. J. 401.

189 A. C.

(3) *Empress v. Sheshayya*, 13 M. 21.

(4) *Surendra Nath Banerjee v. The Chief Justice and the Judges of the High Court*, 10 C. 103;

(5) *Crown v. Wahid Baksh*, 137 P. L. R. 1903.

(6) 2 Welr. 605

(7) *Dalip Singh v. Crown*, 2 Lab. 303 (313)=23 Cr. L. J. 9.

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Latitude to member of Bar.—The law allows same latitude to a member of the Bar acting *bona-fide* in the discharge of his professional duty, so long as his conduct is not so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the court(1). A pleader who presses a court to put a question which the court considers improper, and insists on a note being made of his request, is not necessarily guilty of an offence under this section(2). Where the court thinks the question inadmissible or the objection untenable, there ought to be a spirit to give and take between the Bench and the Bar in such matters and every little persistence on the part of a pleader should not be turned into an occasion for a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the court(3). Where an advocate moved the Judicial Commissioner to take action in the matter of a complaint which he brought against a first class Magistrate, for allowing one Court Inspector to use various insulting expressions and thus annoy and interrupt him while conducting the defence in a criminal case and immediately after, a summons was issued to him by the Deputy Commissioner charging him under this section the Judicial Commissioner transferred the case to his own file, and, after hearing the evidence, held, there was no proper justification for the institution of criminal proceedings against the advocate and that there was no intentional interruption of the Magistrate's proceedings(4).

Latitude to litigant.—The law allows some latitude even to a litigant making a protest against the proceedings of the court; provided that his act is compatible with due respect for its lawful authority and does not indicate an intention to insult the court or obstruct its business(5). The chief ingredient in the offence contemplated by this section is intention of the offender. Where, therefore, the charge against the accused was that he gave a push to the witness whom he wanted to cross-examine and who was going to walk out of the court, it was held that his behaviour may have been and probably it was, objectionable but it could not be said that he pushed or detained the witness with the intention of insulting or causing any interruption to the Magistrate when he only told him not to go as he had to cross-examine him(6). But a witness cannot with impunity persist in refusing to answer any question put to him and thus defy the authority of the court(7).

Jurisdiction of High Court.—The High Court has jurisdiction to proceed summarily in cases of contempt of its authority(8). There is no

(1) *In re Dattaraya*, 6 Bom. L. R. 511.

Oudh

(5) *Gopi Chand v Crown*, 14 P. R. 1918 Cr. at p. 31 = 16 I. C. 36 = 21 P. W. R. 1918 Cr. = 19 Cr. L. J. 675.

(6) *Pohu Ram v. Emperor*, 1213 Lab. 88 = 81 I. C. 76 = 25 Cr. L. J. 553.

(7) *Gopi Chand v Crown*, 14 P. R. 1918 at p. 31. *Jit Singh v. Emperor*, 15 I. C. 953 = 23 P. W. R. 1912 Cr. = 13 Cr. L. J. 567.

(8) *Surendra Nath Banerjee v. The Chief Justice and the Judges of*

Chand v Crown, 14 P. R. 1918 at p. 34.

(3) *In re Dattaraya*, 6 Bom. L. R. 511 = 1 Cr. L. J. 612.

(4) *Empress v. Boyle*, S. C. 186 Cr. P. Q. = 107

Surendra Nath Banerji, In re(1), it was held that the directions contained in s. 481 are mandatory and the omission to record the particulars mentioned in section 481 is fatal to such proceedings: No person can be punished for contempt of court, which is a criminal offence unless the special offence charged against him is specifically stated and an opportunity is given him of answering it. All that the expression 'statement' (if any) of the offenders in this section indicates is, that the court cannot compel the accused to make a statement but it does not mean that the court should not give him an opportunity of making the statement: A conviction under section 228 of the Penal Code without giving the accused person an opportunity of making such statement as required by this section, is illegal(2). A criminal court inflicting a fine for contempt of court should specifically record its reasons, and the facts constituting the contempt with any statement the offender may make as well as the finding and the sentence(3).

Sub-section (2): Nature and stage of judicial proceedings in which the court interrupted or insulted was sitting.—In the case of proceedings for contempt of court under s. 228, Penal Code, the record must show the nature and the stage of the judicial proceedings in which the court interrupted or insulted was sitting and the nature of the interruption or insult, and omission to set forth the particulars as required by s. 481, cl. (2) is not merely an irregularity which could be corrected by the application of s. 537 but is fatal to the proceedings(4). Where, therefore, in a case of a conviction under section 480, all that appeared from the record was that the court (a Tahsildar) was at a certain village for the purpose of attesting transfers in his capacity as revenue court and that the accused and another lambar-dar, on being told by the Tahsildar that they had rendered no assistance, gave him insolent replies, but it did not appear that at the time of the alleged insult the Tahsildar was engaged in any particular proceedings under section 40 of the Land Revenue Act, 1871, or the rules there-under applicable to him, it was held that though the conduct of the accused was insolent, still they could not be summarily punished for contempt under section 480, as there was nothing to show that the Tahsildar was then sitting in some stage of a judicial proceeding which is the gravamen of the offence(5). Where a person making a noise in court is charged with an offence under section 228 of the Penal Code, the record convicting him must show the stage of judicial proceeding interrupted and the evidence must establish that such interruption was intentional, as such vital irregularities in procedure are not

(1) 10 C. W. N. 1062=4 Cr. L. J. 210.

(2) *Krishna Chandra v. Emperor*, 74 I. C. 512=37 C. L. J. 535=1923 C. 562=24 Cr. L. J. 793; *Pohu Ram v. Emperor*, 81 I. C. 76=1923 L. 88=25 Cr. L. J. 589.

(3) *Re Panchanada*, 4 M. H. C. R. 229; *Pohu Ram v. Emperor*, 81 I. C. 76=1923 L. 89=25 Cr. L. J. 589; see *Arumugam v. Emperor*, A. I. R. 1928 Rang. 280.

(4) *Ram Lal v. Emperor*, 134 I. C. 684=14 N. L. J. 106=32 Cr. L. J. 1221=Ind. Rul. (1931) Nag. 172=A. I. R. 1931 Nag. 193=(1931) Cr. Cas. 831; *In re Kukali Narasa*, 25 I. C. 461=15 Cr. L. J. 621; *Jathmal v. Emperor*, 111 I. C. 464=A. I. R. 1928 Lab. 857=29 Cr. L. J. 880=29 P. L. R. 653=11 A. I. Cr. R. 78.

(5) *Khushal Singh v. Empress*, 36 P. R. 1886 Cr.

this section should be applied then and there, at any rate before the rising of the court in whose view or presence a contempt has been committed. Therefore, where a Magistrate in whose presence contempt was committed took cognizance of the offence immediately, but, in order to give the accused opportunity of showing cause, postponed his final order for some days, it was held that he should have directed the detention of the accused, and dealt with the matter at once or before his rising(1). But the power of the court to punish for contempt is not lost simply because the court has risen for a short time in the middle of the day(2).

Punishment—Where the court which deals with the offence of contempt of court is the court in which the contempt occurred, it cannot pass the sentence prescribed by s. 228, Penal Code, but should under this section, limit the punishment to Rs. 200 with imprisonment in default for 30 days(3). Where the court thinks the penalty prescribed by this section to be insufficient; it ought to refer the case under s. 482 to some competent Magistrate(4). A substantive sentence of imprisonment cannot be passed under this section(5).

Appeal.—An appeal lies against an order of the Sessions Court imposing a fine upon a witness under this section for intentional insult to the Sessions Judge sitting in a stage of judicial proceeding(6). A Sessions Judge cannot decline to interfere on appeal merely because in his opinion "the matter is a mere trifle." He is bound to hear the appeal and come to a finding whether the conviction is legal or illegal(7).

481. (1) In every such case the court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(2) If the offence is under section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the court interrupted or insulted was sitting, and the nature of the interruption or insult.

Record.—A court taking action under section 480 is required to record certain particulars mentioned in this section and *inter alia* must record the facts constituting the offence, and the record must also show the nature of the interruption or insult attributed to the accused. When the guilt or innocence of a person depends upon the exact words used by him, it is obviously the duty of the Magistrate to record them with a reasonable degree of precision, and his omission to record the nature of the insult constitutes a grave defect of procedure(8). In

(1) *Empress v Palambor*, 11 A 361.

(2) *Emperor v. Vaik Rao*, 46 B 973 (1979)—24 Bom L R 386.

(3) 2 Welr. 603.

(4) *Buham Khan, In re*, 10 W R. Cr 47; 6 M H O R. App. 16.

(5) *Buham Khan, In re*. 10 W. R Cr 47.

(6) *In re Chappu Menon*, 4 M. H. C R 146.

(7) *Emperor v Jirachram*, Rat. Un. Cr C. 978.

(8) *Dalip Singh v. Crouch*, 2 Lah. 308—23 Cr L J. 9—64 I. C 377—23 P. L R. 65.

being recorded was improper(1).

483. When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1908, shall be deemed to be a civil court within the meaning of sections 480 and 482.

When Registrar or Sub-Registrar to be deemed a civil court within ss. 480 and 482

Power to make Registrar or Sub-Registrar a civil court.—Under this section the Local Government may constitute a Registrar or a Sub-Registrar a court for the purposes of sections 480 and 482. But a Registrar or a Sub-Registrar who has thus been constituted a court is not to be considered a court for ordinary purposes(2). It is difficult to lay it down that by virtue of the Code, the Sub-Registrar is a court for the purposes of sections 480 and 482, and this section appears to leave the matter to the directions of the Local Government, which in Bengal has made no direction as regards the Registrar or the Sub-Registrar. The result is that offence under s. 228, I. P. C., if committed before Sub-Registrar, cannot be dealt with under sections 480 and 482 in the first instance by the court in which the offence was committed. There is grave difficulty in saying that such an offence can be dealt with outside the provision made in section 480 or 482(3).

484. When any court has under section 480 or section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such court, or on apology being made to its satisfaction.

Discharge of offender on submission or apology.

Discharge on submission or apology.—Too much notice should not be taken of the sudden lapse, during a moment of excitement into language which is unfortunately too common among the lower class of rustics and is not meant to be taken seriously. Where a litigant is detained and adopts a submissive attitude when brought before the court later after the excitement has worn off, a due admonition or a petty fine at the most is sufficient for preservation of the order(4). A pleader was tried for contempt of court for having used certain words derogatory to the position of the presiding officer. He, however, gave assurance that the words were not meant for the court. It was held that the pleader's assurance should be taken to be sufficient that the words in question had no reference to the court(5).

(1) 2 Weir. 604.

(2) *Empress v. Tulja*, 12 B. 86 (42).

(3) *Probbhat Chandra v. Emperor*, 57 C. 1007=125 I. C. 853=34 C. W. N. 66=A. I. R. 1930 C. 366=31 Cr. L. J.

942=Ind. Rul. (1930) C. 829; see *In re Sardari Lal*, 13 B. L. R. 40 App.

(4) *Jit Singh v. Crown*, 23 P. W. R. 1912 Cr.=15 I. C. 963=13 Cr. L. J. 567.

(5) *Ram Bali v. Emperor*, 14 Cr. L. J. 687=21 I. C. 1007=11 A. L. J. 955.

cured by section 537 of the Code(1).

482. (1) If the court in any case considers that a person accused of any of the offences referred to in section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such court is for any other reason of opinion that the case should not be disposed of under section 480, such court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

Scope.—This section is confined to a case where the court against whom the offence is committed has applied its mind on the question to decide if a fine of Rs. 200 will not be adequate(2). The necessity for commitment to another Magistrate arises only where the court thinks imprisonment without the option of fine, or a fine of more than 200 rupees, demanded by the circumstances of the case(3). If a court considers a substantive sentence of imprisonment necessary it should record a statement of the facts constituting the contempt and the statement of

A court
the same

case where
a subordinate Magistrate was insulted in the course of a trial by him and the Sub Magistrate proceeded to act under this section, but was unable, owing to the offender having left the court house, to record any statement from the latter explanatory of his conduct, it was held that the dismissal of the case on the ground of no such explanatory statement

(1) *In re Kuloti Narasa*, 25 I. C. 629=15 Cr. L. J. 621.

482 do not apply to a village Munsiff, 18 M. 181.

(3) 6 M. H. C. R. App XVI; 10 W. R. Cr. 47.

(4) *Rulton v. Empress*, 11 W. R. Cr. 49; *Prathal Chandra v. Emperor*, 125 I. C. 633 (857).

(5) *Dipau Chandra v. Emperor*, 35 C. 161=7 C. L. J. 63=7 Cr. L. J. 96.

decrees or orders made in such court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the appellate court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a presidency town shall lie to the High Court, and an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the Sessions Division within which such court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a civil court, be made to the court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge or, in the presidency towns to the High Court.

Court to which decrees or orders are ordinarily appealable.—The court to which decrees and orders made in the Court of a Munsiff are ordinarily appealable within the meaning of this section, is the court of the District Judge(1). The expression "ordinarily lies" denotes "lies in the majority of cases," even though, in a particular instance, the appeal may lie to another court(2).

Appeal.—An appeal lies from an order refusing an application to commit for contempt of court(3).

487. (1) Except as provided in sections * * 480 and 485, no Judge of a criminal court or Magistrate, other than a Judge of a High Court, shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

(2) Nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such court.

Amendment.—The figures 477 which preceded 480 have been omitted by Act XVIII of 1923 as s. 477 is repealed.

(1) *Ct. Fateh Chand v. Empress* 16 F. R. 1587 Cr

11 B. 438 (440)

(2) *In re Anant Ramna Chandra,*

(3) *Mohendra Lal v. Anando Coomar*, 25 C. 236.

485 If any witness or person called to produce a document or thing before a criminal court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the court requires him to produce, and does not offer any reasonable excuse for such refusal, such court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a court established by Royal Charter, shall be deemed guilty of a contempt.

Refusal by complainant to answer.—A person in the position of a complainant cannot be compelled to answer all questions put to him by the court—a question, for example, as to his motive in instituting the complaint(1). On a complainant, in a criminal case, pleading his inability to answer on the ground of headache questions put to him while he was in the witness-box the Magistrate started proceedings against him under this section and convicted him and sentenced him to a fine which was confirmed on appeal. In revision it was held that in the absence of any thing on record to show whether the questions put were questions which the witness was bound to answer the conviction was bad(2).

Refusal by witness to answer.—A witness cannot be punished for not answering a question to which he was not legally bound to answer(3). The court has no power to ask questions to a witness with the object of inculcating him. Where, therefore, the question is asked with a view to criminal proceedings being taken against the witness, the witness is not legally bound to answer it, and he cannot be punished under this section, for refusing to answer(4).

Commit him to custody.—It is advisable but not necessary, to limit the period of commitment to a fixed time(5).

486. (1) Any person sentenced by any court under section 480 or section 485 may, notwithstanding anything heretofore contained, appeal to the court to which

Appeals from convictions in contempt cases

(1) *In re Ganesh Narayan*, 13 B. 600

(2) 17 L. W. 32 n

(3) *In re Ganesh Narayan*, 13 B. 600; *Empress v. Hari Lakshman*, 10 B. 185.

(4) *Empress v. Hari Lakshman*, 10 B. 185

(5) 1 Ind. Jur. N. S. 23 (An application for release should be made to the Committing Judge)

district to administer a warning to the accused for having made a false report to that officer and the Deputy Commissioner directed prosecution of the accused under section 182, Indian Penal Code, on the ground that he was satisfied, that there was a clear case of a false report deliberately made, it was held that the Deputy Commissioner was disqualified from hearing as District Magistrate the accused's appeal from a conviction under section 182, Indian Penal Code, inasmuch as such disqualification took away his jurisdiction, and such defect could not be cured by consent or want of objection on the part of the accused(1). But whereupon a report by a Police Officer that a false information was given, the District Magistrate gave sanction to prosecute the person giving such information, it was held that s. 487 would not apply to the case and prevent the District Magistrate to hear an appeal from the conviction of such person, inasmuch as the offence was not committed before the District Magistrate or in contempt of his authority or brought to his notice as Magistrate in the course of a judicial proceeding(2).

Offence referred to in section 195.—A Magistrate cannot try the offences mentioned in s. 195 (a) committed before himself(3).

Offence is committed before himself or in contempt of his authority.—A Magistrate cannot convict a person for contempt of court committed in respect of his own authority. A commitment to another Magistrate is necessary in all such cases(4). The principle which underlies the rule is of general force, namely, that a man must not at the same time be accuser and Judge; he must not be a party or be personally interested, and he must not have prejudged the case before him(5). A Sessions Judge who has directed the trial of a pe

evidence committed in the course of a judicial nature before him cannot try the case takes cognizance of an offence, coming to his knowledge in the course of judicial proceedings pending before him is debarred from trying it himself under this section(7). Under this section a Magistrate has no jurisdiction to try a person for disobedience to his summons(8). A Magistrate, who made an order under s. 144 of the Code of Crim. Procedure, is not competent to try a person for an alleged offence under s. 188, Penal Code, the offence being an alleged breach of the order made under s. 144, Criminal Procedure Code(9). A Magistrate who makes an order under s. 133 for the removal of a nuisance, cannot himself try and convict the person to whom such order was directed and who has disobeyed it(10). It cannot be desirable that Magistrates whose lawful

(1) *Faiz Muhammad v. Emperor*, 20 I. C. 209=9 N. L. R. 81=14 Cr. L. J. 385.

(6) *Empress v. Makhdum*, 14 A. 354.

(7) *Emperor v. Kunwar Bahadur*, 23 O. C. 136.

(8) *Empress v. Veeranna*, 3 M. L. J. 241=2 Weir. 612; *Deo Saran v. Emperor*, 16 A. L. J. 432; *Emperor v. Nga Eik*, 1 U. B. R. (1892-96.) Page 53; *Empress v. Nga Pyu*, (1897-1901) 1 U. B. R. 61 (62).

(9) *Empress v. Abdulla*, 24 M. 262; *Empress v. Langadaya*, Rat. Un. Cr. Cas. 904; *Reg v. Ranchod Dayal*, 10 Bom. H. C. R. 424.

(10) *Empress v. Hira Lal*, (1883) A. W. N. 222.

U. B. R. 59.

(3) *Pahalwan Singh v. Emperor*, A. I. R. 1926 Jour. 179=98 I. C. 416.

(4) *Reg v. Atmaram*, Rat. Un. Cr. Cas. 64.

(5) *Empress v. Nga Aung Gyi*, (1897-1901) 1 U. B. R. 127.

Except as provided in ss. 480 and 485.—When the court does not take immediate cognizance of the offence under s. 480, it must proceed under s. 476, and cannot try the offence itself(1).

No Judge of a criminal court.—The prohibition in this section is a personal prohibition, the mischief to be prevented being that the same person should not decide a matter which he may have already judged(2).

Magistrate.—This term includes a Presidency Magistrate. A Presidency Magistrate has, therefore, no jurisdiction to try a case under section 188, Indian Penal Code, when the order which is alleged to have been disobeyed was an order which he had himself passed(3).

Other than a Judge of the High Court—A High Court being a superior court of record has the power of punishing summarily for contempt from the mere fact of its being a court of record. It is not a power given to it by the Criminal or Civil Procedure Code or the Penal Code(4).

Shall try any person.—It has been held by the Madras High Court that however inconsistent it may appear that a Judge should be authorized to hear in appeal a case which by reason of the offence having been committed before his court and in contempt of his authority he was precluded from trying, this does not exclude the jurisdiction of the Sessions Court in appeal(5). On the other hand it has been held by the Calcutta High Court that the word 'try' as used in this section includes the hearing of the appeal. Where, therefore, a Judge reversing the order of a Munsiff, sanctions the prosecution of a decree-holder, under s. 210 of the Penal Code he is not competent to entertain an appeal from the conviction of the decree-holder for that offence(6). Following this case it has been held by the Nagpur Court that a Sessions Judge who grants sanction for the prosecution of an accused person has no jurisdiction to hear an appeal against the conviction of that person for the offence in respect of which sanction was granted(7). The same view was taken by the Allahabad High Court in an analogous case(8). It is even held that a Judge who has directed a prosecution should not hear the appeal of the accused when convicted, even although it is not against the conviction but only against the severity of the sentence(9). Where the Magistrate of the District had procured the initiation of a number of prosecutions against the same person and one of them which had resulted in conviction came up before him in appeal, the High Court, considering that it was not altogether seemly that he should hear the appeal ordered under its transfer to the Sessions Judge(10).

Where a Forest Officer asked the Deputy Commissioner of the

(1) *Leahut Hossein v. Emperor*, 7 Cr. L. J. 103 = 7 C. L. J. 70 = 12 C. W. N. 246.
(4) *In re Bai Amrit*, 8 B. 380 (387), following *Surendra Nath Banerjee v. The Chief Justice and the Judges of the High Court*, 10 C. 109 P. C. = 10 L.

A 171.
(5) *Re Kesavaiah*, 2 Weir 607.
(6) *Madhub Chander v. Norodeep Chander*, 10 C. 121.
(7) *Krishappa v. Emperor*, 81 L. C. 201 = 1924 Nag. 51 = 25 Cr. L. J. 713.
(8) *Emperor v. Mahidum*, (1872) A. W. N. 32.
(9) *Emperor v. Huttaluce*, 2 L. B. R. 302 = 1 Cr. L. J. 1021.
(10) *Ramzan Ali v. Durpo*, 24 W. E. 68.

CHAPTER XXXVI

OF THE MAINTENANCE OF WIVES AND CHILDREN.

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate not exceeding one hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing :

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses

orders are disobeyed should, save in very exceptional circumstances, try and dispose of the charge of disobedience themselves, but, unless there has been a clear failure of justice, the High Court will not ordinarily interfere(1). Where a false charge was not preferred before a Magistrate, the offence of making it was held not to be a contempt of his own authority and he was not precluded from trying the case himself(2).

As such Judge or Magistrate.—A more curious question arises whether this section prohibits a Magistrate from trying a person for an offence referred in section 195. When the offence is alleged to have been committed in contempt of his authority not as a Magistrate but as a Civil Judge. On this point there are conflicting rulings of the High Courts. In *Queen Empress v. Sarat Chandra*(3) it was held that a Sessions Judge could try a person for an offence when as District Judge, he has under section 195 sanctioned the prosecution. The ground of the ruling was, in part at least, that as under section 472, Code of Criminal Procedure, the Sessions Judge could try an offence committed before him as Sessions Judge it would be inconsistent to hold that he could not try such an offence if committed before him as District Judge. The High Court at Bombay followed and applied this ruling in *Queen-Empress v. Raji Daji*(4) in which it was held that a Magistrate is not debarred from trying an accused person under s. 174, Indian Penal Code, for disobedience of a summons issued by him in his capacity of Mamlatdar. The contrary view was taken in *Empress v. Sukhari*(5) by the Allahabad High Court. This is well explained in the case of *Queen-Empress v. Nga Pyu*(6) in which it has been held that a Magistrate is not precluded from trying an offence referred to in section 195, Criminal Procedure Code when the offence is committed in contempt of his authority, not as a Magistrate but as a Civil Judge. This view is in accord with that taken in the following cases(7), but is opposed to that taken in the under-noted cases(8).

In the course of a judicial proceeding—A Magistrate who takes cognizance of an offence, coming to his knowledge in the course of judicial proceedings pending before him is debarred from trying it himself under this section(9). So a Magistrate, who has refused to set aside an order sanctioning prosecution on the charge of perjury, has no jurisdiction under this section, to try the case himself(10). The court before which an offence was committed, and by which the preliminary inquiry was held under section 476, should not be the court to try the case(11).

Abetment.—A Magistrate is not competent to convict a person of abetting the giving of false evidence in a judicial proceeding before himself(12).

(1) *J. R. Das v Emperor*, 1 Rang 549 (553).

(2) *Empress v Baldeo*, 3 A 222.

(3) 16 O 766

(4) 18 B 380.

(5) 2 A. 405

(6) (1887-1901) 1 U B R. 61

(7) *Empress v Gaspar D'Silva*, 6 B 479, *Emperor v Bunka Bahari*, 7

O W N 708

(8) *Anonymous*, 1 M 305, 12 W R 18 Cr, 5 M H C R 212

(9) *Emperor v Kunwar Bahadur*, 23 O. C 186

(10) *Empress v Seshadasi Ayyar*, 20 M. 353.

(11) *In re Taraprosad*, 15 W R.

Cr 83

(12) 7 M H. C. R. App xxviii.

the proceedings for maintenance is not to punish a parent for past neglect but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a claim to support(1). The intention of the Legislature is to enforce the liability of the husband of the woman and the male parent of an illegitimate child, as the person primarily responsible for their maintenance(2). The use of the word "may" shows that a Magistrate has a discretion to decide in what cases the award of maintenance may properly be made, though the discretion must be exercised judicially and reasonably and not capriciously(3).

Section not affected by personal law.—The right to maintenance conferred by the section is a statutory right, which the Legislature has framed irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife, being the existence of the conjugal relation(4). In *Luddan Sahiba v. Mirza Kamar Kudar*(5), a Muhammadan wife not entitled under the Shia law to maintenance was held entitled to it under the Code. And in *Rozario v. Ingles*(6) a married woman was held entitled under this section to claim maintenance for her illegitimate children from the putative father. The right of wife and of children to be maintained by the husband and by the actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties(7). There is no text of Hindu Law, under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance. But under this section, such illegitimate child is entitled to claim maintenance from his putative father(8). The Code, overrides the personal law where it conflicts with it(9). But the provision of a summary remedy under this section cannot, unless an Act expressly says so, take away a right conferred by Hindu Law(10).

Sub section (1): Any person having sufficient means.—A Hindu not divided from his father can be ordered to maintain his wife under this section(11). But an order of maintenance of a wife under this section cannot be passed against the father of the husband(12). Nor can the father be made jointly liable with the son(13). A man by merely becoming a Sadhu is not in law excused from maintaining his wife; but if he can prove that by reason of the vows which he has taken he is incapable of holding any property or of earning any money which will enable him to maintain his wife without incurring

(1) *Kumli v. Emperor*, 25 Cr. L. J. 1249 = L. R. 5 A 187 Cr. = 82 I. C. 257 = A. I. R. 1925 A 73; *In re Shaikh Fakr-ud-Din*, 9 B. 40.

(2) 2 Weir 619.

(3) *Pounayee v. Perya Moopan*, 18 M. L. J. 180.

(4) *In re Din Mahomed*, 5 A. 226 (231).

(5) 8 C. 736 = 11 O. L. R. 237.

(6) 18 B. 468.

(7) *Kanyadan v. Kayat Beeran*, 19 M. 461.

(8) *Lingappa v. Esudasan*, 27 M. 19; *Ghana v. Gereli*, 32 C. 479.

(9) *U Thiri v. Mapucayi*, (1922) U. B. R. 2nd Qr. 138 = 1 A. I. Cr. L. T. 265.

(10) *Natarajan v. Muthiah Chetty*, A. I. R. 1926 M. 261 = 22 L. W. 650 = (1926) M. W. N. 73 = 95 I. C. 972.

(11) *Emergen D. Mangani*, 10 M. 17.

(12) *Emergen D. Mangani*, 10 M. 17.

(13) *Emergen D. Mangani*, 10 M. 17.

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to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases :

Provided that, if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the court, the Magistrate may proceed to hear and determine the case *ex-parte*. Any order so made may be set aside for good cause shown on application made within three months from the date thereof.

(7) The court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child

Amendments explained.—The principal changes introduced by s. 131 of Cr. P. C. Amendment Act XVIII of 1923 are the following :

(1) The amount awardable as a maintenance has been raised from Rs. 50 to Rs. 100. (2) The words "without sufficient cause" have been substituted for the word "wilfully" in sub section (3). (3) A new proviso has been added to sub-sec. (3) to lay down a time limit to the enforcement of maintenance orders. (4) Sub-section (7) has been omitted in view of the amendment to s. 340 *supra* which makes the retention of this clause unnecessary. (5) Sub-sections (8) and (9) have been re-numbered as (7) and (8) and contain only mere verbal alterations.

Scope and object of the section.—This section gives effect to the natural and fundamental duty of a man to maintain his wife and children so long as they are unable to maintain themselves. Its provisions apply and are enforceable whatever may be the personal law by which the persons concerned are governed(1). The object of

(1) *Maung Tin v. Ma Honja*, 11 Ring 226, *Ludden v. Kamar Kudar*, 8 C. 795, *Venkata Krishna v. Chimmukutti*, 22 M. 216, *Boran*

Shanta v. Ma Chan, 2 Ring. 631; *Kariyadan v. Koyat Beeran*, 19 M. 461, *Lingappa v. Esudasan*, 27 M. 13.

the proceedings for maintenance is not to punish a parent for past neglect but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a claim to support(1). The intention of the Legislature is to enforce the liability of the husband of the woman and the male parent of an illegitimate child, as the person primarily responsible for their maintenance(2). The use of the word "may" shows that a Magistrate has a discretion to decide in what cases the award of maintenance may properly be made, though the discretion must be exercised judicially and reasonably and not capriciously(3).

Section not affected by personal law.—The right to maintenance conferred by the section is a statutory right, which the Legislature has framed irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife, being the existence of the conjugal relation(4). In *Luddan Sahiba v. Mirza Kamar Kudar*(5), a Muhammadan wife not entitled under the Shia law to maintenance was held entitled to it under the Code. And in *Rozario v. Ingles*(6) a married woman was held entitled under this section to claim maintenance for her illegitimate children from the putative father. The right of wife and of children to be maintained by the husband and by the actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties(7). There is no text of Hindu Law, under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance. But under this section, such illegitimate child is entitled to claim maintenance from his putative father(8). The Code, overrides the personal law where it conflicts with it(9). But the provision of a summary remedy under this section cannot, unless an Act expressly says so, take away a right conferred by Hindu Law(10).

Sub section (1): Any person having sufficient means.—A Hindu not divided from his father can be ordered to maintain his wife under this section(11). But an order of maintenance of a wife under this section cannot be passed against the father of the husband(12). Nor can the father be made jointly liable with the son(13). A man by merely becoming a Sadhu is not in law excused from maintaining his wife; but if he can prove that by reason of the vows which he has taken he is incapable of holding any property or of earning any money which will enable him to maintain his wife without incurring

(1) *Kumli v. Emperor*, 25 Cr. L. J. 1249=I. R. 5 A 187 Cr.=82 I C. 257=A. I R. 1925 A 73: *In re Shaikh Fakr-ud-Din*, 9 B. 40.

(2) 2 Weir 619.

(3) *Pounayee v. Perya Moopan*, 18 M. L. J. 150.

(4) *In re Din Mahomed*, 5 A. 226 (231).

(5) 8 C. 736=11 O L. B. 237.

(6) 18 B. 469.

(7) *Kanyadan v. Kayat Beeran*, 19 M. 461.

(8) *Lingappa v. Esudasan*, 27 M. 13; *Ghana v. Gereli*, 32 C. 479.

(9) *U Thiri v Mapuayi*, (1922) U. B. R. 2nd Qr. 138=1 A. I. Cr. L. T. 265.

(10) *Natarajan v. Muthiah Chetty*, A. I. R. 1926 M. 261=22 L. W. 650=(1926) M. W. N. 73=95 I C. 972.

(11) *Prasad v. Prasad*, 1925 17

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(13) *Crown v. Waryam Singh*, 12 P. R. 1914 Cr.=15 Cr. L. J. 577=25 L. C. 329; *Sohan v. Kartar*, 32 P. L. R. 346.

such serious consequences that no court could expect him to incur them then he cannot be said to have sufficient means to maintain his wife(1). The word "means" in this section includes a capacity to earn money; and if a man can be shown to be capable of earning money then he has the means to maintain his wife within the meaning of the section(2). The expression "means" in this section does not signify only visible means such as real property or definite employment. If a man is healthy and able bodied he must be taken to have the means to support his wife(3). Any able bodied man who is not prevented by any physical infirmity from working, should in proceedings under this section be presumed to have sufficient means to support his child as well as himself(4). The onus lies on him to show that he has not sufficient means. A mere denial by such a man himself of sufficiency of means is not conclusive proof of want of sufficient means(5). *Prima facie*, a man 26 years old must be presumed to be capable of earning money. But it is open to him to rebut that presumption by showing that in fact because of disease, accident or labour-market he is not capable of earning anything(6). So also, the mere fact that the husband is a young boy of 16 is not a ground for granting merely nominal maintenance. He must make serious endeavour to find work, and must pay sufficient maintenance to his wife(7). The fact that the husband may be of slender means does not justify absolute refusal of an order for some maintenance(8). A person who is a professional beggar is not relieved by the fact of his being such from contributing to the support of his illegitimate child(9).

Burmese Buddhist monk's liability.—A Burmese Buddhist monk is amenable to the provisions of this section, notwithstanding the fact that he has adopted the yellow robe, and become a member of the Sangha. It makes no difference whether he does or does not enter the priesthood to avoid his responsibility as a father. This rule of law is also in consonance with the principles of the *Vinaya*(10). *Ma E Shi v. Udisa*(11), in which a contrary view is expressed, must be received with caution.

Means of wife does not relieve husband—A husband, having sufficient means, is bound to maintain his wife and is not relieved of the obligation by the circumstance that the wife may have relations able and willing to maintain her(12) or that the wife has means of earning

(1) *Muni Kantivajayagi v. Bai Lalurati*, 56 B 260=34 Bom. L. R. 587=1932 Cr C 397. 1. R. 1932 Bom 285

(2) *Ibid.*

(3) *In re Kandarami*, 50 M L. J. 44 = (1926) M W N 146=27 Cr L J. 350=91 I C 862=A I. R. 1926 M 346

(4) *Me Tha v. Nga San*, 13 I C 914=1 U. B. R. (1911) 90=13 Cr L. J. 162.

(5) See the case cited in the last note and *U Thiri v. Ma Pwaga*, 72 I C 368=4 U. B. R. 138=1923 B 191=24 Cr. L. J. 368

(6) *Muni Kantivajayagi v. Bai*

Lalurati, 56 B 260=34 Bom. L. R. 587=1932 Cr C 397.

(7) *Ma Lsin v. Maung Hla Min*, 4 Bur. L. J. 258=27 Cr L. J. 725=95 I. C. 63=A. I. R. 1926 Rang. 68

(8) *Re Chockalingam*, 2 Weir 617

(9) *Kondamma v. Kondaiya*, 2 Weir 616.

(10) *Maung Tin v. Ma Hmin*, 11 Rang 226 F B., U Thiri v. Ma Pwaga, 13 I C 914=1 U. B. R. 139

(11) 24 Cr. L. J. 510=72 I. C. 974=1922 U B 15

(12) *Re Veluth Ahmed*, 2 Weir 615; *Chanda v. Rama Misar*, 16 Cr. L. J. 60=26 I. C. 672

money by her own labour(1). The proposition that a wife who has ample means of her own is not entitled to maintenance is not correct. The contention, that in Burma the earnings of a wife are the joint property of herself and her husband and that when the husband leaves the wife in the enjoyment of the whole of her earnings there is no neglect or refusal cannot be sustained(2).

Proof of sufficiency of means.—A maintenance order under this section cannot be passed against a husband or a father who has not "sufficient means" to maintain his wife or children(3). Before an order is passed under this section directing a husband to make his wife a monthly allowance it must be proved that the person ordered has sufficient means to support his wife and children(4). Whether a person has "sufficient means", or "sufficient cause" within this section must be determined upon a consideration of the circumstances disclosed in each case. The term "sufficient means" is not confined to pecuniary resources, and a mere denial by an able-bodied man of sufficiency of means is not conclusive proof of want of sufficient means(5).

Neglect or refusal to maintain.—The essential for a proceeding under this section is that the person proceeded against should have neglected or refused to maintain his wife or child unable to maintain itself. In the absence of evidence of such neglect or refusal, an order under this section cannot be justified on the mere ground that the person proceeded against is willing to maintain the applicant(6). On the other hand, once it is satisfactorily proved that a father has refused or neglected to maintain his children an offer by him to maintain them in the future is not sufficient of itself to debar a Magistrate from making an order for their maintenance under this section. Such an offer may be considered on its merits and in the light of the circumstances in which it is made(7). An order for maintenance should be granted only when the husband refuses or neglects to maintain his wife or children and that this must be proved, as a matter of fact(8). Where a husband and wife and children were living apart by mutual consent and the husband had regularly paid the wife Rs. 92 monthly for their maintenance and the wife applied under this section, and was awarded Rs. 70 for herself and Rs. 20 for each of the three children, it was held that as the husband had never refused or neglected to support his wife and children no application lay under the section and the order should be set aside(9).

Neglect or refusal by words or by conduct.—Under this section, the

(1) *Ghurbin v Gobindi*, (1887) A. W. N. 107.

(2) *Maung Son v. Ma Thet Nu*, 10 Bur. L. R. 166.

(3) *Maung Tin v. Ma Hmin*, 11 Rang. 226 (233).

(4) *Payagi v. Dudhainath*, (1882) A. W. N. 179.

(5) *Maung Tin v. Ma Honin*, 11 Rang. 226; *In re Kandasami*, 50 M. L. J. 44; *T Pillai v. Meenakshi Ammal*, 48 M. L. J. 495.

(6) *Intzar Ahmad v. Samidan*,

83 I. C. 688=10 O. and A. L. R. 323=27 O. C. 271=26 Cr. L. J. 128.

(7) *Emperor v. David Sassoon*, 49 B. 562; *Khemby Ammal v. Ranganathan*, 76 I. C. 30=25 Cr. L. J. 94=19 L. W. 530.

(8) *Harnam Singh v. Sukhi*, 1 Patiala L. R. 410; *Jagan Nath v. Koshallia Devi*, 101 I. C. 191=28 Cr. L. J. 415=1927 Lab. 430 (2).

(9) *Graham v. Graham*, 4 Bur. L. J. 11=26 Cr. L. J. 831=86 I. C. 479=A. I. R. 1925 Rang. 205.

such serious consequences that no court could expect him to incur them then he cannot be said to have sufficient means to maintain his wife(1). The word "means" in this section includes a capacity to earn money; and if a man can be shown to be capable of earning money then he has the means to maintain his wife within the meaning of the section(2). The expression "means" in this section does not signify only visible means such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife(3). Any able-bodied man who is not prevented by any physical infirmity from working, should in proceedings under this section be presumed to have sufficient means to support his child as well as himself(4). The onus lies on him to show that he has not sufficient means. A mere denial by such a man himself of sufficiency of means is not conclusive proof of want of sufficient means(5). *Prima facie*, a man 26 years old must be presumed to be capable of earning money. But it is open to him to rebut that presumption by showing that in fact because of disease, accident or labour-market he is not capable of earning anything(6). So also, the mere fact that the husband is a young boy of 16 is not a ground for granting merely nominal maintenance. He must make serious endeavour to find work, and must pay sufficient maintenance to his wife(7). The fact that the husband may be of slender means does not justify absolute refusal of an order for some maintenance(8). A person who is a professional beggar is not relieved by the fact of his being such from contributing to the support of his illegitimate child(9).

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Means of wife does not relieve husband—A husband, having sufficient means, is bound to maintain his wife and is not relieved of the obligation by the circumstance that the wife may have relations able and willing to maintain her(12) or that the wife has means of earning

(1) *Muni Kantivajayagi v. Bai Lalauati*, 50 B 260=34 Bom L R. 587=1932 Cr C 397=1. R 1932 Bom. 985=138 I. C 517=23 Cr L. J. 625=A. I. R 1932 Bom 285

(2) *Ibid*

(3) *In re Kandasami*, 50 M L. J. 44=1926 M. W. N 146=27 Cr L. J. 350=92 I. C 862=A I. R 1926 M 316

(4) *Me Tha v. Nga San*, 19 I. C. 914=1 U B R. (1911) 90=13 Cr L. J. 162.

(5) See the case cited in the last note and *U Thiri v. Ma Pwaya*, 72 I. C. 368=4 U B R. 128=1923 R 131=24 Cr. L. J. 869

(6) *Muni Kantivajayagi v. Bai*

Lilauati, 50 B 260=34 Bom L R. 587=1932 Cr C 397

(7) *Ma Lsin v. Maung Hla Min*, 4 Bur. L. J. 258=27 Cr L. J. 725=95 I. C 63=A I. R 1926 Rang. 88

(8) *Re Chockalingam*, 2 Weir 617.

(9) *Kondamma v. Kondaiya*, 2 Weir 616.

(10) *Maung Tin v. Ma Hmin*, 11 Rang 226 F B., *U Thiri v. Ma Pica Yi*, 4 U B R. 139

(11) 24 Cr. L. J. 510=72 I. C 974=1922 U B 15

(12) *Re Veluth Ahmed*, 2 Weir 615; *Chanda v. Rama Misar*, 16 Cr. L. J. 80=26 I. C. 672

amounts to illegality in the order for maintenance in the absence of a finding that the offer was not *bona fide* or the reason given by the wife for not going back to her husband was sufficient(1).

Basic principle.—In *Ma Hmin Byu v. Maung Myat Pul*(2), it was laid down that this section is based upon the proposition that there is a continuing obligation upon a father who has sufficient means to maintain his child, that he cannot contract himself out of that obligation and that the fact that the child is not in a starving condition cannot be set up as an answer to an application. The essential point is that a man is bound to feed and clothe his minor off-spring and he cannot be heard to say that the latter should help him to fulfil his obligation(3).

Settlement.—Where a settlement has been made, whether intended to be final or not the question for determination is whether that settlement now furnishes sufficient means of support. It may be that if the husband had invested the amount instead of paying it to the wife or if the wife had invested it herself it would have yielded a sufficient income to maintain for the rest of her days. But this is immaterial if in fact the money was spent or lost, and is no longer yielding a sufficient income(4). But where the father has made over certain property to the mother in consideration of her agreement to maintain the child, an order of maintenance would be rightly refused when the property still existed and furnished sufficient means for the support of the child(5).

Children in custody of mother: Neglect to sue for custody.—Where a child has left its father and has chosen to live with its mother who, since she left her husband, has been leading a life of adultery, the father cannot be directed to pay maintenance to the child. The neglect to sue for the custody of a girl who has chosen to live with her mother who is living in adultery cannot be accepted as neglect on the part of the father to maintain her(6). Where a father is entitled to the custody of his children, and the mother takes them away and does not allow them to return to him, there is no such refusal or neglect to maintain them as is contemplated by this section(7). Where a father has custody of his minor children and is maintaining them properly, the mere fact that they go and live with their mother would not make him liable to be charged for maintenance under this section, though he refuses to maintain them unless they return to his custody(8).

Claim compromised after application.—It is not open to a Magistrate in the case even of the parties, (*i.e.*, husband and wife) consenting, to make an order awarding maintenance in the contingency of a default thereafter on the part of the husband to maintain. To give jurisdiction to the Magistrate, an actual neglect or refusal to maintain must be established(9). Before passing an order under this section, a Magistrate ought to ascertain whether the husband had been called

(1) *Nur Muhammad v. Hajran*, A I. R. 1934 Lah. 946=36 P. L. R. 181.

(2) 8 Bur. L. R. 96.

(3) *Baran v. Ma Chan Tha*, 2 Rang. 682 (684-685).

(4) *Mi Le v. Nga Pa Din*, U. B. R. 1905 (Cr. P. C.) 45.

(5) *Maung Mya v. Ma Bokson*,

(1897-01) 1 U. B. R. 108.

(6) *Parvathi v. Ramasami*, 2 Weir. 630.

(7) *Re Venkatasubbaryam*, 2 Weir. 632.

(8) *Ma Shwe Hmyin v. Mg Po Chat*, 16 Cr. L. J. 217=27 I. C. 841.

(9) *Re Kuppa Mudali*, 2 Weir. 630.

neglect or refusal may be by words or by conduct. It may be express or implied(1), and when the opponent has denied the paternity of a child, that is a fact from which court may infer neglect to maintain(2). Although an actual refusal is not proved, if a father or husband does not in fact maintain his child or wife, he neglects to do so(3). But no refusal or neglect to maintain can be inferred where the husband states that he is willing to maintain his wife and the wife deposes that she is willing to live with her husband but he refuses to maintain her(4).

Offer at trial to maintain.—A mere offer by the father at the time of the trial to maintain the children will not justify the rejection of a petition, on behalf of the children for their maintenance if he had neglected to maintain them(5). An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it was right and proper that the children, if not in the custody of the father, should be handed over to him(6). A father is *prima facie* the guardian of his minor childret and entitled to their custody, as well as to that of his wife he is now under an obligation to make them a money allowance for their maintenance apart from himself, merely because he is the husband, or the father, and by refusing to do so he does not refuse to maintain them(7). But where the children are in the custody of their mother and she is their lawful guardian, they are entitled to claim maintenance from their father while living with the mother. Hence, where the parties are governed by Muhammadan Law and the mother, though divorced, is thus the natural guardian of her daughters until they attain the age of puberty, the father cannot demand the custody of the daughters as a condition precedent to maintaining them(8). A father cannot justly refuse to maintain his children on the plea that they will not live with him. If he wishes them to live with him, his obvious course is to get an order from the proper authority giving him the custody of them(9). When the husband expresses his willingness to take back the wife and child, it is the duty of the Magistrate to inquire from the wife her reasons for not going back to her husband and failure to do so

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(2) *Hidayat Khatun v. Muhammad Hayat*, 1911 C 959—C S, L R 208—14 Cr L J, 303

(3) *Empress v. Ha Hun*, 8 Bur. L R 96

(4) *Phula Khan v. Emperor*, 16 Cr. L J 86—26 I C 998—46 P W R 1914 Cr—213 P L R. 1915

(5) *Kambu Ammal v. Rangana tham*, (1924) M W N 465—76 I C 30—25 Cr L J 94—19 L W 530, *Kent v. Kent*, 49 M 821 (897)—49 M 1 J 935—26 Cr L J. 1597—A I R 1926 M 59.

(6) *Davidssassoon v. Emperor*, 49 B Cr. P O.—103

562 (565)—27 Bom L R 359—26 Cr. L J. 975—87 I C 431—A. I. R. 1925 Bom. 259.

(7) *Empress v. Ha Hun*, 8 Bur. L R 96

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(8) *Allah Rakhi v. Karam Elahi*, 14 Lah 770—A I R 1933 Lah 969—1933 Cr C 1417—35 P L R 34—147 I. C 123 *Sarfraz Begam v. Miran Bakhsh* 9 Lah 313—A I R 1929 Lah 543, *Zauhra Bi v. Muhammad Yusuf*, A I R 1930 Lah 1013; *Emperor v. Alshabai*, 6 Bom. L R 536

(9) *M. Sauc v. Emperor*, 7 I. C. 460—17 B R. 1910, Cr. P. C. 1—11 Cr. L J 493

When wife is not entitled to order for maintenance.—No order for maintenance under this section can be made where the husband and wife are living separately by mutual consent(1); or where a private arrangement has been made for her maintenance(2); or where she leaves her husband of her own accord without sufficient reason(3); or where there has been desertion by a wife of her husband for many years, coupled with adultery(4), which is accompanied with loss of caste(5).

Effect of divorce.—Under Mahomedan law, a *talak*, when it becomes irrevocable, puts an end to conjugal relationship subsisting between the parties. A divorced wife is not entitled to claim maintenance from her husband beyond the period of *iddat* from the date of an irrevocable divorce. This personal law of Mahomedans is not abrogated by this section(6). Where a Muhammadan lady applied for maintenance under this section and the husband divorced her before the court, she was held entitled to maintenance during the period of *iddat* and not after that period has expired(7). A divorced Muhammadan wife is entitled to maintenance during the period of *iddat* but not after that period has expired(8). An order for maintenance subsequent to the expiration of the *iddat* is illegal, unless pregnancy is alleged(9). An order made by a Magistrate under this section directing a Muhammadan husband to pay a sum monthly for the maintenance of his wife cannot preclude the husband from divorcing his wife. The husband is not liable to pay maintenance after the date of divorce and after that date the Magistrate's order cannot be enforced(10). But it does not become inoperative, until the expiration of the divorced wife's *iddat*(11). Where in answer to an application for enforcement of an order under this section for the maintenance of a wife the party against whom such order is subsisting pleads that he has lawfully divorced his wife and therefore the order can no longer be enforced, it is the duty of the court hearing the application to entertain and consider such plea, and, if it finds the plea established, to decline to enforce the order for any period subsequent to the date when the

(1) *In re Tricumlal*, Bat. Un. Cr. C. 870.

(2) *Jampana, In re*, 2 Weir. 648

(3) *In re Thompson*, 6 N. W. P. H. C. B. 205. It is different, however, where the husband either refuses to maintain her or turns her out or illtreats her, *Gavarishankar v. Bai Reva*, 5 Bom. L. R. 614, see also *Ralta v. Atti*, 21 P. W. R. 1914 Cr=115 P. L. R. 1914=15 Cr. L. J. 529=24 L. C. 841.

(4) *In re Shivram*, Rat. Un Cr. C.

(5) *Ponnayee v. Periya Mooppun*,
31 M. 185=7 Cr L J 346=18 M. L. J.
150=3 M L T. 269.

(6) *In re Shekhanmian*, 32 Bom. L. R. 582=126 I. G. 893=A. I. R. 1930 B. 178=31 Cr. L. J. 1110=Ind. Rul. 1930 Bom. 461=1930 Cr. C. 610; *Shah Abu Hiyas v. Ulfat Bibi*, 19 A. 50.

(7) *Mariyam v. Kadir Bakhsh*, 5

Luck 442=123 I. C 221=6 O W. N. 912
=A. I. R. 1929 O 527=31 Cr L. J.
428.

(8) See the case cited in the last note

(10) *In re Suleman Varsi*, 1 Bom. L. R. 346; *In re Din Muhammad*, 5 A. 276; *Emperor v. Shaikh Daud*, 17 N. L. R. 92

(11) *Mahomed Hosain v. Ma Pica Hmt*, 13 Bur. L. T. 43; *Maung Ba Shue v. Ma Nyun*, 4 Bur. L. T. 13 = 9 I. C. 457 = 12 Cr. L. J. 82.

upon to maintain his wife, having regard to the conditions of the society to which the parties belong(1).

Wife's right to maintenance: Proof of valid marriage and existence of marital relation necessary.—Before an order to pay maintenance to the wife as passed against the husband, a valid marriage between them should be proved(2). A woman cannot obtain a maintenance order under this section unless she can prove that she was respondent's wife according to his own personal law(3). It is only on proof of the existence of the relationship of husband and wife, that a Magistrate can make an order under this section(4). The law which governs the union of a Burmese woman with a Chinese half-caste who is a Confucian in the Chinese Customary Law, and marriage according to the requirements of that law must be proved in order to entitle the woman to maintenance under this section. The court may, however, allow the presumption of marriage from long cohabitation and repute to prevail in certain cases(5). Where a boy of 17 years of age eloped with a girl of 17 and cohabited with her without any objection being made by the girl's relatives, it was held that there was a valid marriage and the boy was liable to pay proper maintenance(6). But in a recent Burma case it has been held that long cohabitation does not become in effect a legal marriage(7). Where it is sought to establish a marriage between a Chinese Buddhist and a Burmese Buddhist woman, it must be shown that the practices the husband followed differ from those followed by all Chinese Buddhists and are the peculiar characteristic of Burmese Buddhists(8). Where a woman is pregnant by fornication with the same man who marries her the marriage is lawful and connubial intercourse is not forbidden them(9). Amongst the Jats a "Karao" marriage is valid, and as the children are entitled to inherit to their father, a woman so married is entitled to claim maintenance from her husband(10). Where the wife of a Hindu *kahar* contracts a *sagai* with another person but is not living with him, nor the dissolution of her marriage has been effected or recognised by the caste *punchayat*, her husband cannot be absolved from his liability to pay her maintenance(11).

(1) *Somree v Jitun*, 22 W. R. Cr. 80.

(2) *Manickam v Poong Aran Ammal*, A. I. R. 1934 M. 323=(1934) M. W. N. 185=1934 M. Cr. C. 36=39 L. W. 439=66 M. L. J. 548=148 I. C. 921=35 Cr. L. J. 852, *In re Gulabdas*, 16 B. 269.

(3) *Pwa Me v San Hla*, 7 L. B. R. 270; *Wa Foon v Ma Thein Tin*, 24 L. C. 572=7 Bur. L. T. 71=15 Cr. L. J. 484.

(4) *Sobhan v Shubraton* 5 C. 558=5 C. L. R. 21; *In re Din Mahomed*, 5 A. 226.

(5) *Ma U v. Mg Kyin Htat*, 4 Bur. L. J. 255=94 I. C. 608=1928 R. 82=27 Cr. L. J. 656.

(6) *Ma E Sein v Maung Hla Min*, 95 I. C. 53=4 Bur. L. J. 258=1916

Rang. 88=27 Cr. L. J. 725.

(7) *Sinhal v Ma Thein Tin*, 24 I. C. 572=7 Bur. L. T. 71=15 Cr. L. J. 484.

C. 452=3 Bur. L. T. 67=11 Cr. L. J. 654; *Tone Lan v Ma Gye*, 2 L. B. R. 95, *Wa Foon v Ma Thein Tin*, 24 I. C. 572=7 Bur. L. T. 71=15 Cr. L. J. 484.

(9) *Maung Tun v Mi Du Hlaing*, (1897-1901) 1 U. B. R. 110.

(10) *Queen v Bahadur Singh*, 4 N. W. P. H. C. R. 128; see also *Queen v Juddu*, 6 W. R. Cr. 60.

(11) *Babu Nandan v Punia*, 93 I. C. 1048=27 Cr. L. J. 550=A. I. R. 1926 A. 426=7 L. B. R. A. Cr. 104.

although it may have arrived at the age of majority(1).

Paternity.—A question of paternity under this section is governed by section 112, Evidence Act. The presumption created by section 112, Evidence Act, is not rebutted unless it is proved that there has been no opportunity for sexual intercourse between the husband and wife at any time when the child could have been begotten. If the husband has had access, adultery on the wife's part will not justify a finding that another man was the father(2). It is immaterial for the purpose of determining the liability of the father to maintain the child whether the mother has been married to the defendant or not(3). But where the question at issue is whether a certain man was the father of a certain child, it is *prima facie* improper to accept without corroboration the mere statement on oath of the mother who asserts the paternity. The kind of evidence that should be looked for as corroboration would be evidence that at or about that time the alleged father was frequenting the society of the mother and had opportunity of access to her(4). A father is liable for the maintenance of his own child whether legitimate or otherwise but not for the child of another man(5).

Legitimate children.—The father of a child born during the continuance of the form of marriage known as sambandham under the Marumakkatayim law as observed by the Nayar community in Malabar is liable to have an order made against him for its maintenance under this section(6). In case the tavazhi or tarwad has sufficient means, the offsprings of a Sammandham are not entitled to an order for maintenance against their father. Where, however, the tarwad is not in a position to maintain them without an allowance from their father, an order for maintenance may be passed against him(7). Children of a Nikah wife are legitimate and entitled to maintenance(8).

Illegitimate children.—A married woman is entitled under this section to claim maintenance for her illegitimate children from the putative father(9). Under the Hindu law as well as upon general principles the father of an illegitimate child is bound to provide for its maintenance(10). The basis of an application for the maintenance of a child irrespective of its legitimacy or illegitimacy(11). A woman may be of bad character and yet be entitled to an order for maintenance of her illegitimate child if she proves that the man against whom she

(1) *In re Todd*, 5 N. W. P. H. C. R. 237.

(2) *Nga Tim E v. M. Chon*, 2 U. B. R. (1914-1916) 23; see also *Narayana v. Bhargavi Ammu*, 25 I. W. 151 = (153-154) = 100 I. C. 128 = 52 M. L. J. 118 = 38 M. L. T. 39 = 28 Cr. L. J. 251 = A. I. R. 1927 Mad. 861.

(3) *Nur Muhammad v. Bismilla Jan*, 16 C. 781.

(4) *Vendantachari v. Marie*, 24 L. W. 409 = A. I. R. 1926 M. 1130 = 27 Cr. L. J. 1095 = 97 I. C. 359

(5) *Abdul Rahim v. Amir Begam*,

94 I. C. 354 = 27 Cr. L. J. 610 = 7 Lab. 365.

(6) *Venkata Krishna v. Chinnatti*, 22 M. 246.

(7) *In re Bharata Iyer*, 46 M. L. J. 324.

(8) *Moncerooddeen v. Ramdhan*, 18 W. B. Cr. 28.

(9) *Rozario v. Ingles*, 18 B. 408

(10) *Ghana Kanta v. Gesels*, 32 C. 479

(11) *Nur Muhammad v. Bismilla Jan*, 16 C. 781.

marriage ceased to subsist between the parties(1).

Right of children to maintenance—The obligation to maintain a child unable to maintain itself is a statutory obligation, and the father is not relieved from it by the fact that the mother refused to live with him(2). A father cannot evade the statutory obligation placed upon him by this section to maintain his child by pleading that he is a Buddhist monk(3). This section applies to the case of a father who has sufficient means to maintain his child but neglects to do so(4). It is obvious that the words "unable to maintain itself" refer to a child and not to a wife(5). The father is bound to maintain the child whatever the position of the mother may be(6).

Term "child" explained.—The word "child" in this section simply means son or daughter, and reference to age is purposely omitted. Therefore, any son or daughter is entitled to claim maintenance, whatever his or her age may be, so long as he or she is unable to maintain himself or herself(7). A boy who has become major and hence capable of earning his own livelihood, cannot legally demand maintenance from his father(8). A boy below 18 can be considered to be a child under this section, so long as he is not able to maintain himself(9). There is no limit of age placed by this section for the maintenance allowance to be awarded to a child, such maintenance should be directed to be paid until the child can maintain itself. It is a question of fact in each case as to whether a child can maintain itself or not(10). A boy can ask for maintenance from his parent so long as he is unable to earn his own living, even though that inability results from his taking an educational course, provided the said educational course is not being undergone with the object of inflicting upon the parent the burden of maintenance(11). A father is not bound to maintain a boy, who can maintain himself (by going into service or by manual labour) simply because the boy wants to stay at school and better his prospects(12). The word 'child' means a person who has not attained the age of majority. The attainment of puberty cannot be taken as the age when childhood ceases(13). A child who is deaf and dumb and unable to maintain itself, is entitled to maintenance,

(1) *Shah Abu Ilyas v. Ulfat Bibi*, 19 A. 50=(1896) A. W. N. 173; *Hason Chawa v. Ma Sen*, 2 U. B. R. (1914-1916) 53.

(2) *Maung San Hla v. Ma On Bwin*, 2 L. R. R. 46.

(3) *U. Thiri v. Ma Pua Yi*, 4 U. B. R. 138. *Maung Tin v. Ma Hunri*, 11 Rang. 226 F. B., contra *Ma E Shi v. U. Aditsa*, 72 I. C. 974-A I. R. (1922) U. B. 15=24 Cr. I. J. 510.

(4) *Ma E Shi v. U. Aditsa*, 72 I. C. 974-A. I. R. 1929 U. B. 15=24 Cr. L. J. 510. *Emperor v. David Sassoon*, 27 Bom. L. R. 359.

(5) *Maung Son v. Ma Thet Nu*, 1 Cr. L. J. 553.

(6) *Ma Thein v. Nga Po Nyun*, 7 Bur. L. T. 34=15 Cr. L. J. 278=23 I. C. 486.

(7) *Bhagat Singh v. Emperor*, 6 I. C. 960=28 P. W. R. 1910 Cr. L. J. 447.

(8) *Gangaramsa v. Vishnu*, 5 Nag. L. J. 247-A I. R. 1922 Nag. 249=65 I. C. 631=23 Cr. L. J. 167.

(9) *Shanno Devi v. Daya Ram*, A. I. R. 1933 Lah. 1026=147 I. C. 719.

(10) *Khealani v. Lagan Singh*, 22 Cr. L. J. 386=61 I. C. 64=2 Pat. L. T. 109.

(11) *Shanno Devi v. Daya Ram*, A. I. R. 1933 Lah. 1026=147 I. C. 719.

(12) *Abdul Rahim v. Ma Shewa May*, 1 A. I. Cr. L. T. 165.

(13) *Krishnaswami Ayyar v. Chandraradana*, 57 M. 565=20 I. C. 1005=(1913) M. W. N. 195=14 M. L. T. 221=25 M. L. J. 319=14 Cr. L. J. 525.

custody of his children and the mother has removed the children from the father's keeping without the consent of the latter and has also prevented the children from returning to the father no allowance can be made to the mother for the support of the children(1). A father cannot be ordered to pay maintenance allowance for a child who elects to live with its mother while the latter is living in adultery(2). He is *prima facie* guardian of a legitimate child and therefore entitled to its custody. He is not bound to maintain the child living separately(3). But the child's right to maintenance being independent of the father's right to its custody and guardianship, the Magistrate has no power, in determining questions under this Chapter, to enter into these issues(4).

Agreement between father and mother.—The obligation to maintain a child unable to maintain itself is a statutory obligation, and parties cannot contract themselves out of it. A promise, therefore, by the mother not to claim maintenance for the child in future is not a sufficient answer to an application by her or anyone else for an order for maintenance of the child against the father(5). A father cannot divest himself of his liability to maintain his child by agreement with his wife(6). But where, on a certain sum being paid, the complainant executed a document, in return, renouncing on behalf of her minor children, all future claims for maintenance, it was held that the Magistrate was not competent to pass any further order for maintenance, unless there was proof of fraud in the execution of the document, or unless it was proved that there was a valid subsequent oral agreement in supersession of the document(7). A compromise by the lawful guardian of a minor acting *bona fide* for his benefit, cannot be set aside even at his instance, except on proof of fraud, and the subsequent extravagance or misconduct of the guardian could not revive an obligation which was once lawfully satisfied(8). The agreement by the mother to accept a particular sum for maintenance for the illegitimate child is not binding on the guardian of the latter after the death of the mother, if there is nothing to show that the agreement was for the benefit of the child(9).

"Unable to maintain itself."—The words "unable to maintain itself" in this section mean inability to earn a complete livelihood such as an adult person might earn without depending on any other person(10). The rights conferred by this section are very restrictive under the provisions of the section, a father is bound to maintain his child, if the latter is not able to maintain himself. But where he is able to maintain himself, but wants to prosecute his studies in order to better his prospects, he has no right to force his father to comply with his wishes(11).

(1) *Re Venkatasubbaiyan*, 2 Weir 632.

(2) *Parvathi v. Ramaswami*, 2 Weir. 630.

(3) *Man Singh v. Dharmon*, 18 P. 1894 Cr.

(4) *Lal Das v. Nekunjo*, 4 C 374.

(5) *Ma Gyi v. Maung Pe*, 1 L. B. R. 126; *Ma Le v. Nga Pan Din*, U. B. R. (1905) 45.

(6) *Re Alla Pichai*, 2 Weir. 619.

(7) *Yerukula v. Jamuna*, 2 Weir. 681.

(8) *Parvathi v. Ramaswami*, 2 Weir. 630.

(9) *Hildephonsus v. Malone*, 18 P. R. 1893 Cr.

(10) *Baran Shanta v. Ma Chan Tha*, 2 Rang. 682.

(11) *Abdul Rahim v. Ma Shice May*, 73 I. C. 331=1023 Rang. 45=21 Cr., L. J. 590.

proceeds was the father of the child(1). When maintenance is claimed for illegitimate child, it is not enough to find, that the defendant may have been the father, but the Magistrate must be able to find that in all reasonable probability, none else could have been(2). A wife can be examined as to non access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children(3). But mere statement on oath by the mother that the respondent is the father, ought not be acted upon without some independent corroboration of it, to satisfy the court that her statement is true(4). Nor is the Magistrate justified in holding that the child is the child of the defendant on the ground of the similarity of the features and the name of the child, with those of the defendant(5).

Children in custody of mother.—A mother who has the custody of a child, and who has to maintain the child, is entitled, so long as her custody of the child and obligation to maintain it continue, to the allowance granted for the maintenance of the child(6). Where a child is in the custody of his mother and the father has not before the receipt of the summons, either asked for the custody of the child or offered to provide for him in any way, he must be held to have neglected to maintain the child; and an offer made in court to maintain the child on condition that it lives with him will not take away the Magistrate's jurisdiction to order the father to pay for the child's maintenance(7). A Mubammadan infant daughter who is living with her mother (her legal guardian) apart from her father is entitled to receive maintenance from him and cannot be deprived of it by her refusing to accept his offer to keep her with him(8). The father cannot refuse to maintain his children on the ground that they are living with their mother. If he wants to have them in his custody, he must enforce the right, if any, in the civil court(9). So long as there is no decree that the father should have the guardianship and as long as the child remains with the mother, the statutory obligation still remains(10). The father is not released from the obligation by the fact that the mother refuses to surrender the child(11). A divorced wife is, under the Muhammedan law entitled to the custody of his children; and the father is not thereby relieved of his liability to maintain them(12). But where father had custody of his children and was properly maintaining them, he was held not liable because he refused to maintain them unless they returned to his custody from their mother to whom they had gone(13). Where a father is entitled to the

(1) *Hira Lal v Sahab Jan*, 18 A 107 (108).

(2) *In re Arunachali Pillai* 2 Weir. 621.

(3) *Rozario v Ingles*, 18 B 468

(4) *Yrdantachari v Marie*. 27 Cr. L J 1095=97 I C. 350=24 L W 409=A I R 1926 M 1180

(5) *NurMuhammad v. Bismilla Jan*, 16 C 781.

(6) *Re Vithulinga Aiyar*, 2 Weir 630.

(7) *U. Gauk v Nga Po Hmu*. (1901-06) 1 U B R 39 Cr.

(8) *Sarfaraz Begam v. Miran Bakhsh*, 29 F L R 401, *Allah Rakhs v. Karam Hahs*, 14 Lab. 770

(9) *Murugesu v. Sodamma*, 8 Bur. L T 134

(10) *Nan Sato v. Maung Phone*, 18 I C 658=G L B R 127=14 Cr L J 93=6 Bur L T 51

(11) *Maung San Hla v. Ma On Bwin*, 2 L B R 46

(12) *Emperor v. Ashabas*, 6 Bom. L. R. 696, *Kariyandas v. Kayat*, 19 M. 461

(13) *Ma Shue Hynun v. Mg Po Chat*, 16 Cr. L J. 217=27 I. C. 611.

himself(1). A Magistrate of the first class may pass an order under this section, although he may not be empowered to take cognizance of offences without complaint(2). But no order can be made by a Magistrate of the second class(3). Where a duly empowered Magistrate has, in a maintenance case, gone fully into the question involved, and decided the matter, the District Magistrate is not competent to entertain the application and try it *de novo*(4). The jurisdiction in cases of maintenance is to be exercised in the district in which the person, against whom any final order that may be passed in the proceedings is to operate, has his residence at the time of making the complaint. The expression "the District Magistrate" in this section cannot mean any other District Magistrate than the Magistrate of the particular district in which the person against whom a complaint is made resides. That being the sense of the expression, it must be carried no further in the case of other expressions, "a Presidency Magistrate, or a Magistrate of the first class"(5). See notes below under sub section (8).

Order for maintenance: Conditional.—An order granting maintenance with a proviso that if the husband lives with the complainant the latter would not be entitled to any maintenance is not contemplated by law(6). An order directing the husband to take away his wife with him and maintain her, and in the event of his failing to do so or turning her out, to pay her a fixed sum for maintenance is illegal as being conditional(7). It is not open to a Magistrate in the case even of the parties, (i.e., husband and wife) consenting to make an order awarding maintenance in the contingency of a default thereafter on the part of the husband to maintain(8). An order for maintenance of a wife passed on condition that she lives in certain rooms of her husband's house is illegal(9). Nor can a Magistrate impose a condition that the wife should reside in the village of the husband(10).

Order in terms of compromise.—A Magistrate purporting to act under this section cannot assume the functions of a civil court and give judgment in accordance with a bond evidencing a compromise entered into between a husband and a wife. Where a claim for maintenance is amicably settled by the parties, the Magistrate should simply dismiss the petition, if pending before him(11). But it is not intended to be a general proposition applying to all cases in which the parties to an application under this section enter into compromise under

(1) *Sardaran v. Amir Khan*, 29 P. R. 1905 Cr.; *Venkata v. Paramma*, 11 M. 199.

(2) *In re Todd*, 5 N. W. P., H. C. R. 237.

(3) *Scmree v. Jitun Sonar*, 22 W. R. 30 Cr.

(4) *Jamote v. Gadalo*, 1 C. L. R. 89

(5) *In re Fakrudin*, 9 P. 40

(6) *Ramzan v. Sahib Bibi*, 111 I. C. 575=29 Cr. L. J. 695=A. I. R. 1929 Lab. 66

(7) *Notha Singh v. Harnam Kaur*, 6 A. I. Cr. R. 286=27 P. L. R. 462.

(8) *Re Kuppa Mudali*, 2 Weir 630.

(9) *Jowala Devi v. Jamiat Singh*, 14 P. R. 1917 Cr.=39 I. C. 496=18 Cr. L. J. 528

(10) *Basant Kaur v. Hari Singh*, 113 I. C. 67=30 Cr. L. J. 51.

(11) *Lingadu v. Lobbakka*, 2 Weir 629, *Colbert v. Colbert*, A. I. R. 1933 C. 776=37 Cr. W. N. 726=1933 Cr. C. 1397=147 I. C. 914, *Budhu Ram v. Khem Devi*, 95 I. C. 315=A. I. R. 1926 Lab. 469=27 Cr. L. J. 779; *Sham Singh v. Hakim Devi*, 127 I. C. 18=A. I. R. 1930 Lab. 524=Ind. Kul. (1930) Lab. 813=31 Cr. L. J. 1179=1930 Cr. Cas. 623.

The "educational expenses" of a child do not come within the term "maintenance" as used in this section(1). The words "unable to maintain itself" in this section relate to the absence of sufficient maturity in physical and mental development in the child rendering it in consequence unable to earn its livelihood by its own exertions and do not refer to inability through poverty or absence of means(2). But in some cases it has been held that the expression "unable to maintain" in this section is not confined to physical inability but includes also pecuniary inability(3). A child that possesses a right to maintenance from its mother's *tavazhi* is not entitled under this section to an order for maintenance against its father(4). But if the mother is not in a position to maintain them without an allowance from the father the latter is liable to pay the allowance(5). Even a grown up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means(6), as where the child is deaf and dumb(7). The law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself under this section. It is against public policy to do so(8). An order under this section for the maintenance of a girl cannot be cancelled on her marriage without proof that she has thereby become able to maintain herself and ceased to depend upon the maintenance ordered(9). A Magistrate is not justified in ordering maintenance under this section till the child attains the age of 14; the maintenance allowance should continue till the child is able to maintain himself(10). A father being bound to maintain his child who is under the age of majority, in fixing the sum payable the court should pay no regard to the fact that the child is unable to contribute towards its support by means of its own labour or work of any kind. It would be contrary to public policy to encourage child labour by holding that a boy of 11 years should contribute towards his own support when he should be in school(11).

Magistrates empowered.—Under this section, maintenance cases must be tried by the classes of officers mentioned in the section. A Magistrate cannot direct an inquiry under this section to be made by a Magistrate of a rank below the first class(12). A Magistrate having jurisdiction to determine an application under this section has no authority, either to refer it to his subordinate for inquiry or to dismiss it on his report. He is bound to investigate the matter

(1) *Kumli v. Emperor*, 821 C 257 = 25 Cr L J 1249

(2) *In re Parathy Valappil*, 21 L C 469 = 14 M L T 223 = 25 M L J 355 = (1913) M W N 997 = 14 Cr L J 597

(3) *Chantan v. Mathu*, 39 M 957, *In re Bharla Ayyar*, 77 I C 428 = 19 L W 275 = 46 M L J 324 = (1924) M W N 805 = 34 M L T 167 = 25 Cr L J 371.

(4) *Chantan v. Mathu*, 39 M 957

(5) *In re Bharata Ayyar*, 77 I C 418 = 19 L W 275 = 46 M L J 324 = (1924) M W N 805 = 34 M L T 167 = 25 Cr L J 370

(6) *Kent v. Kent*, 49 M 891 = 49 M L J 335 = 26 Cr L J 1597 = 5 A. I. Cr.

R 86 = 90 I. C 669 = A. I. R. 1926 M. 69.

(7) *In re Todd*, 5 N. W. P. H. C. R. 237.

(8) *Krishnaswami v. Chandravada*, 37 M 665

(9) *Meenatchi Ammal v. Karruppana Pillai*, 48 M 503 = 86 I C 220 = (1925) M W N 67 = 21 L W 142 = 49 M L J 183 = A. I. C. (1925) M 491 = 25 Cr L J 732

(10) *Khedani v. Lagan Singh*, 2 Pat. L T 109

(11) *Daran Shanta v. Ma Chan Tha*, 2 Rang 651

(12) *Re Cheeklingam Pillai*, 2 Weir 617.

monthly payment(1). An order for the payment of a certain sum annually for the value of a cloth is not legal. But where a razinama entered into between the parties contains an agreement to that effect the wife is entitled to ask the court to give effect to the general intention of the parties as disclosed by the razinama(2). An order for maintenance fixing the duration of the period for which it is to be paid, is unauthorized by law(3).

Amount of payment.—The amount is now raised to Rs. 100. A Magistrate can order a person to pay a monthly maintenance not exceeding Rs. 100 to each of his dependants, *vis*, wife or children. The words "in the whole" in the section do not mean that Rs. 100 is the maximum limit for all the dependants together, but mean "for all the kinds of expenses of each dependant, such as boarding, lodging, medical expenses, school-fees, etc."(4). They are intended to prevent the court from exceeding the statutory limit in the case of any particular dependant and are not intended to restrict the powers of the court to ordering a monthly allowance of Rs. 100 in respect of the maintenance of all the dependants(5). *Palmermo v. Palmermo*(6), in which a contrary view is expressed must be received with caution. Where a wife applied for maintenance for herself and her 4 children and the Magistrate ordered the husband to pay Rs. 50 (under the unamended section) for the maintenance of the wife and Rs. 10 for each child every month, it was held that the order was legal. The husband was liable to maintain his wife and each of his children, and the Magistrate might order him to pay as much as Rs. 50 for each of them(7). An order, under this section, for maintenance must be for a sum of money payable as a monthly allowance, at a rate not exceeding Rs. 50 (now Rs. 100) a month. The section does not warrant an order that the allowance be paid wholly or partially in grain or the like(8). In fixing the amount of maintenance, no luxury should be allowed but necessities of life should be considered according to the station in life of the applicant and the means of the respondent(9). In the case of a child, the allowance should be such as may suffice for its maintenance until he or she is able to maintain himself or herself(10). A Magistrate cannot under this section, make an order for maintenance at a progressively increasing rate. He may, however, under section 489, from time to time, alter the rate of monthly allowance granted under this section, as the child grows older(11). The law does not provide for payment of maintenance into a

(1) *Charadi v. Basavan*, 2 Weir. 827.

(2) *Sivabagiam v. Saminatha*, 2 Weir 634.

(6) 99 I. C. 83=28 Bom. L. R. 1209=1927 B. 46 (b)=28 Cr. L. J. 51.

(7) *Clement v. Florence*, 12 I. C. 847=4 Bur. L. T. 139=12 Cr. L. J. 583.

(8) *Emperor v. Dilsukh*, 13 I. C. 1001=19 P. R. 1911 Cr.=13 Cr. L. J. 183=52 P. W. R. 1911 Cr.

(9) *Dragon v. Dragon*, 4 Bur. L. T. 269=13 Cr. L. J. 55=13 I. C. 391.

(10) *Munglo v. Jumna*, 2 N.W. P.H. O R. 454 (455).

(11) *Upendra Nath v. Sondamini*, 12 C. 585; *In re Ramayee*, 14 M. 808=2 Weir 651.

the terms of which the husband is to pay maintenance to his wife, but only to cases in which such compromise was arrived at independently of the court(1). Where a husband has in fact neglected or refused to maintain his wife and has thus forced her to make an application under this section, his entering into a compromise to pay her a fixed monthly allowance when summoned before the court, without any attempt to rebut the wife's allegation cannot be said to annul his previous refusal to maintain her so as to take the case outside the provisions of this section, but where such compromise contemplates the passing of an order under this section an order in the terms of the compromise can properly be passed by the criminal court(2). But it is only where the compromise between the husband and wife does not cover matters outside the purview of this section that an order for maintenance can properly be passed by a criminal court. An order purporting to be based on a compromise cannot be enforced separately from and without regard to the other conditions agreed upon by the parties which conditions a criminal court has no jurisdiction to enforce(3). The mere existence of an agreement between husband and wife, which is not acted upon, does not oust jurisdiction of criminal courts to order maintenance under this section(4).

Monthly allowance.—This section only permits of the court directing a monthly payment of money. An order directing a mixed payment in kind and in cash every year is contrary to the terms of the section(5). A Magistrate is not allowed to make any other order except a monthly cash allowance. An order directing the husband to give his wife 12 maunds of grain each harvest and to provide her with a separate house is illegal(6). A Magistrate has only power under this section to pass an order for the payment of a money allowance, and cannot add to such order an alternative one for a specified quantity of grain and cotton(7). The law empowers a Magistrate only to direct payment of a monthly maintenance. An agreement between a husband and a wife whereby the husband agreed that he would furnish his wife with certain ornaments, build a house for her, deliver to her annually a certain amount of grain, and pay her a certain sum in cash is not an agreement which can be made the basis of an order under this section, and, therefore, cannot be enforced under its provision(8). The law does not allow an order for the payment of two cloths annually the payment ordered must be a

(1) *Lee v Lee*, 84 (r L. J. 744 (746) = 144 L. C. 51 = 10 O. W. N. 374 = A. I. R. 1933 Oudh 119, *Hakim Devi v Shani Singh*, 132 I. C. 851 = A. I. R. 1931 Lah. 574 = 32 Cr. L. J. 993, *Mangayamma v Appalaswami*, 60 M. L. J. 213 = 38 L. W. 405 = 131 I. C. 173 = 32 Cr. L. J. 688 = (1931) M. W. N. 327 = A. I. R. 1931 M. 185.

(2) *Lee v Lee*, 34 Cr. L. J. 744 = 144 L. C. 51 = 10 O. W. N. 374 = A. I. R. 1933 Oudh 119 = (1933) (r Cns 270 = Ind. Rul. 1933 Oudh 216.

(3) *Ram Sarandas v Damodhi A*, I. R. 1934 Lah. 204 = 36 P. I. R. 153 = 152 I. C. 916, *Pal Singh v. Nihal Kaur*, 1932 Lah. 343 = 1932 (r C. 430 =

197 I. C. 364 = 33 Cr. L. J. 488.

(4) *Saraswati Devi v. Narayan Das*, 139 I. C. 613 = 36 C. W. N. 571 = 55 C. L. J. 341 = Ind. Rul. (1932) C. 471 = 33 (r L. J. 631 = A. I. R. 1932 C. 608 = (1932) Cr. Cns 653 = 29 C. 1219.

(5) *Mukta v. Dattu*, 26 Bom. L. R. 186 = 31 I. C. 613 = 1921 D. 332 = 25 Cr. L. J. 935, *Kaluram v. Emperor*, 29 N. L. R. 284.

(6) *Atru v. Mahou*, 62 I. C. 279 = 25 Cr. L. J. 1-71.

(7) *Empress v. Chutar Singh*, 3 P. R. 1867 (r.

(8) *Uramma v. Narayya*, 6 M. 233; *Masta v. Emperor*, 21 Cr. L. J. 612 = 57 I. C. 476.

Magistrate himself(1). The expression "sufficient cause" is wider enough to include all possible considerations that may be submitted to the Magistrate and the words "sufficient cause" have been used deliberately by the legislature, with the obvious intention that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or hindered by any definite rules(2). The words "sufficient cause" are wide enough to justify the raising of a plea that the order of maintenance passed in favour of a child has become spent owing to the child having attained majority and being able to maintain itself. Consequently if the court finds on defence raised that the child has attained the age of majority and was able to maintain itself during the period for which the arrears are claimed it should refuse to grant those arrears; and it is not necessary for the defendant to make a formal application under section 489(3). A husband against whom an order has been made when adjudicated an insolvent cannot be proceeded against for failure to pay arrears due to the wife for maintenance; he being unable to pay his debts, his failure cannot be held to be a failure without sufficient cause(4). Where the order merely embodies an expression of wish by the husband that part of the money should be expended on sending the children to the schools specified, but the maintenance awarded is scarcely sufficient for the bare necessities of the children, the expression of wish cannot have any binding effect and the fact that the wife has not sent the children to the proposed school is not a "sufficient cause" for the failure of the husband to comply with the order of maintenance(5). The bare fact that civil litigation is pending is no reason for not giving effect to the order awarding maintenance under this section, so long as it is in force(6). The defendant's inability to pay is not a ground for the Magistrate's refusal to enforce the order for maintenance. If the allowance granted is too excessive, he may revise the rate of maintenance on further inquiry, and the order will take effect from the date of such inquiry(7). Where the husband is called upon to show why he had failed to comply with the order to pay his wife maintenance under sub-section (3), he can raise a plea of divorce(8). Where an application is made to a Magistrate to enforce an order for maintenance, passed under this section, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released(9).

(1) *Ibid.*; *Maung Tun v. Ma Hmin*, 11 Rang. 226 F. B.

(2) *Ibid.*

(3) *U Ba Thaung v. Ma Aye*, 10 Rang. 194=A. I. R. 1932 Rang. 94=137 I. C. 439=1932 Cr. C. 476=33 Cr. T. J. 495=18 A. I. Cr. R. 195; *Thumbuswamy Pillay v. Malone*, 18 Cr. L. J. 103=37 I. C. 311=9 L. B. R. 49=10 Bur. L. T. 209

(4) *Halfhide v. Halfhide*, 50 C. 867=25 Cr. L. J. 1089=81 I. C. 912=1924 C. 230; *cf. In re Mahomedalli*, 124 I. C. 127=31 Bom. L. R. 1366=A. I. R. 1930 B. 194=31 Cr. L. J. 609=Ind. Rul.

(1930) Bom. 255.

(5) *Birch v. Birch*, A. I. R. 1933 O. 122=9 O. W. N. 1189=141 I. C. 805=34 Cr. L. J. 238=1933 Cr. C. 273.

(6) *Mahbub Sultan v. Qutab Din*, 30 P. L. R. 740=125 I. C. 63=A. I. R. 1930 Lah. 218=31 Cr. L. J. 770=Ind.

(7) *J. 908=111 I. C. 668; Baji v. Nawab Khan*, 21 P. R. 1894 Cr.

(8) *Rangamma v. Muhammed Ali*, 10 M. 13=2 Weir 635

public treasury and an order to that effect is illegal(1). Where the original order made no specific allotment for the wife separately, it is not competent for a Magistrate to do so in enforcement of an order under section 489(2).

Sub section (2).—The maintenance allowance is payable from the date of the order or if so ordered from the date of the application for maintenance. The Magistrate has no power to make an order for payment of any sum for maintenance for any period prior to the date on which the application for maintenance is lodged(3). An order directing the payment of maintenance, with retrospective effect from a certain date is illegal(4). The High Court will not, however, interfere to set aside an order awarding maintenance from a date other than the date of the order when such order has been made by consent of the parties(5). A Magistrate is competent under this section to vary the rate of maintenance payable under a previous order under the section and to give effect to his order from the date of application(6). Where, however, a provisional order of maintenance passed by the Justices of the peace in England against a husband in favour of a wife, is confirmed by a Magistrate in British India with a variation as to rate, the order must direct maintenance to be paid only from the date of an order directing maintenance and not from any earlier period and provision must also be made for payment of future maintenance(7).

Sub-section (3) —In sub-section (3) the words "wilfully neglects" have been omitted and the words "fails without sufficient cause" have been substituted. Under the unamended section it was held that before an order for maintenance could be enforced by a sentence of imprisonment, it was necessary that it should be made out that the non-payment was the result of wilful negligence on the part of the defendant(8). By substituting the words "without sufficient cause" for the word "wilfully" in this sub-section, the legislature has removed an unnecessary restriction of the clause.

Sufficiency of cause is a matter within Magistrate's judicial discretion.—Where in proceedings in execution of a maintenance order under this section, the counter-petitioner comes into court to show cause why it should not be executed, the court is bound to consider the sufficiency of the causes, alleged by the counter petitioner and to refuse execution, if the court should be satisfied that the cause is sufficient and to grant execution if the court is not satisfied with the cause alleged(9). Whether, in the circumstances of the particular case, the cause shown is sufficient or not, must be determined judicially by the

(1) *Ghacodi v Basuvan*, 2 Weir 627

(2) *Thumbawami Pillai v Mai Lone*, 9 L B R 49=18 Cr L J 103= 87 I C 311=10 Bur L T 203.

(3) *Abdul Rahim v Amir Begum*, 7 Lah 365=27 P L R 530

(4) 2 Weir 635

(5) *Ibid*

(6) *Hira Lal v Bai Amba*, 96 I C. 336=28 Bom L R 663=1926 B 419= 27 Cr. L J 910

(7) *In re Rose Craher*. 108 I C 906 =10 A L Cr R 75=A L J. 1928 M 899 =29 Cr L J 458.

(8) *Sidheswar v Gyanada*, 21 C 291, *Bhiku v Zohuran* 25 C 291, *Prabhu v Ramu*. 25 A. 163

(9) *Theetharappa Pillai v Meenakshi Ammal*, 21 L W. 501=67 I C 105 =48 M. L J 491=26 Cr L J 953=A. L. R 1925 M. 715.

Magistrate himself(1). The expression "sufficient cause" is wider enough to include all possible considerations that may be submitted to the Magistrate and the words "sufficient cause" have been used deliberately by the legislature, with the obvious intention that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or hindered by any definite rules(2). The words "sufficient cause" are wide enough to justify the raising of a plea that the order of maintenance passed in favour of a child has become spent owing to the child having attained majority and being able to maintain itself. Consequently if the court finds on defence raised that the child has attained the age of majority and was able to maintain itself during the period for which the arrears are claimed it should refuse to grant those arrears; and it is not necessary for the defendant to make a formal application under section 489(3). A husband against whom an order has been made when adjudicated an insolvent cannot be proceeded against for failure to pay arrears due to the wife for maintenance; he being unable to pay his debts, his failure cannot be held to be a failure without sufficient cause(4). Where the order merely embodies an expression of wish by the husband that part of the money should be expended on sending the children to the schools specified, but the maintenance awarded is scarcely sufficient for the bare necessities of the children, the expression of wish cannot have any binding effect and the fact that the wife has not sent the children to the proposed school is not a "sufficient cause" for the failure of the husband to comply with the order of maintenance(5). The bare fact that civil litigation is pending is no reason for not giving effect to the order awarding maintenance under this section, so long as it is in force(6). The defendant's inability to pay is not a ground for the Magistrate's refusal to enforce the order for maintenance. If the allowance granted is too excessive, he may revise the rate of maintenance on further inquiry, and the order will take effect from the date of such inquiry(7). Where the husband is called upon to show why he had failed to comply with the order to pay his wife maintenance under sub-section (3), he can raise a plea of divorce(8). Where an application is made to a Magistrate to enforce an order for maintenance, passed under this section, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released(9).

(1) *Ibid.*; *Maung Tui v. Ma Hmin*, 11 Rang. 226 F. B.

(2) *Ibid.*

(3) *U Ba Thuang v. Ma Aye*, 10 Rang. 194=A I R 1932 Rang. 94=137 I. C. 439=1932 Cr. C 476=33 Cr. I. J. 495=18 A. I. Cr. R 195; *Thumbaruamy Pillay v. Malone*, 18 Cr. L. J. 103=37 I C 311=9 L B R. 49=10 Bur. L T. 203

(4) *Halfhide v. Halfhide*, 50 C. 867=25 Cr. L J 1088=81 I. C. 912=1924 C. 230; *Cr. In re Mahomedalli*, 121 I C. 127=31 Bom. L R 1966=A I R 1930 B. 194=31 Cr. L. J. 609=Ind. Rul.

(1930) Bom. 255.

(5) *Birch v. Birch*, A. I. R 1933 O 122=9 O W. N 1189=141 I. C. 805=34 Cr. L J. 248=1933 Cr. C. 273.

(6) *Mahub Sultan v. Qutab Din*, 30 P. L. R 740=125 I. O. 63=A I. R. 1930 Lab 213=31 Cr. L J. 770=Ind. Rul. (1930) Lab. 575=1930 Cr. C. 201.

(7) *Re Vembali*, 2 Weir 636

(8) *In re Punja Lal*, A. I. R. 1928 B. 224=30 Bom. L. R. 617=29 Cr. L. J. 908=111 I. C. 668; *Baji v. Nawab Khan*, 21 P. R. 1894 Cr.

(9) *Rangamma v. Muhammed Ali*, 10 M. 13=2 Weir 635

Death.—A claim for arrears of maintenance abates on the death of the person against whom an order under sub-section (1) has been made, and cannot be enforced thereafter against his estate(1).

Courts competent to enforce order.—An order for the recovery of arrears of maintenance may be made either by the Magistrate who passed the original order or by a Magistrate having jurisdiction in the district where the person ordered to pay maintenance has gone to reside 2). A court passing an order awarding maintenance under this section has jurisdiction to execute the same by the issue of a warrant against the person against whom the order was made even though he is beyond the jurisdiction of that court(3).

Duty of court to which application for enforcement is made.—Where a person in whose favour an order under this section has been made takes that order before a Magistrate, and the Magistrate finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance. It is no part of the duty of the Magistrate to entertain a plea by the party against whom the order is sought to be enforced to the effect that he has divorced the applicant and is therefore no longer liable to pay maintenance(4), though there is authority to the contrary also(5).

Distress warrant—This clause lays down that if the maintenance is not paid a distress warrant should be issued for the realization of the dues. It does not contemplate an order against a third party. Where, therefore, the husband against whom an order under this section had been passed defaulted in paying maintenance and thereupon the Magistrate directed a person to whom the husband had mortgaged certain properties to pay the maintenance from out of the income of the property, it was held that the order was invalid(6). Where, however, a Magistrate had directed that the amount of maintenance ordered to be paid under this section should be a charge on the joint estate of the person ordered to pay it and his brothers, and the order was not disturbed in appeal or revision, it was held that the levy of arrears due by attachment and sale of such joint estate should not be interfered with on a subsequent application for revision(7). The section apparently contemplates a separate warrant for each breach and not a cumulative warrant(8). But the Calcutta and Madras High Courts hold that the levy of accumulated arrears of maintenance by a single

(1) *Ead Ali v Lal Bibi*, 41 C. 68=20 I C 138=27 C W N. 1190=14 Cr. L J 378

(2) *Ma Thaw v Emperor*, 7 L B. R. 116=26 I C 149=15 Cr L J 701

(3) *In re Gnanambal Ammal*, 28 L W 421=55 M L J 516=111 I C 852=1928 M W N 837=1928 M 1171=29 Cr L J 932, *Queen v Kari Papayamma*, 4 M. 230=2 Weir 652

(4) *Mahbubani v Fakir Bahsh*, (1893) A. W N. 63.

(5) *In re Punja Lal*, A. I. R 1928 B. 224=30 Bom L R 617=22 Cr L J 908=111 I C 669, see *Boji v Nawab Khan*, 21 P R. 1894 Cr

(6) *Lalit Mohan v Sorojani Das*, 134 I C 1199=33 Cr L J 93=A. I. R 1931 C 644=35 C. W N 692=1931 Cr C. 844

(7) *Shivalingappa v Gurlingara*, 49 B 906=241 C 604=27 Bom L R 1363=1926 B 103=27 Cr L J 652

(8) *Emperor v. Narain*, 9 A 240

warrant and in one proceeding is not illegal(1). A Police Officer in executing a warrant to levy the amount of maintenance under this section, can break open an inner door of the house of the person against whom the order is made(2).

Second proviso.—The second proviso makes it obligatory to apply for a warrant for recovery of the amount due within one year from the date on which the amount becomes payable. Under this proviso, the court's power extends to the recovery of arrears falling due over a period of one year next before the date of application(3). As long as an order for the payment of maintenance holds good, it deserves to be enforced; and while a Magistrate may, in the exercise of his discretion, refuse to recover an accumulation of arrears, there seems to be no good reason why he should not enforce payment from the time of new application(4). An order refusing to enforce the maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period(5). No hard and fast rule can be laid down as to whether a Magistrate should grant or refuse an application for recovery of arrears of maintenance. The Magistrate should ascertain in each case under what circumstances the arrears came to accumulate and if there was no good reason why the application for recovery should not have been made with greater promptitude, whether it would be equitable and in accordance with the spirit of the Code to enforce payment of the accumulation. The Magistrate should also consider whether he should enforce payment of any part of the arrears where, in his opinion, it is not proper to enforce payment of the whole of the arrears(6).

Imprisonment.—Imprisonment cannot be awarded in anticipation of default to an order made under this section for payment of a monthly maintenance(7). Before an order for maintenance can be enforced by a sentence of imprisonment it is necessary that it should be made out that there has been negligence to pay the amount of maintenance(8).

Release on payment—The imprisonment awarded under this section is not a punishment for contempt of the court's order, nor is it an absolute sentence. It is passed only for the unpaid portion of the maintenance, or, in other words, it is owing to default of payment of the unrealized portion of the maintenance. Therefore, upon payment of the amount by the defendant, the imprisonment ought to cease(9). The contrary view taken in the under-noted case(10) is no longer tenable.

(1) *Anonymous*, 7 M. H. O. R. App. 38; *Anonymous*, 6 M. H. O. R. App. 22 = 2 Weir 637

(2) *Empress v. Baba*, Rat. Un. Cr. Cas. 431.

(3) *Kanagammal v. Pandara Nadar*, 28 Cr. L. J. 271 (272) = 50 M. 663 = 100 I. C. 230 = 25 L. W. 148 = 52 M. L. J. 176 = 1927 M. W. N. 111 = A. J. R. 1927 M. 376.

(4) *Mi Kaing v. Nga Po Min*, 4 I. C. 899

(5) *Maung Tin v. Ma Hmu*, A. I.

R. 1933 Rang 138 = 11 Rang 226 = 144 I. C. 187 = 1933 Cr. O. 728 = 34 Cr. L. J. 816

(6) *Mi Mya v. Nga Padon*, 4 I. C. 900 = U. B. R. 1907 - 9, 11, Cr. P. 21 = 11 Cr. L. J. 79.

(7) *Anonymous*, 2 Weir 637 = 5 M. H. O. R. App. 34.

(8) *Sidheswar v. Gyanada*, 22 O. 291.

(9) *Ibid*.

(10) *Byacha v. Moidin*, 8 M. 70 = 2 Weir 639.

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(1) *Ead Ali v Lal Bibi*, 41 C. 88=20 I C 198=27 C W N. 1180=14 Cr. L J. 378

(2) *Ma Thaw v. Emperor*, 7 L B. R. 116=26 I. C 149=15 Cr L J 701

(3) *In re Gnanambal Ammal*, 28 L W 421=55 M L J 516=111 I C 852=1928 M W N 837=1928 M 1171=29 Cr L J 932, *Queen v Kari Papayamma*, 4 M. 230=2 Weir 652

(4) *Mahbub v Fakir Bakhsh*. (1893) A. W. N. 63.

(5) *In re Punja Lal*, A. I. R 1928 B 224=30 Bom L R 617=29 Cr L J 908=111 I C. 668, see *Boji v Nawab Khan* 21 P. R. 1894 Cr

(6) *Lalit Mohan v Sorojani Das*, 134 I C 1199=33 Cr L J 93=A I R. 1931 C 644=35 C W N 692=1931 Cr C. 844

(7) *Queen v Kari Papayamma*, 4 M. 230=2 Weir 652

(8) *Mahbub v Fakir Bakhsh*. (1893) A. W. N. 63.

offers to maintain his wife, the Magistrate must comply with the requirements of the first proviso(1). Where the husband offers to maintain his wife and the wife states that she is willing to live with him, the Magistrate cannot make an order under this section, unless the wife satisfies him that notwithstanding such offer there is a just ground for making such order(2). Where in answer to an application under this section by a wife and her children, the defendant offers to maintain all the petitioners on condition that they live with him, it cannot be said that he refuses to maintain them : and though by the express provision in the section an order of maintenance may be made by the Magistrate, notwithstanding such offer, to a wife who can justify refusal to accept it on the grounds specified, there is no similar provision as to children(3). The first proviso does not apply to orders directing maintenance to children and such an order cannot be superseded by a decree for restitution of conjugal rights against the wife the father not being appointed guardian of the children(4).

Offer must be bona-fide.—An offer to maintain, in order to be valid defence must be a *bona-fide* offer and not made with the object of escaping the obligation to maintain(5). Where it appears that the husband had turned his wife out of his house, he cannot escape liability for giving maintenance to her merely by saying in court that he will keep her in his house, a promise which he might break as soon as he gets home(6). Where the wife has been ill-treated by her husband and that the husband's offer to take her back into his house is disingenuous and made only for the purpose of resisting her claim to maintenance, the claim to live separately and to be maintained is justified(7).

Husband agreeing to maintain wife, but refusing to cohabit with her.—Where a husband agrees to protect and maintain his wife in a manner suitable to her condition in life, it is a sufficient offer under this section, and the mere fact that he refuses to cohabit with her is not a ground for granting her separate maintenance(8). The object of this section is to provide maintenance and not to enforce conjugal duties. The words "as his wife" cannot be read into the section(9). But in one case it has been held that an offer by a Hindu, having two wives, to maintain the first wife by allowing her to live in his house and by supplying her with grain to be cooked and eaten separately, coupled with a refusal to live with her as husband and

125 I. C. 637=A. I. R. 1930 Lah. 665=Ind. Rul. 1930 Lah. 653=31 Cr. L. J. 876.

(1) *Usman v. Jatti*, 96 I. C. 591=27 Cr. L. J. 938.

(2) *Hakimie v. Mouze*, 1 C. L. J. 214.

(3) *Afan Singh v. Dharmon*, 18 P. R. 1891 Cr.

(4) 1 Cr. Law. Rev. 368.

(5) *Dragon v. Dragon*, 4 Bur. L. T. 269=13 Cr. L. J. 65=13 I. C. 891.

(6) *Aishan v. Sher Muhammad*, 22 Cr. L. J. 149=59 I. C. 853; *Sama Jetha v. Bai Wali*, 54 B. 548=1930 Cr. C. 780 (783)=32 Bom. L. R. 764=31 Cr. I. J.

1157=127 I. C. 179.

(7) *Kaluram v. Emperor*, A. I. R. 1933 Nag. 3=28 N. L. R. 284=1932 Cr. C. 900=141 I. C. 115=34 Cr. L. J. 123=19 A. I. Cr. R. 274.

(8) *Basawamma v. Jaggavarapu*, 66 I. C. 832=15 L. W. 535=30 M. L. T. 315=42 M. L. J. 566=(1912) M. W. N. 265=23 Cr. L. J. 336.

(9) *In re Gulabdas*, 16 B. 263; *Arunachala Asari v. Anandayam-mal*, 56 M. 913=A. I. R. 1933 M. 683=88 L. W. 392=1933 M. W. N. 1029=1933 Cr. C. 1178=34 Cr. L. J. 950=145 I. C. 378=1933 M. Cr. C. 335.

Nature of imprisonment.—The ruling in *Sidheshwar v. Gyananda*(1) as regards sentence of imprisonment on default of payment of maintenance, seems to involve the consequence that non-compliance with the order is not an offence, so that the imprisonment ought to be simple only. But in Form XL not only simple but also rigorous imprisonment is provided for, which would indicate an opposite opinion in the minds of the framers of the Code(2). It is thus clear that the imprisonment under this section may be either simple or rigorous(3), but it would be safer to confine imprisonment in default of payment of maintenance to simple imprisonment(4). It is doubtful whether imprisonment under subsection (3) can be said to be imprisonment in execution of a money decree of a court(5).

Term of imprisonment.—Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate acting under this section, it has been held by the Allahabad High Court, has no power to award a heavier sentence in default than one month's imprisonment(6). The same view has been taken in a Burra case(7). But the Madras and Calcutta High Courts hold that the imprisonment, provided by this section, in default of payment of maintenance awarded, is not limited to one month and that the maximum imprisonment that can be imposed is one month for each month's arrear, and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear(8). To the same effect are the decisions of the Punjab Chief Court(9).

Second imprisonment for same arrears—A person who has undergone a sentence of imprisonment on account of his failure to pay certain arrears of maintenance under this section cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears(10).

First proviso : Offer to maintain wife.—Where a husband offers to receive his wife to live with him, an order for maintenance cannot be made except on proof of adultery or cruelty(11). Where in an inquiry under this section the husband offers to maintain his wife, it is the duty of a Magistrate to ask the wife if she is willing to live with her husband and to consider the grounds of her refusal, if any, and any order allowing maintenance to the wife without consideration of the said circumstance, is illegal(12). Where in a proceeding under this section the husband

(1) 22 C. 291.

(9) $M, T_{\text{max}} \vdash T_{\text{max}} T, V_{\text{max}} \text{ in } U$

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(c) *Anthony Augustus, Sr. and In.*
10 Rang. 176

(6) *Empress v Narain*, 9 A 210—
(1887) A W N 54.

(7) *Za Tu v Empress*. 7 L B R 351
-24 L. C 170-7 Bur L. T 225=15 Cr.

Cr. P. C -109

L J 431

(8) *Allanricha v Mohidin*, 20 M. 3;
Bhiku v Zahuran, 25 C 291

(9) *Cronn v Budhu Ram*, 12 P. R. 1919 Cr., *Mussa v. Kaha*, 12 P. R. 1877 Cr. F. B.

(10) *Maung Kyi Pe v Ma Hlu In*,
10 Rang 176
(11) *Makhan Singh v Harnamo*, 111

(12) *Subbaya v Ambamma*, 9 Cr L. J. 50 = 2 I C 155, *Budhaya v Kirpi*.

house, she is justified in refusing to live with her husband and in claiming maintenance(1). The present Code does not restrict payment of maintenance where the wife is living separately to cases in which she has been treated with habitual cruelty(2). The previous Codes used the term 'cruelty'. There was not definition of cruelty; but it was held that the criterion of legal cruelty justifying a wife's desertion is the same in this country as in England, viz., whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it(3). A wife who is driven away from her husband by his cruelty cannot be said to have "left the house not having affection for the husband" within the meaning of the Dhammathats(4).

(2) *Adultery*.—Adultery on the part of the husband, not being such adultery as would be punishable under Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under this section(5). The ruling in *Garraty v. Garraty*(6) is an authority in support of this view. In that case the applicant's wife, with his approval, went to stay for a while with her mother and while she was there, a serious quarrel took place, which resulted in his wife refusing to return to her husband. The husband subsequently took a woman to live with him as his mistress, and she lived with him up to the time when this case came on for hearing before the Magistrate, and before the Magistrate, the wife agreed to return to her husband within a week on his putting away his mistress and promising to have nothing more to do with her; but subsequently she refused to abide by that arrangement. It was held that at the date of application, the wife had an unanswerable reason for refusing to live with her husband, and that her right to refuse was not demolished by the fact, even if it be a fact, that the husband was driven to concubinage by his wife's continued refusal to live with him. It was further held that an offer made in court by the husband to give up his mistress does not deprive the wife of her rights of refusal to live with her husband. But in determining, in such cases, whether the cause shown by the wife for refusing to live with her husband is good and reasonable, it is but just that the Magistrate should take into consideration the social habits of the particular community to which the parties belong. If that community (as is the case with Hindus) does not completely disapprove of concubinage and tolerates it so far as to give kept woman some status and rights, the fact that the husband keeps a concubine ought not by itself entitle the wife to claim separate

(1) *Rajputi v. Deoli*, 46 A. 877 (878); *Kalnaya v. Hera*, 27 A. L. J. 1208=1929 Cr. C. 593. (The fact that the parties belong to a low class makes no difference); *Pritam Singh v. Basant Kaur*, 93 I. C. 971=27 Cr. L. J. 507; *Gaurishanker v. Bai Reva*, 5 Bom. L. R. 614; *Ralla v. Ati*, 21 P. W. R. 1014=115 P. L. R. 1914=15 Cr. L. J. 529=24 I. C. 811.

(2) *Dragon v. Dragon*, 13 Cr. L. J. 55=4 Bur. L. T. 269=19 I. C. 391

(3) *Yamuna v. Narain*, 1 B. 164 at p. 165 "Cruelty" is not necessarily limited to personal violence; *Rukmin v. Peari Lal*, 1891 A. W. N. 82. See *Kelly v. Kelly*, L. R. 2 P. D. 59; *Tomkins v. Tomkins*, 1 S. and T. 168.

(4) *Thein Me v. Po Gyce*, 18 Cr. L. J. 767=41 I. C. 143=9 L. B. R. 44=10 Bur. L. T. 212.

(5) *Gantapalli v. Gantapalli*, 20 M. 470; *In re Malcolm De Castro*, 13 A. 318.

(6) 14 Bur. L. R. 240=8 Cr. L. J. 422.

wife, is not a sufficient offer of maintenance(1). However, an offer to maintain wife must be one to maintain her with the consideration due to her position as wife(2). A wife is not bound to accept an offer of her husband to provide her with a separate residence she can insist upon her being kept in the house where the husband himself lives(3).

Refusal of wife to live with her husband.—Where a wife lodges an application under this section against her husband and is not willing to live with him, she should be given a chance by the Magistrate to substantiate her reasons for refusal to live with him by such evidence as she can produce. According to proviso 1 to sub-section (3) it is desirable for the Magistrate to consider the grounds of refusal stated by the wife and in case he finds that there is just ground for her living apart from her husband he should pass an order of maintenance in spite of her not agreeing to live with her husband(4). It is to be observed that the section in the present Code has no reference to cruelty or living in adultery as a ground for the wife's refusal to live with the husband. On the contrary, it uses the general phrase "just ground for so doing"(5). An order for separate maintenance in favour of the wife may be made under this section if the wife has some just ground for living apart from her husband(6). The view that where the husband offers to receive his wife to live with him, an order for maintenance should not be made except on proof of adultery or cruelty on the part of the husband(7) must be received with caution. Where, however, a wife refuses to live with her husband without causes she cannot claim separate maintenance(8). The proviso does not authorise a Magistrate to entertain applications for separate maintenance on the ground of ill-treatment from wives whose husbands have not neglected or refused to maintain them, but who have, of their own accord, left their husband's house and protection, and to order allowances to be paid to such wives on evidence of ill-treatment(9). When the wife voluntarily leaves her husband's house without sufficient justification, she is not entitled to any order under this section, unless the husband refuses to maintain her, or turns her out or ill-treats her, so as to make it impossible for her to live with her husband(10).

What are just grounds for refusing to live with husband: (7) Cruelty.—If the husband, either refuses to maintain her, or turns her out or ill-treats her, so as to make it impossible for her to live in the

(1) *Marakal v. K. Kandappa Goundan*, 6 M. 371; *Sakrulla v. Fatma*, 25 Cr. L. J. 453=77 I. C. 805= (1924) A. I. R. N. 227.

(2) *In re Manatha Achari*, 17 M. 260.

(3) *In re Bai Manek*, 52 B. 763=29 Cr. L. J. 1019 (1050)=30 Bom. L. R. 958=A. I. R. 1928 B. 418=112 I. C. 473.

(4) *Said Bibi v. Umar Din*, A. I. R. 1930 Lah. 461=1930 Cr. C. 533=31 P. L. R. 664=130 I. C. 51; *Sultan v. Mahtab*, 27 P. L. R. 233=27 Cr. L. J. 1819=98 I. C. 291=A. I. R. 1928 Lah. 686; *Subbayya v. Ambamma*, 9 Cr.

L. J. 601=2 I. C. 155.

(5) Woodroffe's Cr. P. C. pp. 553, 559.

(6) *Bai Parvati v. Ghanchi*, 44 B. 972 (975).

(7) *Makhan Singh v. Harnamio*, 29 Cr. L. J. 909 (910)=111 I. C. 669.

(8) *Tota v. Duji*, 30 P. L. R. 367=30 Cr. L. J. 861 (862)=117 I. C. 903=Ind. Rul. (1929) Lab. 727.

(9) *In re Thompson*, 6 N. W. P. H. C. R. 205; *Tota v. Durgi*, 30 P. L. R. 367=30 Cr. L. J. 861 (862).

(10) *Ghoshvishanker v. Bai Rena*, 5 Bom. L. R. 614.

house, she is justified in refusing to live with her husband and in claiming maintenance(1). The present Code does not restrict payment of maintenance where the wife is living separately to cases in which she has been treated with habitual cruelty(2). The previous Codes used the term 'cruelty'. There was no definition of cruelty; but it was held that the criterion of legal cruelty justifying a wife's desertion is the same in this country as in England, viz., whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it(3). A wife who is driven away from her husband by his cruelty cannot be said to have "left the house not having affection for the husband" within the meaning of the Dhammathats(4).

(2) *Adultery*.—Adultery on the part of the husband, not being such adultery as would be punishable under Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under this section(5). The ruling in *Garraty v. Garraty*(6) is an authority in support of this view. In that case the applicant's wife, with his approval, went to stay for a while with her mother and while she was there, a serious quarrel took place, which resulted in his wife refusing to return to her husband. The husband subsequently took a woman to live with him as his mistress, and she lived with him up to the time when this case came on for hearing before the Magistrate, and before the Magistrate, the wife agreed to return to her husband within a week on his putting away his mistress and promising to have nothing more to do with her; but subsequently she refused to abide by that arrangement. It was held that at the date of application, the wife had an unanswerable reason for refusing to live with her husband, and that her right to refuse was not demolished by the fact, even if it be a fact, that the husband was driven to concubinage by his wife's continued refusal to live with him. It was further held that an offer made in court by the husband to give up his mistress does not deprive the wife of her rights of refusal to live with her husband. But in determining, in such cases, whether the cause shown by the wife for refusing to live with her husband is good and reasonable, it is but just that the Magistrate should take into consideration the social habits of the particular community to which the parties belong. If that community (as is the case with Hindus) does not completely disapprove of concubinage and tolerates it so far as to give kept woman some status and rights, the fact that the husband keeps a concubine ought not by itself entitle the wife to claim separate

(1) *Rajputi v. Deoli*, 46 A. 877 (878); *Kalniya v. Hera*, 27 A. L. J. 1208=1929 Cr. C. 593. (The fact that the parties belong to a low class makes no difference); *Pritam Singh v. Basant Kaur*, 93 I. C. 971=27 Cr. L. J. 507; *Gaurishanker v. Bai Reva*, 5 Bom. L. R. 614; *Ralla v. Ati*, 21 P. W. R. 1914=115 P. L. R. 1914=15 Cr. L. J. 529=24 I. C. 811.

(2) *Dragon v. Dragon*, 13 Cr. L. J. 63=4 Bur. L. T. 269=13 I. O. 391

(3) *Yamuna v. Narain*, 1 B. 164 at p. 166 "Cruelty" is not necessarily limited to personal violence; *Rukmin v. Peari Lal*, 1891 A. W. N. 32. See *Kelly v. Kelly*, 1 B. 2 P. D. 59; *Tomkins v. Tomkins*, 1 B. and T. 168.

(4) *Thein Me v. Po Gywe*, 18 Cr. L. J. 767=41 I. C. 143=9 L. B. R. 44=10 Bur. L. T. 212.

(5) *Gantapalli v. Gantapalli*, 20 M. 470; *In re Malcolm De Castro*, 19 A. 318.

(6) 14 Bur. L. R. 210=8 Cr. L. J. 422.

maintenance(1). Concubinage is so far recognized among Hindus, that the circumstance of a Hindu husband keeping a concubine in his house will not entitle a wife to a maintenance allowance, provided the husband is willing to receive her and treat her with the consideration which is due to her position as a wife(2).

(3) *Change of religion by husband*.—The rejection of an application for maintenance made by the wife of a Christian, who has reverted to Hinduism is wrong(3). A Christian wife is not, however, by the mere fact of the conversion of her husband to Judaism entitled to live apart and get maintenance from him so long as a Jewish husband does not harass a Christian wife and so long as he treats her as a husband should permit her to practice her own religion and does not apply any temporal or moral pressure to her to cause her to abandon her religion or to adopt his, she has no right to leave her husband and should not be awarded maintenance if she does so. But a Christian wife will be justified from withdrawing from the conjugal domicile where there is an attempt on the part of her husband to introduce a system of polygamy, or concubinage into the household(4).

(4) *Irremediable breach*.—Where the breach between husband and wife is irremediable and it is quite impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute; she is entitled to maintenance while living separate from him(5).

(5) *Marriage with wife's step-mother*.—The marriage of a Muhammadan with the step-mother of his wife being prohibited, the wife is entitled to say that she will not live with her husband during the continuance of marriage with her step-mother(6).

Buddhist law : Polygamy.—Polygamy being legal among Burmese Buddhists, the refusal of a chief wife to live with her husband merely because he had taken a second wife is a proper ground for refusing to make an order for her personal maintenance under this section(7). Also, a lesser wife, refusing to live with the chief wife, will not be deprived of her right to maintenance if, at the time she married, she did not know that the husband had been previously married(8). But a grievance against an elder wife is not a sufficient cause in Upper Burma for a wife to refuse to live with her husband(9).

What are not just grounds for refusing to live with husband :

(1) *Marrying another wife*.—A wife is not entitled to an order for

(1) *Gantapalli v Gantapalli*, 20 M 470 (475).

(2) *Latchmi v. Pavadai*, 2 Weir. 641.

(3) *Anonymou*, 4 M, H C R. App. 8.

(4) *Talkar v. Emperor*, 97 I. C. 809 = 19 S. L. R. 128 = 1926 S. 278 = 27 Cr. L. J. 1177.

(6) *Sheik Issake v. Biyyamunni* 2 Weir 647.

(7) *Pica Thin v. Ba Wan*, 4 L. B. R. 146 = 7 Cr. L. J. 444, *Ma Ka U. v. Po Saic*, 4 L. B. R. 340 = 9 Cr. L. J. 25, *Po Nyein v. Ma Shice*, 11 Bar. L. T. 105 = 47 I. C. 866 = 19 Cr. L. J. 966.

(8) *Maung Po We v. Ma The Hla*, 8 I. C. 997 = 3 Bar. L. T. 154 = 11 Cr. L. J. 750.

(9) *Nga Po Saw v. Mi Thet*, 8 I. C. 479 = (1910) 1 U. B. R. 34 = 11 Cr. L. J. 662.

maintenance merely because her husband has married another wife and she declines to live with him on that account(1). Mere existence of a co wife with whom the complainant had quarrels or want of affection for her or greater affection for the co-wife on the part of the husband are not sufficient grounds within the meaning of sub section (1) for separate maintenance(2). The fact that a younger wife is likely to suffer annoyance from an elder wife, and has some reason to fear that her husband may not protect her from such annoyance, is not sufficient cause for refusing to live with her husband, within the meaning of sub-section (3)(3). Mere second marriage on the part of husband does not justify first wife's refusal to live with him. But where a first wife has been turned out after continued ill-treatment; a half hearted attempt to induce her to come back before second marriage must be regarded merely an excuse for the contracting of a second marriage and she is not bound to go back to her husband, nor her refusal to do so will disentitle her to maintenance(4).

Decree for restitution of conjugal rights—Decrees for restitution of conjugal rights against wives are nowadays no longer enforced by courts of justice though decrees may be passed. But if the wife refuses to go and live with the husband, a decree for restitution of conjugal rights is good answer to an application for maintenance under this section(5).

Incompatibility of temper.—Mere incompatibility of temper has been held not to be a sufficient ground for a wife to refuse to live with her husband(6).

Minority of wife.—A court has no authority to award maintenance, merely because the wife is a minor, and it might be better that she should live with her parents(7).

Non-payment of prompt dower.—Non-payment by the husband of prompt dower is not a "sufficient cause" within the meaning of this section, so as to empower a court to decree separate maintenance to a Muhammadan wife against a husband who is willing to maintain her upon condition of her living with him(8).

Sub section (4).—"Living in adultery."—A single act of adultery does not necessarily amount to 'living in adultery' within the meaning of sub-section (4), and will not justify a Magistrate in refusing maintenance. "Living in adultery" refers to a course of conduct and means

(1) *Crown v. Waryam Singh*, 12 P. R. 1914 Cr.; *Empress v. Khushala*, 27 P. R. 1880 Cr.; *Basant v. Kuri*, 31 P. R. 1882 Cr.; *Dhera v. Nando*, 2 P. R. 1880 Cr. See also *Empress v. Kuri*, 31 P. R. 1882 Cr.

(2) *Empress v. Kuri*, 31 P. R. 1882 Cr.

(3) *Ganda Singh v. Atma Devi*, 14 P. R. 1901 Cr.

(4) *Msaung Waing v. Ma Chit*, (1904) U. B. R. 1st Qr. (Cr. P. C.) 10.

(4) *Pritam Singh v. Basant Kaur*, 93 I. C. 971-27 Cr. L. J. 507

(5) *Ma Hta v. Aya Maung*, A. I. R. 1931 Rang 111-1931 Cr. C. 352-193 I. O. 96; *Nga Po Saw v. Mi The*, 11 Cr. L. J. 662-8 I. C. 479-1910 U. B. R. 34; See *Ali Mahomed v. Emperor*, 96 I. O. 124-27 Cr. L. J. 676-1926 S. 270

(6) *In re Gulabdas*, 16 B. 263.

(7) *Jhando v. Empress*, 1 P. R. 1882 Cr.

(8) *Mehtab v. Dina*, 15 P. R. 1880 Cr. *Sadar Din v. Suban*, 6 P. R. 1883 Cr.

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(4) *Talkar v. Emperor*, 97 I. C. 609—19 S L R 129—1926 S. 278—27 Cr. L. J. 1177.

(5) *Nihal Kaur v Bhagwan Singh*, 24 I. C. 963—26 P W R 1914 Cr.—170 P. L. R. 1914—15 Cr. L J 554, *Baloch v. Zainab*, 32 P L R 619—1931 Cr. C. 849 (850).

(6) *Sheik Issake v. Bayyammunni* 2 Weir 647.

(7) *Pica Thin v Ba Win*, 4 L. B. R 146—7 Cr L J 444, *Ma Ka U. v Po Saic*, 4 L B R 310—9 Cr L J. 25, *Po Nyein v Ma Shure*, 11 Bur L. T 105—47 I C 866—19 Cr L J. 966.

(8) *Maung Po We v Ma The Hla*, 8 I C 927—3 Bur L. T 154—11 Cr. L. J 750

(9) *Nga Po Saw v. Mi Thet*, 8 I. C 479—(1910) 1 U. B. R. 24—11 Cr. L. J 662.

another man, it was held that, even if the husband could make out that the child was illegitimate, that would not be sufficient to dis-entitle his wife, to receive an allowance, as it did not amount to "living in adultery" as required by this section(1). The Magistrate should inquire and ascertain whether or not the wife is living in adultery. He cannot dismiss an application under this section on the ground that a *punchayat* of the brotherhood has condemned her and that under the circumstances the husband is not bound under the Hindu law to maintain her(2).

'*Refuses to live with her husband.*'—The allegation of wife's refusal since the order for maintenance in her favour was passed must also be adjudicated upon(3). A decree of a civil court for restitution of conjugal rights supersedes any previous order for maintenance if the wife persists in refusing to live with her husband(4). Where a Hindu wife leaves her husband's house without good cause, her right of maintenance is only suspended, and she has the right to return to her husband's house and claim maintenance(5).

'*Living separately by mutual consent.*'—No order for maintenance under this section can be made where the husband and wife are living separately by mutual consent(6). Where it appeared that, by mutual consent, the husband and wife have been living separately for a number of years, and that the maintenance of the wife was, by arrangement made at the time they began to live separately, provided for by the assignment to her of some land, held, that a Magistrate had no jurisdiction to make an order under this section(7). What the law contemplates by sub-section (4) is well recognized in *affiliation proceedings* between husband and wife under the English Law, viz., where husband and wife have lived apart by a definite contract mutually made between them, then *affiliation proceedings* are inapplicable. A contract voluntarily and freely made between them and entered into by reason of the ill-treatment of the husband towards his wife would be an act of their own volition, if the parties separated under such terms, so that neither should molest the other and that both should be free to live and go where and whither they respectively wished. Such an agreement would be a voluntary act and contract by the parties themselves unfettered by the decree or declaration of any tribunal(8). Where a husband and wife are living apart in obedience to the arbitration of a *Panchayat* of their castemen by which the wife was given a stipend as maintenance, it cannot be said that they are living apart by mutual consent. When once it is proved that the parties are living separately by mutual consent the Magistrate has no jurisdiction to pass an order under this section(9).

Sub section (5) : Cancellation of order.—The general principle of

(1) *Empress v. Nandan*, (1881) A. W. N. 37.

(2) *In re Kashi Dala*, (1891) A. W. 62.

(3) *Shoni v. Monohar*, (1882) A. W. N. 168.

(4) *Balakidas v. Empress*, 23 B 484; *Emperor v. Nur Aisha*, 27 A. 483; *Ali Mahomed v. Emperor*, 27 Cr. L. J.

876=96 I. C. 124.

(5) 12 S. L. R. 90

(6) *In re Tricumal*, Rat. Un. Cr. Cas. 870.

(7) *Jampana v. Jampana*, 2 Wel. 648

(8) *Nathun v. Maturica*, 4 Pat. L. J. 109 at pp. 112, 113

(9) *Ibid.*

something more than a single lapse from virtue(1). Unless continuity of conduct is established it cannot be inferred from a single act of adultery that the woman is "living in adultery" so as to be deprived of maintenance from the husband(2). The fact that the wife does not seek pardon for her past misconduct is not by itself, a sufficient reason for excluding a wife who has committed only a single act of adultery from the benefit of this section(3). It is harsh to penalize a child of fourteen because of a single lapse. Where a Magistrate refused to award maintenance to a wife aged 14 because she has been excommunicated from her caste, although it was due to single act of rape on her by a man of lower caste, the exercise by the Magistrate of his discretion is on wrong principle and maintenance ought to be allowed to her(4). In another case it was held that the fact that a woman who applied for an order for maintenance against her husband had given birth to an illegitimate child some two years before the date of her application, was not a reason for refusing to make an order for maintenance, it being found that since that time she had been living with her parents and leading a chaste and respectable life(5).

Wife committing adultery before applying for maintenance.—Though if a wife be living in adultery at the time of application, she cannot get an order for maintenance it does not follow that if she was not at such time living in adultery she can get such an order. The court may refuse the order properly where the wife had deserted her husband improperly and had committed adultery although at the time when she made the application she was not living in adultery, or where she had been expelled from caste on account of adultery and had thereby made it impossible for her husband to keep her with him without himself losing the society of his fellow castemen(6). Where there has been a desertion of the husband for many years, coupled with adultery, and no attempt to seek the husband's pardon for past misconduct, the wife is not entitled to an order for maintenance under this section, merely because, at the time when she makes her application, she may not be living in adultery(7).

Proof of adultery.—A Magistrate has no power to dismiss an application for maintenance on the mere ground that he considers the conduct of the applicant open to suspicion(8). Where the husband admitted that his wife was not living on adultery, but wished to prove that her child was the result of an intimacy with

(1) *Atchamma v. Muhalakshmi*, 30 M 332=17 M L J 280, *Kallu v. Kaunsilia*, 26 A 326. *In re Fulchand*, 52 B 160=29 Cr L J 314 (315)=9 A. I Cr R 447=108 I C 24=30 Bom L R 79=1 L T 40 B 56. *Gantapalli v. Gantapalli*, 20 M 470, *Paik v. Vishwanath*, 5 N L R 19, *Ram Autar v. Raghubar*, 13 O L J 802=3 O W. N 717=27 Cr L J 1190=97 I C 950.
(2) *Jalindra v. Gouri*, 29 C W N 647.
(3) *In re Fulchand*, 108 I C 24=52 B 160.
(4) *Yesubai v. Parasram*, A I B

1933 B 21=31 Bom L R 1449=1933 Cr. O. 15=31 Cr L J 140=141 I C 318.

(5) *Kallu v. Kaunsilia*, 26 A 326=1 A L J 18=1 Cr. L. J 81, *Empress v. Nandan*, (1881) A. W. N 37.

(6) *Ram Autar v. Raghubar*, 3 O W. N 717=13 O L J 802=27 Cr L J 1190 (1191)=97 I C 950=1926 O 604. *Pounajee v. Peria Moopan*, 31 M. 185.
(7) *In re Shirram*, Rat. Un. Cr. 1' 506, *In re Fulchand*, 52 B 160=30 Bom L R. 79=29 Cr L J 314 (315)=108 I C 91=1928 Bom 59.
(8) *Re Soundararajacami*, 2 Weir 647 (648).

the order for maintenance in favour of the wife was passed must be adjudicated upon(1). There must be sufficient proof of adultery(2). The evidence of adultery should not be general and inconclusive, but specific and cogent(3).

Living separately by mutual consent.—There may be cancellation by virtue of an agreement entered into after an order for maintenance has been passed(4). But it is not competent to a Magistrate to cancel an order for maintenance on the ground that the parties have entered into an arrangement evidenced by a deed, the validity of which is denied by the complainant, until it has been declared by some competent tribunal to be binding on the parties(5).

Other cases.—This sub section deals with only three specifically named cases. It does not deal with the cancellation of the order and cessation of allowance after a divorce. But it is open to a Magistrate to entertain and inquire into a plea of divorce, and, if he finds it established, to refuse to enforce his order, at least after such date as the divorce operates under the law or custom governing the parties to disentitle the woman to further maintenance(6). The apostasy of a Muhammadan wife *ipso facto* dissolves the marriage and disentitles the wife from claiming maintenance from her husband(7). Where a husband is willing to maintain his wife who has not attained puberty, a Magistrate cannot order the father of the girl to maintain her, on the ground that the husband is not bound to maintain his wife until she attains puberty and the nuptial ceremony has been performed(8).

Application to whom to be made.—An application for cancellation of an order of maintenance must be made to the Magistrate who passed the original order or to his successor-in-office(9).

Sub section (6) Mode of recording evidence.—In maintenance cases evidence must be recorded in the manner prescribed for summons cases, but the proceedings cannot be conducted as in a summary trial(10). Where a *prima facie* case has been made out in favour of the wife's claim for maintenance in the preliminary proceedings the evidence of both sides should be recorded before a final order is passed(11).

(1) *Crown v. Ullam Chand*, 36 P. R. 1902 Cr.

(2) *Empress v. Doulat*, (1681) A. W. N. 113; *Re Soundaraja*, 2 Weir 647; *In re Kashi Diala*, (1881) A. W. N. 62; *Doxappa v. Chikathaysee*, 15 Cr. L. J. 52=21 I. C. 324=1 L. W. 156; *Paike v. Vishwanath*, 1 I. C. 801=5 N. L. R. 19.

(3) *Shyama v. Madho*, (1893) A. W. N. 56.

(8) *Re Gurusami Pillai*, 2 Weir 650.

(9) *Bhagwanian v. Sheo Charan*, 25 A. 545.

(10) *Kali Dassi v. Durga Charan*, 20 C. 351; *Shadi Khan v. Gul Begam*, 101 I. C. 606=28 Cr. L. J. 478=1927 L. 435. As to mode of recording evidence by the Presidency Magistrates: *Hanifabai v. Muhammad Yakub*, 32 Bom. L. R. 1499=A. I. R. 1931 B. 142=120 I. C. 339=32 Cr. L. J. 276=1931 Cr. C. 150; *In re Chhagan Horgovan*, A. I. R. 1932 B. 179=34 Bom. L. R. 276=1932 Cr. O. 238=137 I. C. 27=33 Cr. L. J. 461.

(11) *Mangli v. Gonda Singh*, A. I. R. 1932 Lah. 301=33 P. L. R. 230=137 I. C. 80=1932 Cr. C. 881=33 Cr. L. J. 447.

law that an order whose term is not fixed and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled, is *prima facie* applicable to maintenance orders passed under this section. The husband may, on proof of circumstances specified in this subsection or section 489, obtain the cancellation or modification of the original order, as the case may be and until he does that; the original order must be deemed to be still in force. The mere fact that a wife has returned to live with her husband will not bring the order to an end automatically and on her separating from him again, she can enforce it(1). The return of a wife to her husband temporarily after obtaining an order for maintenance may have the effect of suspending the operation of the order, it has not the effect of cancelling the order in the way in which it can be cancelled under this subsection(2). But the Rangoon High Court holds that since a maintenance order in favour of the wife is necessitated by neglect or refusal by the husband to maintain the wife, a *bona fide* re-union must be interpreted as removing the basis on which the order rests, and as therefore vacating the order(3). A woman's refusal to surrender a child is no ground for stopping an allowance previously ordered(4). There is no provision in this section, for cancelling an order awarding maintenance to a child, though on proof of a change in the circumstances of the child or of the father, the amount of maintenance may be altered under s. 489(5).

'Living in adultery.'—A single act of adultery cannot by itself amount to 'living in adultery' nor do several such acts, if isolated, necessarily come within the meaning of the expression, which implies following a course of adulterous conduct more or less continuous(6). The mere fact that a woman in whose favour an order for the payment of a maintenance allowance has been passed under sub-section(1), has given birth to an illegitimate child is not sufficient basis for a finding that she is living in adultery for the purposes of the sub-section(7). An order for maintenance passed in favour of a wife may be cancelled on proof of adultery subsequent to the order(8). An order cancelling maintenance cannot be passed on proof of adultery by the wife before the date of the maintenance order(9). The allegation of adultery since

(1) *Kanagammal v. Pandara Nadar*, 50 M CG 1=1927 M 376=28 Cr L J 271=52 M L J 170=25 L W 148=(1927) M W N 111=100 I C 239, *Narayansuami Mudali v. Mangayakarasammal*, 28 Cr L J 237=99 I. C. 1037=38 M L T 13.

(2) *Parul Bala v. Satish Chandra*, 75 I C 829=37 C L J 160=1926 C 456=24 Cr L J 945.

(3) *U Po Shein v. Ma Sein Mya*, 8 Rang 400=A I R 1931 Rang 89=128 I C. 353=32 Cr L J 114=(1931) Cr. C 377=15 A I. Cr R 344.

(4) *Ma Nyein Me v. Maung Kyaw*, (1902=1903) 1 U B R 7 (1 r).

(5) *Mehlab v. Alla Bakhsh*, 17 P R, 1885 Cr., *Budhui v. Dabal*, 27 A 11

(6) *Paiki v. Vishvanath*, 5 N. L. R. 19, *Chaku v. Ishwar*, 8 Bom. H. C. R. 124, *Appalamma v. Yellayya*, 20 M. 470, *Kallu v. Kaunsilia*, 26 A 376; *Atchamma v. Mahalakshmi*, 30 M 332, *Jalindra v. Gorie*, 88 I C. 608=29 C. W N 647=A I R (1925) C 794=26 Cr L J 1184, *Gopaldeo v. Ratni*, 2 Cr Law. 659=115 I C 161=20 Cr. L J. 403=1929 Nag 239.

(7) *Paiki v. Vishvanath*, 5 N. L. R. 19, *Jalindra v. Gorie*, 88 I C. 608=29 C. W N 647, *Kallu v. Kaunsilia*, 26 A 376.

(8) *In re Totaram*, Rat Un Cr Cas. 553; *Chaku v. Ishwar*, 8 Bom. H. C. R. 124.

(9) *Laraite v. Ram Dial*, 5 A 214

ex-parte against the husband when circumstances show that there was no refusal of acceptance of service of notice by him(1). An *ex-parte* order under this section cannot be made against a party who is present in court along with his pleader, without hearing him(2). An *ex-parte* order may be passed in the contumacious absence of the defence(3). But the absence of a defendant who is represented by a mukhtar cannot be treated as due to wilful neglect(4). A Magistrate has power under the latter part of the proviso to re-open a case in which maintenance has been awarded by his predecessor and to revise the order granting maintenance where the petition is presented within three months of the order(5).

Presence of complainant.—Dismissal for default.—There is nothing in the section which requires the personal attendance of the person in whose favour the order for the maintenance is to be made(6). But in one case the Magistrate dismissed an application for maintenance for default of appearance of the complainant(7). An application for maintenance should not be dismissed on the failure on the part of the applicant to comply with an order for payment of process fees(8).

Examination of person proceeded against—It is not incumbent on a Magistrate to examine under section 342, the husband or the father before an order under this section can be made against him, to make a monthly allowance for the maintenance of his wife or his child, as the case may be(9) especially if he gives evidence on his own behalf(10).

Sub section (7).—Under this sub section courts have power to deal with costs, and if the husband fails he must pay the costs of the applicant(11). But the Magistrate passing the decision is alone entitled to award costs. The High Court in revision cannot award costs(12).

Sub-section (8).—This sub section removes certain doubts which had arisen in the reported cases as to the jurisdiction of Magistrates to entertain cases under this section(13). This sub-section requires that an application for maintenance should be made either in the district

(1) *Allah Ditta v. Sakina Bibi*, A. I. R. 1928 Lah 853=29 Cr. L. J. 687=10 A. I. Cr. R. 490=110 I. C. 239

(2) *Sham Singh v. Hakam Devi*, 127 I. C. 13=1930 L. 594=Ind. Rul.(1930) L. 813=31 Cr. L. J. 1179=1930 Cr. O. 623

(3) 7 M. H. O. R. App. 43.

(4) *Hormuz Shah v. Pirozbar*, 2 Bom. L. R. 700.

(5) *Mauv Tun v. Ma Rhein*, 75 I. C. 301=2 Bur. L. J. 61=1923 R. 159=74 Cr. L. J. 929.

(6) *Ghulam Rakeya v. Niaz Ali*, 19 P. R. 1903 Cr.

(7) *Masu v. Paul*, U. B. R. 1 (1892)=96 G.

(8) *V. v. V.*, 15 M. 921

Cr. L. J. 1002; *Shadi Khan v. Gul Begam*, 101 I. C. 606=28 Cr. L. J. 478=1927 Lah. 435; *Vithaldas v. Bai Kashi*, 52 B. 768=30 Bom. L. R. 957=29 Cr. L. J. 1051=112 I. C. 475=A. I. R. 1928 B. 347; *Cl. Demello v. Demello*, 96 I. C. 856=27 Cr. L. J. 1000=1926 Lah. 667.

(10) *Bachai v. Jamuna*, 81 I. C. 915=25 Cr. L. J. 1091 s. c. A. I. R. 1925 O. 339=79 I. C. 567.

(11) *Yesubai v. Parasram*, A. I. R. 1933 B. 21=34 Bom. L. R. 1449=1933 Cr. Cas. 15=34 Cr. L. J. 140=141 I. C. 348.

(12) *Veerappa v. Avudayammal*, 48 M. 262 F. D.

(13) *In re Fakrudin*, 9 B. 40; *In re Debastro*, 13 A. 348; *In re Todd*, 6 A. 237; *Benbow v. Benbow*, 24 C. 633

An order for payment of maintenance without recording evidence and without examining any witnesses is illegal(1). An order under this section must be made on the evidence in the proceedings and cannot be based on knowledge acquired by the Magistrate in another case(2). The various elements, required to sustain an order under this section must be strictly proved(3). Proceedings under this section are judicial in their nature and must not be conducted as if they were ministerial matters. The notes of evidence therefore must not be inadequate and vague and the order recorded should be one on distinct findings of fact(4). An order for maintenance passed under this section simply on the applicant's verification on oath of the truth and correctness of her application, without examining the applicant or her witnesses (if any) on oath, is bad, as the application cannot be used to supplement, much less to take the place of, the applicant's examination on oath in the presence of her husband and is consequently no legal evidence as against him(5). A person against whom an order for maintenance is sought is a competent witness on his own behalf in such proceedings(6). The court is bound to ask him if he wishes to adduce evidence before it closes the case and there is no proper inquiry under law if this is not done(7). Where both parties have adduced evidence, a court is not justified in receiving fresh evidence and deciding the case on such evidence(8).

Presence of defendant.—Evidence in proceeding under this section ought to be taken in the presence of the defendant or his pleader unless he is wilfully avoiding service of summons or neglecting to attend the court(9). Where on a date of hearing the defendant instructed a mukhtyar to appear for him, as his pleader could not remain present on that date and the Magistrate refused to allow the mukhtyar to appear, and thinking that the personal attendance of the defendant was not dispensed with, heard the case *ex parte*, it was held that although the Magistrate might have been fully justified in refusing to allow the mukhtyar to appear, he ought not to have treated the absence of the accused as due to wilful neglect to attend(10).

Personal attendance of applicant may be dispensed with.—A Magistrate has discretion in the case of an application under this section to dispense with the personal attendance of the applicant when she is a pardanashin lady(11).

Proviso: Ex-parte order.—A Magistrate is not justified in proceeding

(1) *Re Venkatachala*, 2 Weir 628. But an order passed in accordance with a compromise dispenses with the necessity of taking evidence. *Re Rangammal*, 2 Weir 679.

(2) *Lopotee v. Tykha*, 8 W R Cr. 67.

(3) *Gonda v. Pyart*, 13 W R Cr 19.

(4) *Larait v. Ram Dial*, 5 A. 224 (226).

(5) *Kamla v. Mangal Dei*, 56 I C 974=23 O. C 237=25 Cr L J 302.

(6) *Hira Lal v. Sahab Jan*, (1895) A W N 242, 17 C P L R 127. *Nur Mohd. v. Bismilla*, 16 C 781.

(7) *Punnuswamy v. Almelu Bai*, 120 I C 416=3 Cr Law Nag 11=31 Cr L J 110=Ind. Rul (1930) Nag. 48=1930 Nag 59.

(8) *Narayana Nair v. Manikkath*, 52 M L J 118=38 M L T 39=25 L W 151=100 I C 123=1927 M 261=29 Cr L J 251.

(9) *Ajoy Chandra v. Dulla*, 1 C L J 102, *Venkata v. Parama*, 11 M. 199.

(10) *Hormuzshah v. Prozbai*, 2 Decm. L R 700.

(11) *Ghulam Rakiya v. Niaz Ali*, 19 P. R 1903 Cr.=105 F. 1 R. 1903.

kept mistress, a man may be said to reside with the mother of the illegitimate child at the place where she has her settled abode and where he visits her occasionally provided he has not abandoned his intention to continue to visit her(1). It is the residence of husband and not of his father that gives jurisdiction to the court(2). An order for maintenance will not be invalid on the mere ground that proceedings were held in a wrong district(3). A Magistrate making an order for maintenance under this section is competent to enforce it against the person made liable for the payment of such maintenance even though such a person resides outside the jurisdiction of his court(4).

Whether civil suit lies.—The remedy under this section is only cumulative, in the case of a person otherwise entitled to maintenance under the common law and will not take away the remedy under the common law to enforce such right by action brought against his father during his life-time, or after his life-time, or after his death, against his estate. But in the case of illegitimate children, by a woman who is not a Hindu, they are not entitled to claim maintenance from the putative father under the common law; the right conferred on them by the statutory law can be enforced only by the particular remedy provided by the statute and to the extent therein provided. He cannot seek to enforce it by suit, nor does such right survive the death of his putative father(5).

Effect of order under s. 488 on subsequent civil suit.—A Magistrate's order for maintenance does not take away the jurisdiction of the civil court(6). A suit by a person against whom an order for maintenance in favour of defendant has been made by a Magistrate under this section is maintainable in a civil court for a declaration that the defendant is not his wife(7). A civil court has no jurisdiction to pass a decree that the wife is not entitled to receive maintenance; but it is competent to decide whether she is or is not the lawful wife of the plaintiff(8). The jurisdiction of a civil court to grant a declaratory decree as to paternity is not affected by the provisions of the Code relating to the maintenance of wives and children(9) though there is authority to the contrary also(10). An order of a Magistrate refusing maintenance does not bar a suit in a civil court for maintenance(11). But a civil court has no jurisdiction to cancel an order for maintenance granted by criminal court under the Criminal Procedure Code, or to grant an injunction against a criminal court, but there is no reason why the civil court, having issued a declaration, the party who has obtained

(1) *Hidayat v. Hayat*, 58 L. R. 220—73 Cr. L. J. 522—15 I. C. 794.

(2) *Bishen Das v. Amar Kaur*, A. I. R. 1933 Lah. 387—146 I. C. 51—31 Cr. L. J. 1171.

(3) *Sitaram v. Sukia*, 115 I. C. 602—A. I. R. 1929 C. 336—49 C. L. J. 205—32 C. W. N. 932.

(4) *In re Guanamba*, 52 M. 77.

(5) *Lingappa v. Esudasan*, 27 M. 13.

(6) *Deraji Mubga v. Marati Kaveri*, 80 M. 400.

(7) *Bakhan v. Ala Bakhs*, 100 F. L. R. 1903, where earlier cases are collected.

(8) *Waryam Singh v. Premon*, 138 P. L. R. 1901; *Maung Po Thein v. Ma Me San*, 1 Bur. L. J. 82.

(9) *Maung Po Thein v. Ma Me San*, 1 Bur. L. J. 82; *Kailasa v. Raghubar*, 17 O. C. 331.

(10) *Subhudra v. Basdeo*, 18 A. 29; 2 Weir. 614.

(11) *Ghanna Kanta v. Gereli*, 32 C. 479.

where the husband resides or at the place where he last resided with his wife(1). The words "last resided" have given rise to a discussion as to whether they contemplate a mere casual residence in a place for a temporary purpose(2). In *Ramdei v. Jhunni Lal*(3), it was held that words "last resided" in this section did not contemplate a mere casual residence in a place for a temporary purpose, and that where the husband is employed as a carpenter in the railway workshops in Lahore and has been residing there continuously for eleven years, a temporary sojourn to Lucknow by him with his wife would not confer on the Lucknow court jurisdiction to entertain an application by the wife for maintenance under this section. In *Jolly v. Jolly*(4), where the husband ordinarily resided outside Calcutta but was temporarily in Calcutta on the date of the application it was held that the temporary residence was sufficient to give the Calcutta court jurisdiction under this section. In *Sher Singh v. Amir Kunwar*(5), Mr. Justice Ashworth held that a stay of two months in a temporary place of residence with occasional visits during that period to the permanent place of residence can be regarded as amounting to a "residence" within the meaning of this section. He held that the expression "resided" in clause (9), [now clause (8)] of this section includes a temporary residence and is not to be confined to permanent residence. It would follow from these decisions that where the husband and wife have a fixed place of abode or a permanent place of residence, a casual or temporary residence in any other place would not confer jurisdiction on the court situate at that place under sub-section (8)(6). Where, however, the husband and wife have no fixed abode or permanent residence their casual or temporary residence at a place for about eight days with the intention of staying there longer if employment was found by the husband, give the court as that place jurisdiction to entertain an application under this section(7). The words "last resided" are not restricted to permanent residence but include also a temporary residence of two months with wife at the house of parents-in-law as "gharjama" so as to confer jurisdiction on the court of that place(8). Such residence does not, however, include casual visits by a person to the house of the mother-in-law where his wife happens to be at the time(9). But in the case of a

-1 C W N. 577, *Bishen Das v. Nanki*, 3 P R 1893 Cr.

(1) *Ram Kumar v. Rukmini*, 21 O C 249=22 Cr. L J 710

(2) *Khairunissa v. Bashir Ahmed*, 53 B. 781=31 Bom L. R. 931=A. I. R. 1929 B 410, *Flower v. Flower*, 32 A. 203

(3) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(4) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(5) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(6) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(7) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(8) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(9) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(10) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(11) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(12) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(13) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(14) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(15) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(6) *Khairunissa v. Bashir Ahmed*, 53 B. 781=31 Bom L. R. 931=A. I. R. 1929 B 410, *Flower v. Flower*, 32 A. 203

(7) *Khairunissa v. Bashir Ahmed*, 53 B. 781=1929 B. 410, *Jolly v. Jolly*, 21 C W N 872, *Bright v. Bright*, 86 C 964; *Murphy v. Murphy*, 45 B 517, *Sama Jetha v. Bai Wali*, 54 B 518

(8) *Sama Jetha v. Bai Wali*, 54 B 518=A. I. R. 1930 B 348=127 I C 179=31 Bom L. R. 754, *Alla Ditta v. Sakina* 110 I C 259=10 A. I. Cr R 490, *Ramrao v. Emperor*, A. I. R. 1922 Nag 55=15 N. L. J. 24.

(9) *Ram Kumar v. Rukmini*, 21 O C 249=63 I C 870=22 Cr. L J 710

not competent to a civil court to make a decree setting aside an order of maintenance made by a Magistrate. But if in disposing of a suit, a civil court decides any matter which might have the effect of disentitling a wife to maintenance, a Magistrate who has awarded maintenance is bound, in the interests of justice, to take the judgment of the civil court into consideration before proceeding to pass a fresh order enforcing payment of the allowance(1). In considering any application for cancellation of a maintenance order, however, the Magistrate is not necessarily bound to follow the order of the civil court, but must consider it along with any other circumstances which may be brought before him(2). A decree of a civil court for restitution of conjugal rights passed after an order of maintenance in favour of the wife supersedes the maintenance order and ought to be cancelled(3). But a decree of a civil court ordering restitution of conjugal rights does not *ipso facto* cancel a maintenance order passed under s. 488(4). Such a decree is no answer to an application for enforcement of an order previously obtained by the wife under this section for her maintenance without proof by the husband that the conditions of the decree for custody had been duly complied with and that without any sufficient reason she has left his custody(5). Where the court is satisfied that the husband did not wish to have his wife back and his object in getting the decree was merely to get the maintenance order cancelled, in the exercise of the courts discretion under s. 489 (2), it would be wrong for the court to cancel the order for maintenance(6).

Non-existence or change of relationship.—Where the relationship on which the maintenance order is based has been declared by the final decree of a competent civil court not to exist, it is open to the person affected thereby to ask the Magistrate to abstain from giving any further effect to his order of maintenance(7). The Magistrate is bound to abstain from enforcing his previous order for maintenance when it is once established that the relationship of husband and wife ceased to exist since the date of the order(8). On obtaining a decree of a civil court that a child is not his illegitimate child, a person is entitled to ask the Magistrate not to give effect to his previous order awarding maintenance to the child(9). In *Ghana Kanta v. Gereli*(10) it was held in the converse case that the Magistrate's finding against the sonship of a person for whom maintenance was claimed by the mother was not a bar to a suit in the civil court to establish the sonship and to recover maintenance(11).

(1) 2 Weir 614.

(2) *Moung Dun v. Ma Sein*, 3 Rang 150=20 Cr. L. J. 1341=A. I. R.

1907, 268=89 I. C. 317.

(3) *Parakkal v. Athappa Goundan*, 1907.

(4) *Parakkal v. Athappa Goundan*, 1907.

(5) *Parakkal v. Athappa Goundan*, 1907.

(6) *Parakkal v. Athappa Goundan*, 1907.

(7) *Parakkal v. Athappa Goundan*, 1907.

(8) *Parakkal v. Athappa Goundan*, 1907.

27 Cr. L. J. 30=91 I. C. 62=49 M. L. J. 269=1925 M. 1218=22 L. W. 479.

(7) *Venkayya v. Padamma*, 46 M. 721 (722); *Muhammad Abid v. Ludden*, 14 O. 276.

(8) *Syed Sahib v. Meeran Bee*, 20 M. L. J. 12.

(9) *Venkayya v. Padamma*, 46 M. 721=45 M. L. J. 101; *Po Gyi v. Ma Myen*, 13 Bar. L. T. 101=59 I. C. 559=22 Cr. L. J. 127; *Raghubar v. Emperor*, 6 Cr. L. J. 609.

(10) 32 O. 479.

(11) See also *Trinayani Dasei v. Srichondan*, 15 I. C. 603.

it should not apply to the criminal court under the provisions of section 489, Cr. P. Code, or otherwise, for an order to stay the payment of maintenance(1).

Effect of civil court decree : Previous decree—A decree for maintenance passed by a civil court, which cannot be executed on account of insolvency of the husband, is no bar to proceedings for maintenance under this section(2). Where the husband has obtained a decree for restitution of conjugal rights; and the decree is in force no application for maintenance by the wife ought to be entertained by the Magistrate(3). But the weight to be attached to a previous civil court decree for restitution of conjugal rights must depend upon the particular circumstances of each case and no hard and fast rule can be laid down that the civil decree is for ever binding on the Magistrate or that his discretion is never fettered(4). In this case in November, 1922, *R* obtained a decree for restitution of conjugal rights against his wife *D*. Thirteen months afterwards *R* was found to be ill-treating his wife, so much that she had to leave him, and she applied to a Magistrate for an order for maintenance under this section, which the Magistrate granted, finding that the applicant was "quite justified in refusing to live with" her husband. It was held that the Magistrate's order was a proper one and he could not be considered to be bound for indefinite period by the decree of the civil court. Where, however, a Magistrate passed an order under this section, directing the petitioner to pay a sum of money every month for the maintenance of a child of which the petitioner was alleged to be the father, in spite of the fact that a competent civil court had declared that the child was not born to the petitioner and that the mother of the child who now applied for maintenance on its behalf, had executed a registered release deed in favour of the petitioner giving up the claim to maintenance for a consideration of Rs 200, it was held that the Magistrate ought to have held that the prior decision of the civil court was conclusive on the question of relationship between the child and the petitioner and should have refused to pass any order for maintenance(5).

Order of English Probate Court for alimony.—An order for alimony for the wife passed by the Probate Court in England which the wife is unable to execute against her husband is no bar to the passing of an order under this section(6).

Effect of subsequent decree—The fact that an order for maintenance has been made under this section does not take away the jurisdiction of a civil court to make a declaration that the husband is not liable to pay separate maintenance to his wife. It is not open to a Magistrate to inquire a final decree of a civil court, the jurisdiction vesting in him under this section, being auxiliary to that of the civil courts(7). It is

(1) *Maung Po Thein v Ma Me San*, 1 B L J 82-1924 U B 20

(2) *In re Mahomed Ali*, 81 Bom. L. R. 1866-A. I. R. 1930 B 141-31 Cr. L. J. 609-124 C 127

(3) *Nga Po Saw v Ma Thei*, (1910-18) U B R 84

(4) *Rajjals v Dechi*, 46 A. 577 (578) -L. R. 5 A. 126 Cr.

(5) *Illoth Narayanan v Kattal Itticheray*, 35 M L J 443-42 C. 331 -18 Cr L J 971-6 L W 536

(6) *Kent v Kent*, 49 M 521-49 M. L. J 335-26 Cr L J 1507

(7) *Veeran v Myyammiah*, 2 Weir 615 *Po Gye v Ma Myens*, 13 Lur L. T 104-49 C. 559-44 Cr. L. J 127.

inquiry under s. 437(1).

Appeal.—No appeal lies against an order for maintenance(2). Nor does an appeal lie under cl. 15 of the Letters Patent against the order of a single Judge made on a revision petition against the order of a Magistrate(3).

Revision.—In *Kandasami Chetty, In re*(4) though the order under this section sought to be revised was considered not satisfactory, it was not interfered with in revision because petitioner had his remedy in the civil court. But a High Court can set aside in revision the previous criminal court's order in view of the subsequent civil court decree(5).

Delay in advancing claim—A wife does not lose her right to maintenance because she may not have advanced her claim immediately on her husband's desertion of her(6). A married woman whose husband has deserted her might well hesitate to commence proceedings till all hope that he would return to her has been abandoned(7).

489. (1) On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under section 488 should be cancelled or varied, he shall cancel the order, or, as the case may be, vary the same accordingly.

Amendment.—This section has been amended by section 132 of Act XVIII of 1923 and the following two changes have been introduced:—First, in sub-section (1) the monthly allowance has been raised to rupees one hundred consequent on the change in s. 488, sub-section (1). Secondly, sub-section (2) has been newly added. It is in accordance with the following cases(8). Where it was held that if in disposing of a suit, a civil court decides any matter which might have the effect of disentitling a wife or a child to maintenance, a Magistrate who has

(1) *Parbati v. Chetty*, 1 Cr. L. J. 864; See also *Ajoy Chandra v. Duli*, 1 C. L. J. 102.

(2) *Reg v. Thoku Ira*, 5 Bom H. C. R. (C.) 81; 7 W. R. Cr. 10.

(3) *Appadu v. Appayann*, 16 Cr. L. J. 326—28 L. C. 662—17 M. L. T. 350.

(4) 50 M. L. J. 44—27 Cr. L. J. 820—92 L. C. 82—1926 M. J. 16.

(5) *Raghubar v. Emperor*, 16 Cr. L. J. 609—30 L. C. 433.

(6) *Re Veluth Ahmed*, 2 Weir. 616 (616).

(7) *Kunnath Anjumma v. Veluth Ahmed*, 2 Weir. 616.

(8) *Venkayya v. Padamma*, 46 M. 721. *In re Chandulal*, 43 B. 845; *Muhanmad Abid v. Idder*, 14 C. 276.

Fresh application.—Though a complaint for maintenance may have been dismissed once on one state of facts, it is competent to a Magistrate to award maintenance on a complaint based on a different state of facts which may subsequently take place(1). No second inquiry is competent into allegations which have already been once made(2). A previous complaint is competent court(2). A previous complaint dismissed for default without an appearance is a subsequent application for the same relief(3) though there is authority to the contrary also(4).

Plea of insanity.—When maintenance under this section is claimed and the plea of insanity is set up on behalf of the counter-petitioner, the Magistrate must hold a judicial inquiry into his sanity and put him, if necessary, under medical observation. If he is found insane and incapable of understanding questions put to him, the Magistrate must postpone further proceedings until he is satisfied that the counter-petitioner can understand the same. The proceedings under this section are wholly governed by this Code(5).

Enforcement of order based on compromise.—Where the parties to an application for maintenance under this section compromise the matter, the Magistrate should dismiss the application leaving the parties to enforce the compromise in the civil courts. An order of maintenance passed in accordance with a compromise cannot be enforced by criminal courts(6).

Withdrawal of proceedings.—Section 528 (1) of the Code is applicable to proceedings under this section, and a District Magistrate by virtue of the powers conferred upon him by that section is competent to withdraw such proceedings from a Magistrate subordinate to himself(7).

Nature of proceedings.—An application for maintenance is not a complaint of an offence(8). And proceedings under this section are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act(9). The neglect or refusal to pay maintenance is not an offence, within the meaning of section 4(10). Compensation cannot be awarded under section 250 to the person proceeded against if the complaint is dismissed as false and frivolous or vexatious(11).

Further inquiry.—When an application for maintenance is refused by a Deputy Magistrate, a District Magistrate cannot direct a further

(1) *Avudai Ammal v. Sabramanna Pillai*, 2 Weir 633. As to a case in which a retrial was ordered, see *Punuscamy v. Almelu Bai*, A. I. R. 1930 Nag 59.

(2) *Sadr-ud Din v. Musahib Khanam*, 24 P. R. 1916 Cr., 18 Cr. L. J. 326-38 I. C. 438.

(3) *Maung Hla v. Ma On*, 5 Ring 697-1917 R. 328-105 I. C. 210-6 Bur. L. J. 200, *Po So v. Ma Kyin*, 4 L. B. R. 837.

(4) *Ma Su v. Paul Saisoon*, 1 U. B. R. (1891-96) 64-2 Weir 633.

(5) *Appichi Goundan v. Kuttigam-mal*, 43 M. 388-21 L. W. 180-43 M. Cr. P. C. -110.

L. J. 187-26 Cr. L. J. 701-1915 M. 440.

(6) *Sham Singh v. Hakam Devi*, 1930 L. 521-31 Cr. L. J. 1179-127 I. C. 13, 2 Weir 629, and see *Bhagwati v. Gayadhar*, A. I. R. 1935 A. 291.

(7) *Ghulan. Ruhia v. Nias Ali*, 5 P. R. 1905 Cr.

(8) *Aldenhousus v. Malone*, 13 P. R. 1885 Cr.

(9) *Nur Muhammad v. Bismilla Jan*, 16 C. 781, see *Takee Bibee v. Abdul Khan*, 5 C. 536-5 C. L. R. 459.

(10) *Bishendas v. Nanki*, 3 P. R. 1893 Cr.

(11) *Amloo v. Baboo*, 6 M. L. T. 251.

and accidental change in one of such circumstances but is exercisable only on proof of a change in all(1).

What is or is not a change in circumstances.—The fact that a child has grown older may constitute a change in the circumstances justifying a variation in the rate(2). A Magistrate can under this section go into the question whether the children have become able to maintain themselves subsequently to the order 'under' section 488 and reduce the allowance awarded to their mother for their maintenance, if he finds that they are in fact able to maintain themselves(3). But the fact that the second husband of a divorced Muhammadan has undertaken to maintain her child by the first husband does not constitute a change in the circumstances of the infant justifying an alteration in the allowance(4). A husband cannot claim reduction of allowance granted under s. 488 to his deserted wife, on the ground that she might possibly be able to earn something by her own labour(5). An order to vary the rate can be passed on proof of a change in the circumstances. It is not open to the Magistrate to alter the rate on the ground that the deserted wife might possibly be able to make a few pice by her own labour(6).

Alteration of allowance.—On a change of circumstances of the husband an order for maintenance passed against him cannot be cancelled; it can only be altered(7). But, in a Madras case it has been held that the word "alter" in this section includes also a cancellation and the Magistrate on proof of altered circumstances is competent not only to alter or modify an order of maintenance, but altogether cancel it(8). A Magistrate has no power to reduce the rate of a maintenance allowance which has accrued due in arrears. An order reducing the rate can operate only as regards payment accruing after the date of the order of reduction(9). In dealing with an application for increase of maintenance a Magistrate has no jurisdiction to inquire into the propriety or otherwise of the order for maintenance previously made(10). Where the original order made no specific allotment for the wife separately, it is not competent for a Magistrate to do so in enforcement of an order under this section(11). Although a maintenance order of a criminal court, under this section,

(1) *Rukmini v. Piare Lal*, (1891) A. W. N. 32.

(2) *In re Ramayee*, 14 M. 398 ;

(4) *Budhni v. Dabal*, 27 A. 11.

(5) *Ghurbin v. Gobindi*, (1887) A. W. N. 107.

(6) *In re Punja Lal*, 20 Bom. L. R. 617—1928 B. 224—111 I. C. 668.

(7) *In re Punja Lal*, 20 Bom. L. R. 617—1928 B. 224—111 I. C. 668.

In re Punja Lal, 20 Bom. L. R. 617.

(8) *Meenakshi v. Kampana*, 48 M. 503—48 M. L. J. 183—26 Cr. L. J. 732—86 I. C. 220—1925 M. 491.

(9) *Parvathain v. Mutha*, 2 Wel. 650 ; *Lalavanti v. Nandan Gopal*, A. I. R. 1935 Lah 21 (specially in the absence of an application by the husband). A Magistrate can direct increased rate of maintenance to be paid from the date of application for increase ; *Heralal v. Bai Amba*, 1926 B. 419—38 Bom. L. R. 609—27 Cr. L. J. 940—96 I. C. 396.

(10) *Re Marakkal*, 2 Wel. 650.

(11) *Thambhuranay Pillay v. Ma Lone*, 18 Cr. L. J. 103—87 I. C. 311—9 L. B. R. 49—10 Bur. L. T. 203.

awarded maintenance is bound in interests of justice, to take the judgment of the civil court into consideration before proceeding to pass a fresh order enforcing payment of the allowance.

Scope.—Where an order has once been passed by a competent court under section 488 for the payment of maintenance for a child or a wife, the only power that exists of modifying such an order is that given by this section(1). A person aggrieved by an order directing him to pay a certain sum for maintenance should apply to the Magistrate under this section(2). A revised order awarding maintenance, made by a Magistrate of his own motion and without proof of a change of circumstances is illegal(3). The provisions of this section are comprehensive and empower a Magistrate having jurisdiction to vary the amount of allowances fixed under the preceding section not only by himself but by his predecessor-in-office; and more so to vary his own order which has been corrected on revision(4).

Change in circumstances.—In this section the "change in circumstances" referred to is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed and not a change in the status of the parties which would entail a stoppage of the allowance(5). On an application under this section it is not permissible to the husband to plead that he is not liable to pay maintenance because he has divorced his wife. The plea can properly be urged, and acted upon if satisfactorily established by evidence, on an application by the wife to recover arrears of maintenance under s. 488 (3)(6). The alteration in the allowance contemplated by this section only refers to a power to alter that amount, and not to a total discontinuance thereof(7). This view is supported by the following cases(8). But in the case of *Meenakshi v. Karuppan*(9) the Madras High Court expressed an opinion that the language of this section is sufficiently wide to enable the Magistrate to reduce the maintenance to nothing, that is to say, in effect wholly cancel it. The power given by this section is intended to be exercised on account of a merely temporary

(1) *Budhini v. Dabal*, 27 A. 11

(2) *Goyamoney v. Mohesh Chunder*, 9 W. R. Cr. 1; See *Mahtab Bibi v. Ala Baksh*, 17 P. R. 1865 Cr.

(3) *Re Venkatachala*, 2 Weir. 628

(4) *Haji v. Fatma*, A. I. R. 1932 S. 59—1932 Cr. O. 200—138 I. C. 624—33 Cr. L. J. 646.

(5) *Shah Abu Nyas v. Ulfat Bibi*, 19 A. 50—(1896) A. W. N. 173, *In re Punjalal*, 111 I. C. 603—30 Bom. L. R. 617—A. I. R. 1928 B. 224. See *In re Din Muhammad*, 5 A. 226 (228), *Abdul Rahman v. Sukhina*, 5 C. 568, *Zeb-un-Nissa v. Mendu Khan*, (1885) A. W. N. 29, *In re Karam Pirbhai*, 8 Bom. H. C. R. 95; *In re Abdul Ali*, 7 B. 180, *Muhammad Abid v. Ludden*,

14 C. 276. In *Shah Abu Nyas v. Ulfat Bibi*, 19 A. 50, *Nepoor v. Jurat*, 10 B. L. R. App. 33 was dissented from, and *Mahtubani v. Fakir Buksh*, 15 A. 143 was overruled, *Zulawanti v. Madan Gopal*, A. I. R. 1935 Lah. 21.

(6) *In re Punja Lal*, 30 Bom. L. R. 617—A. I. R. 1928 B. 224—111 I. C. 668, see also *U. Ha Thaung v. Ma Aye* 10 Rang. 106—1932 Cr. C. 476 (477)

(7) *In re Din Muhammad*, 5 A. 226 (228)

(8) *Shah Abu Nyas v. Ulfat Bibi*, 19 A. 50, *In re Punja Lal*, 30 Bom. L. R. 617

(9) 66 I. C. 220—(1925) M. W. N. 67—21 L. W. 142—48 M. L. J. 183—A. I. R. (1925) M. 491—26 Cr. L. J. 732—48 M. 603.

of arrears may be made either by the Magistrate who passed the order for payment of maintenance or by the Magistrate having jurisdiction in the place where such person resides(1). This section does not deprive a Magistrate who has made an order for maintenance of the jurisdiction given him under section 488(2). A Magistrate making an order for maintenance under section 488 is competent to enforce it against the person made liable for the payment of such maintenance, even though such a person resides outside the jurisdiction of his court(3). When the defendant is beyond his jurisdiction, he may issue a warrant for collection of arrears of maintenance(4). But he cannot refer the applicant to the Magistrate having jurisdiction at the place in which the defendant is to be found(5) as was held in *Queen v. Karri Papayamma*(6). A second class Magistrate of a place where the husband lives is competent to enforce an order for maintenance(7).

Duty of Magistrate.—The conditions specified in the second clause of this section have special reference to cases in which enforcement is sought at a place other than that in which the order was originally passed, or by a Magistrate other than the one who passed it, and cannot be considered exhaustive, and it is open to any party to such order to show cause against its enforcement and to ask for its cancellation or alteration on any of the grounds specified in ss. 488 and 489 in one and the same petition(8). And inasmuch as the Magistrate's order for maintenance of a wife must be in favour of a person bearing that legal character under the personal law which governs the parties, such order cannot enure for the benefit, and cannot be enforced in favour, of one who no longer bears that character under that law, and it is incumbent on the Magistrate, when the question is raised before him, to satisfy himself that the woman still possesses the character by virtue of which she was unable to obtain an order of maintenance(9). When, therefore, a Magistrate has passed an order under section 488, for a person to make a monthly allowance by way of maintenance of his wife, and after such order the person liable thereunder alleges that he has lawfully divorced the woman and that she therefore is no longer his wife, it is open to the Magistrate to entertain and inquire into such plea, and if he finds it established to refuse to enforce his order at least after such date as the divorce operates under the law or custom governing the parties to disentitle the woman to further maintenance(10). But the Magistrate under this section cannot call in question the order of the

(1) *Ma Thaw v. Emperor*, 7 L. B. 116.

(2) *Queen v. Karri Papayamma*, 4 M. 230.

(3) *In re Gnanambal*, 52 M. 77—55 M. L. J. 516—29 Cr. L. J. 932—111 I. C. 852—1928 M. 1171.

(4) See *Queen v. Karri Papayamma*, 4 M. 232 and the case cited in the last note.

(5) *Ma Thaw v. Emperor*, 7 L. B. 116; *In re Gnanambal*, 52 M. 77—55 M. L. J. 516—29 Cr. L. J. 932 (so assumed).

(6) 4 M. 230.

(7) *In re Ubhai*, Pat. Un. Cr. C. 293.

(8) *Baji v. Nawab Khan*, 21 P. R. 1894 Cr.

(9) *Baji v. Nawab Khan*, 21 P. R. 1894 Cr.

(10) See the case cited in the last note and *Shah Abu Alias v. Ulfat Bibi*, 19 A. 50; *Prabhu v. Rami*, 25 A. 165; *Prabhu v. Rami*, 25 A. 165.

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may be modified, on a change of circumstances being shown, still, so long as that order remains in force, it must carry with it its proper consequences(1).

Reference to arbitration.—Where an arbitrator has made an award in an application by a husband to reduce maintenance awarded to his wife, he cannot subsequently review his own award(2).

Compromise.—Where the parties to an application for maintenance under this section compromise the matter, the Magistrate should dismiss the application leaving the parties to enforce the compromise in the civil courts. Such a compromise is a bar to an application under this section(3). If, however, the parties, subsequent to an order under section 488, make an agreement modifying its terms, such agreement would amount to a change in the circumstances, and the party interested can apply under this section and get the order modified(4).

Sub section (2).—Under sub-section (2) as amended by Act XVIII of 1923, it is competent for a Magistrate to cancel or vary an order of maintenance, if he thinks that it should be cancelled or varied in consequence if any decision of a competent civil court. If a civil court has given to the husband a decree for restitution and the husband *bona-fide* wishes to execute that decree and the wife refuses, that would be a good ground for cancelling the order of maintenance under section 488, but where the court is satisfied that the husband did not wish to have his wife back and his object in getting the decree was merely to get the maintenance order cancelled, in the exercise of the court's discretion under sub section (2), it would be wrong for the court to cancel the order of maintenance(5). See Notes to s. 488, under heading "Effect of subsequent decree".

490. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid, and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

Magistrates competent to enforce order.—When a person ordered under section 488, to pay maintenance has ceased to reside in the jurisdiction of the Magistrate who passed the order an order for the recovery

(1) *Sidheshwar v. Gyanada*, 22 C. 291.

(2) *Bhagwati Devi v. Gajadhar Prasad*, A. I. R. 1934 A 940=4 A. W. R. 216=1934 Cr. O. 1218=152 I. C. 812=36 Cr. L. J. 186=1934 All. L. R. 1061.

(3) *Sham Singh v. Hakam Devi*, 127 I. O. 18=A. I. R. 1930 Lah. 524=Ind. Rul. (1930) Lah. 813=31 Cr. L. J. 1179=1930 Cr. Cas. 623; *Pal Singh v.*

Nihal Devi, A. I. R. 1932 Lah. 349=33 P. L. R. 292=1932 Cr. O. 430=137 I. O. 364=33 Cr. L. J. 493.

(4) *Prabhu v. Ram*, 25 A. 165.
(5) *Parakkal v. Athappa Goundan*, 91 I. O. 63=49 M. L. J. 269=21 L. W. 479=1 I. R. 1925 M. 1218=17 Cr. L. J. 30, see *In re Chandulal*, 43 B. 853=20 Cr. L. J. 687=52 I. C. 607=21 Bom. L. R. 766.

CHAPTER XXXVII

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS

Power to issue
directions of the
nature of a *habeas*
corpus

491. (1) Any High Court may, whenever it thinks fit, direct—

- (a) that any person within the limits of its appellate criminal jurisdiction be brought up before the court to be dealt with according to law;
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
- (c) that a prisoner detained in any jail situate within such limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into such court;
- (d) that a prisoner detained as aforesaid be brought before a court-martial or any Commissioners acting under the authority of any commission from the Governor-General in Council for trial or to be examined touching any matter pending before such court martial or Commissioners, respectively;
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of *ceppi corpus* to a writ of attachment.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners' Regulation, 1818, Madras Regulation II of 1819 or Bombay Regulation, XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858.

first Magistrate. He has only to satisfy himself as to the identity of the parties and the non-payment of arrears and as to the enforceability of the order in the sense that the same is a subsisting one at the time and not released, satisfied or set aside(1). The fact that the parties had made an agreement subsequent to the order modifying its terms is not a matter for the consideration of the Magistrate enforcing the order. If the person against whom that order for maintenance is made considers that such order should no longer be in force against him, it is for him to apply under section 489 and get the order altered(2). But if the defendant proves that the claim for maintenance has been released, a Magistrate is not bound to enforce an order for maintenance made under s. 488(3). Further, if after the wife returns with the child and lives with the husband who maintains them in his own house, its effect is to render the order of maintenance ineffectual. For if the parties come together and live together again, the act of neglect or refusal ceases to exist, and if a new act, subsequently arises it must be proved in fresh proceedings(4).

Decree of civil court on question of marital or final relationship supersedes Magistrate's previous maintenance order.—The order of maintenance cannot be enforced after a decree of the civil court declaring the parties not being husband and wife(5). A civil court decree declaring that A is not an illegitimate child of B supersedes a Magistrate's previous order for A's maintenance and the Magistrate is justified under this section, in refusing to enforce the criminal court's order after the civil court decree is passed(6).

(1) *Prabhu v. Rami*, 25 A. 165 (166),
See also *Mahbubani v. Fakir Bukhsh*,
15 A. 143.

(2) *Prabhu v. Rami*, 25 A. 165

(3) *Rangamma v. Muhammad Ali*,
10 M. 13—2 Weir. 635.

(4) *Empress v. Phul Kori*, (1835) A.
W. N. 217, *Ma Tin v. Emperor*, 1 Cr.
L. J. 870

(5) *Zulfiyar Khan v. Zainab*, 9 O.
C. 49—3 Cr. L. J. 229

(6) *Raghutar v. Emperor*, 2 O. L. J.
251, where earlier cases are collected.

writ of *habeas corpus*, which used to be issued by the Supreme Courts and by the High Courts under Act X of 1875, when it was abolished so far as the purposes in the section are concerned(1). In two recent Calcutta cases it has been held that the writ of *habeas corpus* has been displaced by section 491, and that section, in so far as it displaces the writ, is not illegal or *ultra vires*(2).

Custody of children.—The High Courts have power to determine questions as to the proper custody of minors under this section(3). But the power under this section is to be exercised in matters of *urgency*, where, for instance, the father is suddenly deprived of the custody of his sons, and there is a danger to life of the sons in the transferred custody. It is a remedy for a person deprived of his liberty. The power therefore has to be exercised with caution, and not in a case where there is a dispute merely as to who should be guardian of particular minors(4). Where a Hindu mother, who has custody of her minor children, is inclined towards Christianity and is likely to be converted to that religion and to bring up her children in such a way that they will ultimately express a desire to be converted to Christianity, the proper course is to remove the mother from guardianship and appoint another person as guardian, under the provisions of the Guardians and Wards Act. The High Court will not take action under this section(5). A similar rule is laid down in a recent Allahabad case, where a Muhammadan lady had been divorced by her husband, her son aged four years remaining with him, and she applied to the High Court under this section that her minor son be brought before the court and be delivered to her by her husband because under Muhammadan law the mother was entitled to the guardianship of a child under seven years of age(6).

Principles on which courts act.—In dealing with an application for a writ of *habeas corpus* by a guardian to recover custody of an infant, the main consideration for the court is the infant's welfare in its widest sense, moral religious and physical(7). Due regard must be had to the ties of affection(8). The rules that guide the Court of Chancery in such matters are applicable to the courts in this country also(9). But though in applying this section the welfare, and interest, of the minor,

(1) Act X of 1875, s. 148.

(2) *Pratul Chandra v. Commandant, Hiji Detention Camp*, 61 C. 197=A. I. R. 1934 C. 259=38 C. W. N. 293=1934 Cr. C. 387; *Girendra Nath v. Birendra Nath*, 31 C. W. N. 593=1927 C. 406=54 C. 727.

(3) *Subbuswami v. Kamahshi*, 53 M. 72=31 Cr. L. J. 187=1927 M. 834;

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Cr. L. J. 1048=1928 M. 1087.

(6) *Haidari Begum v. Jawab Ali*, A. I. R. 1935 A. 55

(7) *Saraswathi v. Dhanakoti*, 48 M. 293=85 I. C. 840=47 M. L. J. 614=(1914) M. W. N. 870=20 L. W. 902=A. I. R. (1924) M. 873=26 Cr. L. J. 616; *Zorabibi v. Abdul Razzak*, 12 Bom. L. R. 891=11 Cr. L. J. 687; *Sua Lay v. Yen Boon*, 4 Bur. L. J. 289=27 Cr. L. J. 737; *Pollard v. Rouse*, 33 M. 259

(8) *Saraswathi v. Dhanakoti*, 48 M. 293

(9) See the case cited in the last note and *In re Sailthre*, 16 B. 307.

Amendment.—This section has been amended by section 30 of the Criminal Law Amendment Act, XII of 1923, and the changes introduced are the following:—*First*, the opening words "any High Court" have been substituted for the words "any of the High Courts of Judicature of Fort William, Madras, Bombay, etc." *Secondly*, in sub-section(1) (a), the words "appellate criminal jurisdiction" have been substituted for the words "ordinary original jurisdiction".

Habeas corpus.—A man in false imprisonment has the right to sue out a writ of *habeas corpus*, in fact it is only by doing so that he may regain his liberty, and such a writ will issue in all cases of false imprisonment(1). The law can be stated to be that in every part of the British Empire every person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *habeas corpus*(2). The power to issue writ in the nature of *habeas corpus* is given by this section but the jurisdiction inherited from the supreme court is apart from that conferred by this section and is in no way curtailed by its provisions(3). But a non-presidency High Court has not the common law right of issuing a writ of *habeas corpus*, but only the power, conferred upon it by statute for the first time in 1923, of making directions of the nature of a *habeas corpus*(4). The underlying principle of every writ of *habeas corpus* (and proceedings under this section) is to ensure the protection and well being of the person brought before the court under that writ. The real interest and well being of the person ought to be not only the determining but the sole consideration(5). Proceedings by way of *habeas corpus* are proceedings calling upon a person having custody of a prisoner to produce him and demonstrate under what authority he holds him, in custody. If the authority be a legitimate authority binding on the officer complying with it, he is bound to obey the order of that authority and the court cannot interfere. All that the court can do is to see that there is no patent defect visible in the authority by which the person having custody detains any person(6). It applies whether the cause of detention alleged be civil or criminal. In the case of unlawful detention of a child(7) from his parents or guardians(8) or of a married woman from her husband(9) and in the case of wrongful detention of a person irregularly committed for extradition(10) and in any other case of wrongful deprivation of liberty, the writ of *habeas corpus* (or under this section direction in the nature of such writ) is the appropriate remedy(11).

Habeas corpus abolished.—This section takes the place of the

(1) Blackstone, Vol 3 (Nineteenth Edition), pp. 126—131 and *Hottenot Vener's case*, 13 East 195 (1810), quoted in *Girindra Nath v Birendra Nath*, 31 C W. N 593 at p 601

(2) *In re Govindan Nair*, 45 M. 922 (1925).

(3) See the case cited in the last note and *In re Kochunni Elaya*, 45 M. 14 (19)

(4) *Haidari Begam v. Jauad Ali*, 56 A 271

(5) *Zarabibi v Abdul Razzaq*, 12

Bom L R 691.

(6) *Jamna v Emperor*, 91 I C, 62= 27 Cr L J 37=1926 S 126

(7) *Muthuswamy v. Narayana*, 8 I C 393=8 M L J. 300=11 Cr. L J. 441

(8) *Zarabibi v. Abdul Razzaq*, 12 Bom L R 679=9 I C 618

(9) *Sudduswami v Kamalshet*, 53 M 72=1929 M 834=31 Cr. L. J 187=120 I C 691

(10) *In re Stallmann*, 39 C. 164; *Tops v Emperor*, 46 C. 51

(11) Woodroffe's Cr. P. C p 565.

not ordinarily be compelled to remain in custody to which he or she objects; and in the case of younger children who are still old enough to form an intelligent preference, their wishes will form one of the elements for consideration(1). But in a petition for *habeas corpus* by a husband against the mother and the step brother of his minor wife aged 13 years, her consent or otherwise to the court's action is immaterial(2).

Person to be brought up, from outside British India.—The High Court can under its common law powers, issue a writ of *habeas corpus* for the production of a person who is outside British India, provided it is satisfied that he is in the custody or under the control of a person within its jurisdiction(3). In this case there was a person within the jurisdiction of the Bombay High Court who had sent minor children, who had been in his custody, to Junagadh, a native state; and the court held that it had jurisdiction to direct the person within the court's jurisdiction to produce the minors whom he had sent away to a foreign state. But the High Court has no power to issue directions of the nature of a *habeas corpus* under this section, where the person in respects of whom this power is invoked is in the custody of a native state over which the High Court does not exercise jurisdiction and there is no person within British India who may be said to have vicarious custody of such person(4).

Custody of wife—A husband seeking to recover custody of his minor wife illegally detained by others is entitled to proceed under this section, and the opposite party cannot be heard to say that, where there are more than one remedy provided for under the law, the less expensive and less threatening remedy should be resorted to by the petitioner(5). On an application under this section by a husband for a writ of *habeas corpus* against his mother-in-law for production of his minor wife of immature age what the court has to consider is the welfare of the minor wife and in doing so the fact that she prefers to reside elsewhere than with her husband, is not entitled to any weight, although where she is old enough to form a good opinion, this would be a very important circumstance for consideration(6). It is not proper that questions involving status of parties, *i.e.* validity of marriage and conversion, should be decided in application for writ of *habeas corpus* under this section(7).

Illegal or improper detention.—The words "detained" and "custody" in this section imply some sort of confinement or physical restraint on the liberty of movement of the detenu. The use of the words "be set at liberty" also supports this construction. Hence where no restriction of any kind has been placed on the personal

(1) *Pollard v. Rouce*, 33 M. 285=6 J. C. 754=8 M. L. T. 47=(1911) 1 M. W. N. 167=12 Cr. J. 160.

(2) *Subbaswami v. Kamakshi*, 53

(4) *Shiva Prasad v. Emperor*, 119 I. C. 527=27 A. L. J. 520=A. I. R. 1919 A. 317 (318)=30 Cr. L. J. 1093

(5) *Subbaswami v. Kamakshi*, 53 M. 72=31 Cr. L. J. 187.

(6) *Ibid.*

(7) *Jai Dayal v. Asst. Sohanan*, 1934 L. 647=151 I. C. 692=35 P. L. R. 591=35 Cr. L. J. 1997.

is the main feature to be regarded(1); the court will restore a minor to the custody of his guardian unless it be shown that such custody is likely to be injurious to the minor. Where a court of competent jurisdiction has under the Guardians and Wards Act declared a person to be a fit and proper person to exercise guardianship over an infant, the procedure by way of *habeas corpus* cannot be utilized for the purpose of going behind such an order and depriving the guardian so appointed of his custody(2). It is only in cases where it can be shown that a minor child is illegally or improperly detained that courts will interfere by way of *habeas corpus*(3). If a minor even though with her own consent, remains in the custody of a person, he must be held to have illegally detained her within the meaning of this section if another person, who is better entitled in law to have the custody of the minor, desires to have that custody(4). The court will not act unless it be in the interest of the minor that it should do so(5), and will, so far as possible, administer the principles contained in the Guardians and Wards Act, while refusing to recognize the rights of a guardian who had shown himself by his bad conduct or otherwise, incapable of properly performing his duties as guardian. Where a mother had for eight years neglected her child who had been educated at a mission school the High Court refused her application for custody of the girl aged 15 years, on the ground that, if granted, it would be detrimental to the welfare of the child(6).

Effect given to wishes of minor.—The court in acting under this section would pay regard to the wishes of a minor old enough to form a sound opinion as to his custody(7). If the infant is capable of forming intelligent opinions the court must take them into consideration. There is no hard and fast rule obtaining in England that the court has no option but to give effect to the wishes of an infant of over 14 if a boy, and over 16 if a girl, without reference to its mental capacity. Even if such a rule prevails in England it is inapplicable to India(8). Where the mother of an aged girl about to complete her 18th year, applied for directions in the nature of a writ of *habeas corpus*, alleging that the minor girl was being illegally detained and was about to be married but the girl herself stated that she would not go to her mother and expressed a strong desire to marry the person objected to by the mother the writ was refused(9). A male child above the age of 14 and a female child above the age of 16 years will

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(2) *Subbarath Nammal v Seshachalam*, 54 M 759=A I R 1931 M 773=4 M Cr R. 300=1931 Cr C 1029=134 I C 1215=33 Cr L J 49=61 M. I. J 219=34 L W 171=(1931) M W N. 769

(3) See the case cited in the last note.

(4) *Subbucan v Kamackshi*, 63 M. 72, 73=57 M I. J 642=31 Cr L J. 197.

(5) *In re Sasthre*, 16 B 307 at p. 336, *In re Joshy Assani*, 23 C 200, *Kristo Kessar v Kader Meye Dossee*, 2 C L R 583, at p. 588; *Pollard v Rouse* 83 M. 289, *Annie Besant v Narayanaiah* 38 M 607 P C, *Moidin v Kunhadein A I R*, 1929 M 33=2 Mad Cr Cas 58, *Sherbanoo v Abbas*, 9 Cr L J 214

(6) *In Sasthre* 16 B 307

(7) *Pollard v Rouse*, 83 M 289, *Saraswathi v Dhanakoti*, 48 M 299.

(8) *Saraswathi v Dhanakoti*, 48 M. 299

(9) See the case cited in the last note.

not ordinarily be compelled to remain in custody to which he or she objects; and in the case of younger children who are still old enough to form an intelligent preference, their wishes will form one of the elements for consideration(1). But in a petition for *habeas corpus* by a husband against the mother and the step brother of his minor wife aged 13 years, her consent or otherwise to the court's action is immaterial(2).

Person to be brought up, from outside British India.—The High Court can under its common law powers, issue a writ of *habeas corpus* for the production of a person who is outside British India, provided it is satisfied that he is in the custody or under the control of a person within its jurisdiction(3). In this case there was a person within the jurisdiction of the Bombay High Court who had sent minor children, who had been in his custody, to Junagadh, a native state; and the court held that it had jurisdiction to direct the person within the court's jurisdiction to produce the minors whom he had sent away to a foreign state. But the High Court has no power to issue directions of the nature of a *habeas corpus* under this section, where the person in respects of whom this power is invoked is in the custody of a native state over which the High Court does not exercise jurisdiction and there is no person within British India who may be said to have vicarious custody of such person(4).

Custody of wife—A husband seeking to recover custody of his minor wife illegally detained by others is entitled to proceed under this section, and the opposite party cannot be heard to say that, where there are more than one remedy provided for under the law, the less expensive and less threatening remedy should be resorted to by the petitioner(5). On an application under this section by a husband for a writ of *habeas corpus* against his mother-in-law for production of his minor wife of immature age what the court has to consider is the welfare of the minor wife and in doing so the fact that she prefers to reside elsewhere than with her husband, is not entitled to any weight, although where she is old enough to form a good opinion, this would be a very important circumstance for consideration(6). It is not proper that questions involving status of parties, *i.e.* validity of marriage and conversion, should be decided in application for writ of *habeas corpus* under this section(7).

Illegal or improper detention.—The words "detained" and "custody" in this section imply some sort of confinement or physical restraint on the liberty of movement of the detenu. The use of the words "be set at liberty" also supports this construction. Hence where no restriction of any kind has been placed on the personal

(1) *Pollard v. Rouce*, 33 M. 288=6 I. C 754=8 M. L. T. 47=(1911) 1 M. W. N. 167=12 Cr. J. 160.

(2) *Subbaswami v. Kamakshi*, 63 M. 72=A. I. R. 1929 M. 631=(1929) M. W. N. 689=30 L. W. 655=57 M. L. J. 612=31 Cr. L. J. 187.

(3) *Mahomedalli v. Jamulji*, 50 B. 616=28 Bom. L. R. 471.

(4) *Shiva Prasad v. Emperor*, 119 I. C 527=27 A. L. J. 520=A. I. R. 1929 A. 317 (348)=30 Cr. L. J. 1093

(5) *Subbaswami v. Kamakshi*, 63 M. 72=31 Cr. L. J. 187.

(6) *Ibid*

(7) *Jai Dayal v. Mst. Sohagan*, 1934 L. 617=151 I. C. 692=35 P. L. R. 521=35 Cr. L. J. 1397.

movements of a person but people are allowed to see him only after obtaining previous permission from the court of wards authorities(1). Where the applicant's nephew, a minor, went on a visit to his sister and did not return giving as a reason that he did not wish to prosecute his studies any further and was going to find work, and the applicant applied to the High Court for a writ *habeas corpus* to the lad's welfare and further education it was held, that as there was no suggestion that the sister and her husband were not proper persons for him to live with and as he was not apparently detained against his will no order under this section ought to be made(2). Where the Commissioner of Police has, under section 3-A of the Foreigners Act (III of 1864) ordered a foreigner to be detained or released on bail, he must report the fact to the Local Government forthwith; and the order of the Local Government, directing either the discharge or the removal of the foreigner, must be passed without delay, i.e., within a reasonable time of the receipt of the report. Otherwise the detention of the person concerned would be illegal or improper within the meaning of this section(3). Such an improper exercise of the power of detention may be corrected under this section(4). A Magistrate when remanding an accused to police custody under s. 167, Cr. P. C. although he is not expected to write an elaborate order should briefly indicate reasons for remanding him to police custody. Where however the Magistrate has failed to give reasons for remanding a petitioner to police custody but it appears that there were some grounds for believing that the prisoner was concerned in a serious crime and further information to that effect is obtained during investigation, the defect in Magistrate's order must be regarded as a mere irregularity and the custody cannot be said to be illegal within the meaning of this section, entitling the prisoner to be set at liberty(5). The word "improperly in this section cannot include any consideration of the question whether the legislation is proper, but refers to cases in which, although the forms of the law have been observed, there has been fraud on an act or an abuse of the powers given by the legislature. The court can and in a proper case must determine the question whether there has been such fraud or abuse(6). The petitioner alleging such fraud or abuse must set out his case with the same precision as is essential in alleging fraud against any other litigant and his case fails unless he can establish it as pleaded(7). The release of a prisoner by the Government temporarily so as to enable him to be at the bedside of his sick relative does not amount to remission of the unexpired portion of the sentence and re-arrest and confinement in jail of such prisoner without fresh trial is not illegal(8).

Person arrested under illegal extradition warrant—This section is very widely worded and entitles the High Court to inquire into the

(1) *Hazoor Ara v. Deputy Commissioner, Gonda*, A I R 1934 O 201 = 149 I C 991 = 35 Cr. L J 1052

(2) *Paul v. Hunt*, 6 Bur L J 111 = 104 I C 705 = 9 A I R R 28.

(3) *In re Jagerdeo*, 49 B 212 = 27 Bom L R. 1252, see *Alter Cauffman v. Government of Bombay* 8 B C 36

(4) *Srimal v. Emperor*, 97 I C 945 = 44 C L J. 134 = 27 Cr. L J 1185

(5) *Dhruva Dev v. Crown*, 31 P L

R 760, *Sundar Singh v. Crown*, 12 Lab 16 - A I R 1930 Lab 915 = 32 Cr L J 3-9 (340), see *Ital Krishna v. Emperor*, 12 Lab. 435 = A I R 1931 Lab 99 = 135 I C 602 = 1931 Cr C. 163 = 32 P L R 1

(6) *Jitendra Nath v. Government of Bengal*, 40 C 361 = 26 C. W N 1053

(7) *Idat*

(8) *Gardhar Lal v. Emperor*, A. I. B 1535 A 181.

question whether a person arrested under an extradition warrant was illegally or improperly detained in public or private custody and if the High Court is satisfied that he was so detained to order that he be set at liberty. The mere fact that after his arrest he was temporarily released on bail pending further inquiry does not oust the jurisdiction of the High Court under this section(1). Nor does the mere fact that the Government have already issued a warrant for surrender under section 3, sub-section (1) of that Act(2).

Executive order.—An executive order can be revised only if it comes within the purview of this section(3).

Person arrested under Sind Encumbered Estates Act.—Where a person is arrested under the orders of the manager, Encumbered Estates under the provisions of s. 10 of the Sind Encumbered Estates Act read with s. 157 of the Bombay Land Revenue Code, the High Court has no jurisdiction to issue a writ of *habeas corpus* under this section(4).

Clause (a).—The terms of this section as it now stands give the High Court power to issue a direction to the nature of a *habeas corpus* within the limits of its *appellate criminal jurisdiction* under the unamended section, the jurisdiction of the High Court was confined to the limits of its *original jurisdiction*(5). The criminal appellate bench has jurisdiction to deal with an application under this section, as amended by Act XII of 1923, s. 30. The previous rules of the court and the practice in the matter have now become obsolete(6). The High Court has power to issue a writ of *habeas corpus* to mufussil places and even in cases of persons who are not European British subjects(7). But it has no power to issue a writ on its civil side(8).

Persons convicted in the usual course.—It is well-settled that a writ of *habeas corpus* is not granted to persons convicted or in execution under legal process, including persons in execution of a legal sentence after conviction on indictment in the usual course. When the law does not allow an appeal, the accused cannot have one indirectly in this way. When there has been a miscarriage of justice, the proper course is to carry the matter to the Crown for remedy(9).

Other remedy.—The proper method of having a *bona-fide* dispute as to the guardianship of minor children between their parents settled,

(1) *Sandal Singh v. District Magistrate, Dehra Dun*, 56 A. 409—A. I. R. 1931 A. 148; *Tops v. Emperor*, 46 C. 52; *In re Stallmann*, 39 C. 161; *Gulli Sahu v. Emperor* 42 C. 793; *Sabodh Chandra v. Emperor*, 62 C. 319—29 C. W. N. 98—26 Cr. L. J. 625; *In re Bai Aisha*, 31 Bom. L. R. 62.

(2) *Tops v. Emperor*, 46 C. 52; *In re Stallmann*, 39 C. 161.

(3) *Bhissesar Roy v. Emperor*, 53 C. 952—99 I. C. 42—30 C. W. N. 791—A. I. R. 1916 C. 261.

(4) *Ghanshamdas v. Manager, Encumbered Estates*, 99 I. C. 90—1927 B. 121—28 Cr. L. J. 191.

(5) *Tops v. Emperor*, 46 C. 52; *In re*

Stallmann, 39 C. 161.

(6) *Subodh Chandra v. Emperor*, 52 C. 319—29 C. W. N. 98—26 Cr. L. J. 625—85 I. C. 913.

(7) *In re Gorindan Nair*, 43 M. L. J. 326 F. B.; See *In re Kochunni*, 69 I. C. 26—41 M. L. J. 411—14 L. W. 465—(1921) M. W. N. 708—45 M. 14—23 Cr. L. J. 490.

(8) *Girundra Nath v. Birendra Nath*, 1917 C. 496—31 C. W. N. 693—54 C. 727—102 I. C. 647.

(9) *In re Bonomally*, 44 C. 723—15 Cr. L. J. 311. The High Court has power to revise the sentences of the military courts if a validating Ordinance is not passed. *Chanappa v. Emperor*, 31 Bom. L. R. 1613—A. I. R. 1931 B. 57

movements of a person but people are allowed to see him only after obtaining previous permission from the court of wards authorities(1). Where the applicant's nephew, a minor, went on a visit to his sister and did not return giving as a reason that he did not wish to prosecute his studies any further and was going to find work, and the applicant applied to the High Court for a writ *habeas corpus* to the lad's welfare and further education it was held, that as there was no suggestion that the sister and her husband were not proper persons for him to live with and as he was not apparently detained against his will no order under this section ought to be made(2). Where the Commissioner of Police has, under section 3-A of the Foreigners Act (III of 1864) ordered a foreigner to be detained or released on bail, he must report the fact to the Local Government forthwith; and the order of the Local Government, directing either the discharge or the removal of the foreigner, must be passed without delay, i.e., within a reasonable time of the receipt of the report. Otherwise the detention of the person concerned would be illegal or improper within the meaning of this section(3). Such an improper exercise of the power of detention may be corrected under this section(4). A Magistrate when remanding an accused to police custody under s. 167, Cr. P. C. although he is not expected to write an elaborate order should briefly indicate reasons for remanding him to police custody. Where however the Magistrate has failed to give reasons for remanding a petitioner to police custody but it appears that there were some grounds for believing that the prisoner was concerned in a serious crime and further information to that effect is obtained during investigation, the defect in Magistrate's order must be regarded as a mere irregularity and the custody cannot be said to be illegal within the meaning of this section, entitling the prisoner to be set at liberty(5). The word "improperly in this section cannot include any consideration of the question whether the legislation is proper, but refers to cases in which, although the forms of the law have been observed, there has been fraud on an act or an abuse of the powers given by the legislature. The court can and in a proper case must determine the question whether there has been such fraud or abuse(6). The petitioner alleging such fraud or abuse must set out his case with the same precision as is essential in alleging fraud against any other litigant and his case fails unless he can establish it as pleaded(7). The release of a prisoner by the Government temporarily so as to enable him to be at the bedside of his sick relative does not amount to remission of the unexpired portion of the sentence and re-arrest and confinement in jail of such prisoner without fresh trial is not illegal(8).

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(3) *In re Jagerdeo*, 49 B. 222 = 27 Bom. L. R. 1252, see *Alter Kaufman v. Government of Bombay* 8 B. 136.

(4) *Sital v. Emperor*, 97 I. C. 945 = 44 C. L. J. 131 = 27 Cr. L. J. 1185.

(5) *Dhruva Dev v. Crown*, 31 P. L.

R 760, *Sundar Singh v. Crown*, 12 Lab. 16 = A I R 1920 Lab. 915 = 32 Cr. L. J. 339 (340), see *Hal Krishna v. Emperor*, 12 Lab. 435 = A I. R. 1931 Lab. 99 = 135 I. C. 603 = 1931 Cr. C. 163 = 32 P. L. R. 1.

(6) *Jitendra Nath v. Government of Bengal*, 60 C. 364 = 36 C. W. N. 1059.

(7) *Ibid*.

(8) *Girdhari Lal v. Emperor*, A. I. R. 1935 A. 181.

PART IX

Supplementary Provisions

CHAPTER XXXVIII. OF THE PUBLIC PROSECUTOR.

492. (1) The Governor-General in Council or the Local Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) * * The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Local Government may prescribe in this behalf, to be Public Prosecutor for the purpose of any case.

Amendment.—The words, "In any case committed for trial to the Court of Sessions" in the beginning of sub section (2) have been omitted, because the necessity of appointing a Public Prosecutor in the absence of that officer may arise not only in Sessions Courts but in all other instances. The words "such rank as the Local Government may prescribe in this behalf" have been substituted for the words "the rank of Assistant District Superintendent", there being variety of nomenclature of Police Officers it was thought better to leave it to the Local Government to prescribe the rank of Police Officers who may be appointed as prosecutors for a particular case(1)..

Sub-section (1).—The Prosecuting Inspectors are not Public Prosecutors within the meaning of sub-section (1)(2).

Public Prosecutor.—A pleader appointed with the permission of the District Magistrate to support the conviction in a criminal appeal in the Chief Court is not a Public Prosecutor under this section(3). The appointment of the convicting Magistrate as Crown Prosecutor in the inquiry by the Sessions Judge subsequently directed is a most improper proceeding(4).

(3) *Akbar v. Empress*, 22 P. R. 1836 Cr.

(4) *Ileg. v. Kashinath*, 8 Bom H. C. R. 125.

is by way of an application under the Guardians and Wards Act and not by way of an application under this section. Where an application is made under the latter section and the court is of opinion that an applicant has another remedy open to him under which the rights of the parties can be more satisfactorily settled, it has power to refuse to exercise its discretionary powers under this section(1). But in one case it has been held otherwise(2).

Second application.—A High Court should not under this section re-try for itself a question which has already been determined(3), though there is authority to the contrary also(4).

Sub-section (3)—A relief by way of a writ of *habeas corpus* for production of a person ordered under section 11 of the Bengal Criminal Law Amendment Act, 1925, is not available. It would be available solely under the Code, except for the provisions in Bengal Criminal Law Amendment (Supplement) Act 1925(5). A commitment under Madras Regulation, 11 of 1819 in an executive act of the Government and is not a judicial proceeding. A statement in a warrant of commitment under that Regulation that the reasons mentioned in s. 2 (3) exist in a particular case in the opinion of the Governor in Council is sufficient and it is not open to a court to consider its correctness or the propriety of the reasons of State Policy(6).

Appeal.—It has been held by the High Court of Bombay that an order of a single Judge of the Bombay High Court directing the issue of a writ of *habeas corpus* is not an order made in the exercise of criminal jurisdiction and is open to appeal(7). But this view has not been accepted in Allahabad(8).

491-A. Any High Court established by Letters Patent may exercise the powers conferred by section 491 in the case of an European British subject within such territories, other than those within the limits of its appellate criminal jurisdiction, as the Governor-General in Council may direct.

This section, which has been added by s. 31 of Act XII of 1923, re-enacts in a modified form the provision of the former section 458. By this section, power is given to the High Courts to exercise the powers conferred upon them by section 491 in the case of European British subjects, who are outside the limits of their appellate criminal jurisdiction.

(1) *Suu Lay v Leo Boon*, 95 L C 65=4 Bur L J 169=1946 Rang 76=27 Cr L J 737, *Veeraswami v Rat namma*, 112 L C 472=A. I. L. 1928 M 1087=(1928) M W N 549, *Sultan Singh v Maya Ram*, 52 A 991.
(2) *Subbaswami v Kamakshi*, 53 M 72.

(3) *Rameshwar v Emjeeror*, 114 L J 132=1928 C 217=124 WN 820 *Haydari Begum v Jawad Ali* 11 A L J 1110=A. I. L. 1924 A 42, *In re Muhon nudd Nama*, 55 M 219.

(4) *Eshubhaya v. Administrator*.

Nigessa, 28 L W 874.

(5) *Girendra Nath v Bivendra Nath*, 511 727.

(6) *In re Etakandan*, 76 L. C. 187=45 M L J 473=18 L. W. 517=(1923) M W N 741=33 M L T 17=25 Cr. L J 123.

(7) *Mahomedali v Ismailji* 20 B. 616=94 B 132=27 Cr L J. 721=29 Pem L R 471=35 L C 49. See also *In re Narayandas* 11 B 555.

(8) *Haridra Hegam v. Jawad Ali*, 41 R. 114 (C)=120 L. 710=1931 A L J 684=34 W. R. 297.

Magistrate, conduct the prosecution(1). Where the Public Prosecutor has charge of a prosecution, a pleader instructed by a private person, including the Agent of a Railway Administration, must act under the directions of the Public Prosecutor(2). An advocate engaged by the complainant when desired by the public prosecutor to address the Magistrate for the prosecution is entitled to do so. The word 'act' in the end of the section does not mean something other than examining or cross-examining witnesses or addressing the court and is not used in any technical sense in distinction from the words 'appear and plead' in the opening part of the section(3). The Public Prosecutor may avail himself of the assistance of counsel retained by a private individual, but in doing so, he does not deprive himself of the management of the case(4). It is ordinarily undesirable that any counsel should be brought in to assist the Public Prosecutor at a late stage after the examination of the witnesses are all over even though he acts under the control of the Public Prosecutor except in very special circumstances(5).

494. Any Public Prosecutor * * may, with the consent of the court, in cases tried by Jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and upon such withdrawal,—

- (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
- (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

Amendment.—This section has been amended by section 134 of Act XVIII of 1923, and the changes introduced are the following:—*First*, the word "appointed by the Governor-General in Council or the Local Government" at the commencement of sub section (1) have been omitted. This change confers the power of withdrawal on all Public Prosecutors and render the following cases(6) obsolete. *Secondly*, the word the words "withdraw from the" have been added. This change is intended to empower the prosecutor to withdraw from all or any of the charges and to overrule the decision reported as 2 C. L. J. XVIII.

(1) *Chaitan Lal*, Oudh. S. C., No. 31.
 (2) *B. N. Ry Co Ltd. v. Sheikh Mahbul*, 27 Cr. L. J. 313=7 Pat. L. T. 343=92 I. C. 697.
 (3) *Vaz v. Emperor*, (1930) M. W. N. 769=3 Mad. Cr. Cas. 219.

(4) *In re Narayan*, 11 Bom. H. C. R. 102.

(5) *Vaz v. Emperor*, (1930) M. W. N. 769=3 Mad. Cr. Cas. 219.

(6) *Madhoo*, 8 A. 291; *Rama Krishna*, 2 Weir. 653.

"In the absence of the Public Prosecutor."—These words are wide and include temporary absence of the Public Prosecutor at the time and in the court where a case is proceeding(1).

Duty of Public Prosecutor.—The duty of the counsel for the prosecution is to be assistant to the court in the furtherance of justice and not to act as counsel for any person or party. He should not by statement aggravate the case against the prisoners, or keep back a witness because his evidence may weaken the case for the prosecution. His only object should be to aid the court(2). It is not his duty to call only witnesses who speak in his favour(3). He should, in a capital case, place before the court the testimony of all the available eye-witnesses, though brought to the court by the defence, and though they give different accounts. The rule is not technical one, but founded on common sense and humanity(4). The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused; and the duty of a Public Prosecutor is to represent not the police but the Crown, and this duty

There should be on the part of a
ness for or grasping at, conviction"
He is not to aggravate the case against the prisoner and has to
"perform his duties with that calmness and impartiality which should
ever characterise a Public Prosecutor." He has to "aid the court in
discovering the truth" and also in the discharge of its duty to do
justice as between the Crown and the accused(6).

493. The Public Prosecutor may appear and

Public Prosecutor
may plead in all
courts in cases un-
der his charge.
Pleaders privately
instructed to be un-
der his direction.

plead without any written authority be-
fore any court in which any case of which
he has charge is under inquiry, trial or ap-
peal, and if any private person instructs
a pleader to prosecute in any court any
person in any such case, the Public

Prosecutor shall conduct the prosecution, and the pleader
so instructed shall act therein under his directions.

Pleaders privately instructed to be under Public Prosecutor's direction.—A pleader or other person appointed by or on behalf of a complainant, and not by or for Government, is not entitled to conduct the prosecution in trial as of right, or otherwise than with the permission of the court, there being no provision in the Code, to confer this privilege(7). He can watch the case on behalf of his client, but he cannot, without being especially empowered by the District

(1) *Emperor v. Dipchand*, 121 I. O. 378=A. I. R. 1930 S. 166=1930 Cr. C. 74=D1 Cr. L. J. 684

(2) *Reg v. Kishnath*, 8 Bom. H. C. R. 126

(3) *Ram Ranjan v. Emperor*, 42 C. 422.

(4) *Ram Ranjan v. Emperor*, 42 C. 422.

Cr. P. C. 111.

(5) *Ibid.*

(6) *Anant Wasudeo v. Emperor*, 1924 Nag. 143=7 N. L. R. 155=26 Cr. L. J. 603=83 I. C. 723; *Reg v. Kishnath*, 8 Bom. H. C. R. 126; *Sardars Lal v. Emperor*, 3 L. 443=1923 L. 261=24 Cr. L. J. 246.

(7) *Albar v. Empress*, 29 P. B. 1553 Cr.

Magistrate to appear for the prosecution, withdraws from the prosecution, the effect provided in this section does not follow; in other words, the trial proceeds(1). But if the prosecution is withdrawn by the Public Prosecutor and the vakil privately engaged, and the application for withdrawal of the case is signed by both the persons, the withdrawal is not invalid(2). An application for withdrawal of prosecution by public prosecutor who is not in charge of the case before but appears in the case only to withdraw the prosecution is not regular and is open to objection, but the application does not amount to an illegality(3). Prosecutors, with the exception of the Advocate-General, may not withdraw from a prosecution without giving reasons and without the consent of the court; and that in withholding or according consent, the court is acting in a judicial (and not a ministerial) capacity and that it ought to give and record its reasons(4). The Public Prosecutor is the person responsible for making the application for withdrawal. There is no provision in the Code for any formal inquiry by the court under this section(5). A District Magistrate is not bound to consider the Public Prosecutor in charge of a case before applying for withdrawal of the case(6). But where a private complainant was permitted to conduct the prosecution and after charge was framed a Prosecuting Inspector was allowed without consulting the complainant to withdraw the prosecution and the Magistrate acquitted the accused, the High Court in revision set aside the acquittal(7). But when a case has been started upon a police report, and the Court Sub-Inspector wants to withdraw the case, the court cannot reject the application for withdrawal simply because the complainant wants to proceed with the case. In such a case the complainant has no *locus standi* to control the proceedings(8).

May with the consent of the court withdraw.—It is always open to the prosecution to withdraw a case with the permission of the court(9). A Magistrate issuing process, against an accused holding that a *prima facie* case has been made out, is not prevented subsequently from permitting the Public Prosecutor to withdraw the case(10). This section

(1) *Nga Maung Gyi v. Nga Lu Gale*, (1907-09) 1 U. B. R. Cr. Pro. 15; cf. *Emperor v. Aung Nyun*, 2 L. B. R. 165. Non compoundable cases can only be withdrawn under ss. 494 and 495, and not by private prosecutors; *Emperor v. Yankayya*, 10 L. B. R. 375=13 Bur. L. T. 244=64 I. O. 273=22 Cr. L. J. 753. The officer, who has the power of withdrawing from the prosecution of a case, under this section, is the officer referred to in section 495, clause (1). *Lalshmana Chetty v. Keelan Peria*, 8 I. C. 667=11 Cr. L. J. 722=2 M. W. N. 106=9 M. L. T. 203.

(2) *Sital Singh v. Emperor*, 46 C. 700.

(3) *Sher Singh v. Jitendranath*, 33 Cr. L. J. 3=134 I. C. 1045=36 C. W. N. 16=54 C. L. J. 253=1931 Cr. C 719=A. I. R. 1931 C. 607=50 C. 275.

(4) *Abdul Gani v. Abdul Kader*, 1 Rang. 756; following *Umesh Chander*

v. Satish Chander, 22 C. W. N. 69.

(5) *Gomibai v. Emperor*, 137 I. C. 344=26 S. L. R. 67=A. I. R. 1932 S. 93=1932 Cr. C. 532=Ind. Rul. (1932) Sind. 74.

(6) *Emperor v. Dipchand*, 81 Cr. L. J. 684=124 I. C. 878=81 Cr. L. J. 684=1930 Sind. 156=24 S. L. R. 377=Ind. Rul. (1930) Sind. 100.

(7) *Gopwara v. Emperor*, 1 Pat. L. T. 400=57 I. C. 657=21 Cr. L. J. 641.

(9) *Mehr Singh v. Emperor*, A. I. R. 1933 Lah. 884=1933 Cr. C. 1178=34 P. L. R. 1029=146 I. O. 387=35 Cr. L. J. 66.

(10) *Sher Singh v. Jitendra Nath*, 59 C. 275=83 Cr. L. J. 8=134 I. C. 1045=A. I. R. 1931 C. 607=54 C. L. J. 253=(1931) Cr. Cas. 759=Ind. Rul. (1932) Cal. 5=36 C. W. N. 16; see *Sabul Chandra*

Thirdly, the words "in respect of such offence or offences" have been added in cls. (a) and (b). This addition is consequential on the second amendment.

Scope.—Under this section, the Public Prosecutor, can withdraw from the prosecution—(i) in cases tried by Jury, before the return of the verdict and (ii) in other cases before the judgment is pronounced. Clauses (i) and (ii) do not necessarily indicate two distinct classes of cases from the point of view of their being triable by the Court of Sessions or by a Magistrate. Clauses (i) and (ii) together exhaust the whole scope of cases triable by the Court of Sessions or by a Magistrate.

has been committed to the Court of Sessions, but a joint trial has not begun, the case is not within clause (i) and so is within clause(ii)(2). This section really controls the other sections of the Code so far as the matter of withdrawal, by the Public Prosecutor with the consent of the court, of the case against the accused is concerned(3). Neither section 215 nor section 333 can be resorted to for construing this section as they are not *pari materia*(4). The power which an Advocate-General, entering a *nolle prosequi* in a trial before a High Court, exercises under section 333 does not depend on the consent of the court, which a Public Prosecutor has to obtain when acting under this section, and are indeed rights and privileges of a very different character which the Advocate-General owes by virtue of his appointment(5). The legislature never intended that, under the garb of this section and merely because the Public Prosecutor is an officer of the Court, he should be able to withdraw from the prosecution at will and then only on a question of law(6).

Any Public Prosecutor—The unamended section empowered only the Public Prosecutors appointed by Government to withdraw from prosecution. It was accordingly held that a person appointed by the Magistrate, under section 492, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session had not the power of a Public Prosecutor with regard to withdrawal from prosecution(7). The words "appointed by the Governor-General in Council or the Local Government" following the words "Public Prosecutor" have been omitted and the amended section confers the power of withdrawal on all public prosecutors(8). A person appointed a public prosecutor for the purposes of a case under section 492 is competent to withdraw a case(9). But it is only the Public Prosecutors who have the power to withdraw from the prosecution with the effect stated in this section. If an advocate privately engaged by the complainant, and permitted by the

(1) *Giribala Dassee v. Madar Ghazi*, 60 C. 233.

(2) *Ibid*.

(3) *Hepin Behari v. Hari Pada*, 1924 C. 538—24 Cr. L. J. 5—71 I. O. 53.

(4) *Giribala Dassee v. Madar Ghazi*, 60 C. 233.

(5) *Ibid*.

(6) *Ibid*.

(7) *Empress v. Madho*, 8 A. 291—(1886) A. W. N. 94, 2 Weir 653, 2 Weir. 258.

(8) *Emperor v. Dipchand*, 121 I. C. 378—31 Cr. L. J. 684—1930 Sind. 156—24 S. L. R. 377, *Sital Singh v. Emperor*, 46 C. 700, *Emperor v. Gorind Balwant*, 18 Bom. L. R. 266.

(9) *Emperor v. Dipchand*, 121 I. C. 378.

Consent is not to be given as a matter of course neither is it to be unreasonably withheld(1).

Trial before which withdrawal can take place.—This section contemplates the case of withdrawal of a prosecution by the Public Prosecutor in cases tried by Jury before the return of the verdict and in other cases before the judgment is pronounced and it does not contemplate the case of withdrawal by the Public Prosecutor after the conviction of the accused by the first court and in the appellate stage of a case(2). The Public Prosecutor may apply to withdraw from the prosecution at any stage of the case so long as the judgment is not pronounced or the Jury have not given their verdict and it is true quite independent of the possibility that at the time of the application the court has come to the conclusion that the prosecution case is true and that the accused has committed the offence. In a suitable case the court may still give consent to the Public Prosecutor to withdraw from the prosecution if it finds that there are good reasons for doing so(3). The expression "cases tried by Jury" in clause (1) means a state of things when it can be said that there is, in fact, a trial by a Jury. When the accused has been committed to a court but a Jury trial has not begun, the case is not within cl. (1), and is within cl. (2). In such a case the withdrawal of the case may be permitted until the judgment is pronounced. If the trial before a Jury has actually begun, the case will at once come within cl. (1) and that clause will then apply to it(4).

Withdrawal from prosecution of any person.—A withdrawal by a Public Prosecutor is a withdrawal from the prosecution of any person for any act or omission made punishable by any law; that is, the Public Prosecutor states that he does not want to prosecute for certain alleged acts or omissions(5). A withdrawal at the beginning of a case must come under cl. (a) and would only amount to a discharge of the accused and it would not come under cl. (b), a withdrawal after a charge has been framed, which produces the result of an acquittal(6). When a Public Prosecutor is appointed to conduct a prosecution it means he is to conduct the whole case and therefore he has power to withdraw under this section from the prosecution of an accused person who was added subsequent to his appointment as Public Prosecutor(7).

Record of reasons.—It has been held by the High Court of Calcutta that an order according consent is a judicial one, and the reasons therefor should be stated in order to enable the High Court on revision to determine the propriety of the exercise of its discretion by the lower court(8). This view is in accord with that taken by the

J. 519=29 N. L. R. 201; *Rujulu v. Emperor*, 25 N. L. R. 6=30 Cr. L. J. 872=118 I. C. 63=1929 Nag. 139=Ind. Rel (1929) Nag. 255

(1) *Sher Singh v. Jitendra Nath*, 33 Cr. L. J. 3=59 C. 275

(2) *Ananta Lal v. Jahiruddin*, 104 I. C. 449=46 C. L. J. 121=28 Cr. L. J. 833=A. I. R. 1927 C. 816.

(3) *Sher Singh v. Jitendra Nath*, 33 Cr. L. J. 3=59 C. 275=134 I. C. 1045=A. I. R. 1931 C. 607=54 C. L. J. 253=

1931 Cr. C. 759=Ind. Rel. (1932) C. 5=36 C. W. N. 16.

(4) *Giribala Dassi v. Madar Gazi*, 60 C. 238=34 Cr. L. J. 433(2)=142 I. C. 891.

(5) *Alopi Din v. Emperor*, A. I. E. 1935 A 366.

(6) *Ibid.*

(7) *Emperor v. Gobind Balwant*, 18 Bom. L. R. 266.

(8) *Rojani Kanta v. Idris*, 48 C. 1195=22 Cr. L. J. 760=64 I. C. 280=25

gives a wide discretion to the Magistrate as to whether he would consent to the withdrawal of a prosecution by the Public Prosecutor, such discretion to be exercised not arbitrarily but must be based on correct legal principles(1). The test is whether in giving consent for withdrawal of prosecution the court has been influenced by circumstances which ought not to have been considered(2). The ground that the prosecution evidence, if believed, will sustain a conviction is not the only criterion, which should guide the court, in giving or refusing permission to the Public Prosecutor, to withdraw the case(3). In according or withholding sanction to an application for withdrawal made by the Public Prosecutor under the provisions of this section, the court acts in a judicial capacity, and for such order so judicially made the court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the court has been properly exercised(4). A Magistrate may allow the Public Prosecutor to withdraw the prosecution against an accused person in order that his evidence might be available, after his discharge, against the other accused(5). But he cannot allow the Public Prosecutor to withdraw a case on the ground that the complainant was keeping out of the way and could not be served with summons(6). The legislature, not having defined the circumstances under which a withdrawal is permissible, it would not be right to attempt to lay down any hard and fast rule circumscribing the limits within which a withdrawal may be made. A concurrence of opinion between the Judge and Public Prosecutor that the prosecution case is a weak one and is not likely to end in a conviction is not, by itself, sufficient to justify the Public Prosecutor in making an application for withdrawal and the judge in according his consent thereto(7). This section contemplates action to be taken, more often than not, upon circumstances extraneous to the record of the case: inexpediency of a prosecution for reasons of State, necessity to drop the case on grounds of public policy, credible information having reached the Government as to the falsity of the evidence by which the prosecution is supported and other matters of that description(8). The Magistrate is bound to give his consent to a withdrawal; no tacit assent may be assumed(9).

v. Ahadulla, 53 O 606 (610)=95 I. C. 388=A. I. R. 1926 O. 795=27 Cr. L. J. 789=80 C. W. N. 546=41 C. L. J. 114

(1) *G. V. Raman v. Emperor*, 56 C. 1023=121 I. C. 678=A. I. R. 1929 Cal. 319=39 C. W. N. 469=31 Cr. L. J. 315=Ind. Rul. (1930) Cal. 166.

(2) See the case cited in the last note and *Sher Singh v. Jitendranath*, 59 C. 275.

Cr. L. J. 519=143 I. C. 77=A. I. R. 1933 Nag. 78=(1933) Cr. Cas. 315=Ind. Rul. (1933) Nag. 149=29 N. L. R. 201; *Rajulu v. Emperor*, 116 I. C. 63=25 N. L. R. 6=A. I. R. 1929 Nag. 133=20 Cr. L. J. 572=Ind. Rul. (1929) Nag. 255, but see *In re Sadayan*, 4 I. C. 1126=5 M. L. T. 216=11 Cr. L. J. 193, *Gul v.*

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(6) 2 Weir 655.

(7) *Geribala Dass v. Mader Gazi*, 60 C. 233=34 Cr. L. J. 433 (1=142 I. C. 891=A. I. R. 1932 C. 69=(1931) Cr. Cas. 651=86 C. W. N. 928=26 C. L. J. 79=Ind. Rul. (1933) Cal. 347.

(8) *Id.* at p. 214 of 60 C.

(9) *Kanhaya Lal v. Baij Nath*, 143 I. C. 77=133 Nag. 78=1933 Cr. C. 315=Ind. Rul. (1933) Nag. 149=31 Cr. L.

C. L. J. 51

(1) *Jagat Chandra v. Kalimudda*, 71 I. C. 693=26 C. W. N. 650=24 Cr. L. J. 129; *Umesh Chandra v. Satis Chandra*, 18 Cr. L. J. 856=41 I. C. 998=26 C. L. J. 208=22 C. W. N. 62; *Abdul Ghani v. Abdul Kader*, 1 Rang. 750; *Kanhaya Lal v. Baynath*, 34

the Magistrate from taking cognizance of a complaint on the same facts if there are new materials before the Magistrate which were not before him formerly(1). There is nothing to debar the injured person from filing a complaint against the accused merely because the Crown has chosen to withdraw the case, and the courts are legally entitled to ignore the orders of discharge passed on the withdrawal of the complainant if they are satisfied that the case is otherwise a fit one to be proceeded with(2). But when a case is withdrawn under this section and the accused is discharged on the ground that the evidence discloses no case against him, it is not competent for another Magistrate to proceed against the accused on the ground that there is a *prima facie* case against him, except in accordance with the provisions of section 437 of the Code(3).

Further Inquiry.—A District Magistrate has jurisdiction under section 436 of the Code to order a further inquiry in the case of persons discharged under this section(4). But no further inquiry should be directed where the order of discharge under this section is a proper one(5).

After such charge, the accused shall be acquitted.—This section, it is to be observed, provides for the withdrawal from the prosecution, and directs that the accused on such withdrawal shall, if no charge has been framed, be discharged, or shall, if the withdrawal is after a charge has been framed, or when no charge is required, be acquitted. A prisoner committed on a charge, therefore, cannot be discharged under this section, but must be acquitted(6). Where at a Session's trial the Public Prosecutor withdrew a charge and the Judge approving of it discharged the accused, it was held that the accused has a statutory right to an acquittal(7). An acquittal is a matter of right to the accused after Public Prosecutor has withdrawn from the prosecution with the consent of the court. The opinion of the Assessors need not be taken in such a case. It may be disregarded(8). Where persons have been charged before a Magistrate with an offence triable by him, though they ought to have been charged with another offence exclusively triable by the Court of Session and the Magistrate consents to the withdrawal of the first mentioned charge, he must pass an order of acquittal(9). But there must be a formal withdrawal from prosecution by the Public Prosecutor. Where the Prosecuting

(1) *Bisa Ram v. Emperor*, 23 Cr. L. J. 236=60 I. C. 76; *Ramanand Lal v. Ali Hassan*, 83 I. C. 689=1924 Pat. 226=A. I. R. 1924 Pat 797=26 Cr. L. J. 129; *In re Malayil Kottayil*, 18 Cr. L. J. 329=39 I. C. 441; *Lori Chand v. Niroda Sundari*, 34 C. W. N. 196.

(2) *Nasir v. Abdul Karim*, A. I. R. 1934 Lah. 169=1934 Cr. C. 347=154 I. C. 73.

(3) *Chandi Ram v. Emperor*, 69 I. C. 635=15 S. L. R. 131=1922 S. 23=23 C. L. J. 737.

(4) *Kanhaiya Lal v. Baijnath*, 29

N. L. R. 901; *Hata v. Crown*, 30 P. L. R. 58.

(5) *In re Seetharamier*, 11 I. C. 624=(1911) 2 M. W. N. 74=12 Cr. L. J. 440.

(6) *Empress v. Sivarama*, 12 M. 35; *Empress v. Sivarama*, 12 M. 35.

(7) *Empress v. Sivarama*, 12 M. 35.

(8) *Chenhasapa v. Empress*, Bat. v. Un. Cr. Cas. 307.

(9) *Sheobaran v. Shibli*, 2 Cr. L. J. 21=2 A. L. J. 30.

Rangoon(1) and Nagour Courts(2), but is opposed to that taken by the Madras(3), Patna(4), Lahore(5) and Sind(6) courts. These courts hold that this section does not expressly require the court to give any reasons for consenting to withdrawal nor is there any provision which compels the court to write a reasoned judgment establishing the propriety of the order. Where the only reason given by the court for allowing withdrawal from prosecution was that on a previous trial in connection with the riot in question, with which the present accused was charged, six persons had already been convicted and punished, it was held that the imprisonment of the first six cannot be regarded as a vicarious atonement for the sins, if any, committed by the present accused. The order allowing withdrawal was therefore bad(7). The exercise of the revisional powers of the High Court is entirely discretionary and the High Court does not take a technical view and interfere in every case, where the reasons are not adequately expressed by the Magistrate in his order permitting withdrawal of the prosecution(8).

Withdrawal of some of the charges.—Under the unamended section when there were more charges than one, the Public Prosecutor could not withdraw only one of them(9). But now the Public Prosecutor may withdraw all or any of the charges. Failure, however, to obtain the consent of a court under this section, to confine the prosecution to some of the charges alone, is a mere irregularity and does not vitiate a trial where no objection is taken to such trial in the trial court(10).

Before charge, the accused shall be discharged of such offence :
Fresh complaint.—A person discharged by a Magistrate on a consideration of the evidence tendered against him and a person discharged at the instance of the Public Prosecutor under this section are on the same footing(11). An order of discharge under this section does not prevent

O W. N 615=34 C L. J. 51; *G. V. Raman v. Emperor*, 56 C 1023=121 I. C. 678=1929 C. 319=33 C. W. N 469=31 Cr. L J 315, *Umesh Chandra v. Satish Chandra*, 22 C W N 69
 (1) *Abdul Ghani v. Abdul Kadar*, 1 Rang 756=2 Bur L J 287=25 Cr L J. 1106=81 I. C 930=1914 Rang 168

(2) *Ruzulu v. Emperor*, 118 I C. 63=30 Cr L J 872=25 N L R 6=

Cr O 315

(3) *Sadayan, In re* 4 I. C. 1126=5 M L T. 216=11 Cr L J 193

(4) *Gulli v. Narain Singh*, 2 Pat 709=1914 Pat. 283=5 Pat L T. 401=25 Cr L J. 446=77 I C 731=2 Pat L R. 165.

(5) *Mul Singh v. Emperor*, 1923 L. 163=72 I. C 593=21 Cr L J 433.

(6) *Emperor v. Dipchand*, 31 Cr. L. J 681=124 I. C 37=1930 Cr C 94= A. I R 1930 S 156. *Gomidai v. Emperor*, A I R 1932 S 92=26 S. L. R. 67=137 I. C. 344=33 Cr. L J. 449=1932 Cr. C 332

(7) *Jagat Chandra v. Kalimuddi*, 26 C. W N 880=1924 C. 332=71 I. C 693=24 Cr L J 229.

(8) *Sher Singh v. Jitendra Nath*, 33 Cr L J. 3=134 I C. 1045=A. I. R. 1931 C 607=34 C L J. 253=1931 Cr. C 759=Ind Rul (1932), C 5=36 C. W. N 16=39 C 275

(9) *Affiluddi v. Emperor*, 2 C. L. J XVIII

(10) *Abdul Hamid v. Emperor*, 97 I. C 264=27 Cr. L J 1160

(11) *Hata v. Emperor*, 114 I. C. 50=30 P L R 53=A. I. R 1929 Lab. 315=30 Cr. L J 233=12 A. I. Cr. E. 113.

permit the withdrawal of the prosecution against one of the two accused persons in order that the accused who has to be discharged may be examined as a witness against his co-accused(1).

Revision.—If the discretion vested in a Magistrate by this section is arbitrarily exercised, the High Court is entitled to interfere in revision(2). But the High Court will be slow to interfere in revision with an order allowing withdrawal when reasons are given by the court below for allowing the same(3). Even if the reasons are not adequately expressed in his order permitting the withdrawal, the High Court is not on that account bound to interfere(4). The failure to record reasons does not vitiate the order so as to entitle the High Court to interfere in revision with what is virtually an order of acquittal(5). Where a discretion has been exercised by a court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court is that as a revisional court it will neither inquire into the reasons nor interfere(6). Where a Sessions Judge, in the proper exercise of his discretion, refuses permission to withdraw a case the High Court will not interfere with his order in revision(7).

495. (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below a rank to be prescribed by the Local Government in this behalf, * * * but no person, other than the Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer.

N. 16 (28)=124 I. C. 1045=1931 O. 607=54 C. L. J. 253.

(5) *Mul Singh v. Emperor*, 72 I. C. 593=1923 L. 163=24 Cr. L. J. 433. The Local Government can take action for correction of such order: *Gulli v. Narain*; 2 Pat 708 (711)=5 Pat. L. T. 404=25 Cr. L. J. 446=77 I. C. 734=1924 Pat 283=2 P. L. R. 165 & 167 Cr. But in one case the High Court in revision set aside the acquittal: *Ram Gobind v. Lallu*, 46 A. 88=81 I. C. 618=25 Cr. L. J. 976=1924 A. 203.

(6) *Gulli v. Narain*, 2 Pat. 708=5 Pat. L. T. 404=25 Cr. L. J. 446=77 I. C. 734.

(7) *In re Kaliappa*, 23 L. W. 101=1926 M. 296=27 Cr. L. J. 834=92 I. C. 750.

(3), *Bepin Behari v. Hari Pada*, 71 I. C. 53=24 Cr. L. J. 5.

(4) *Sher Singh v. Jitendra Nath*, 83 Cr. L. J. 9 (8)=59 C. 275=36 O. W.

Inspector simply dropped out and let a vakil carry on the prosecution, there was no withdrawal and consequently the accused could not be acquitted(1). In a summons-case, an order of discharge under this section amounts to an order of acquittal(2).

Retrial.—Section 403 applies to an order of acquittal made under this section and forbids a second trial(3). If a case is withdrawn against an accused in order that his evidence may be available against his co accused, and he is acquitted, he cannot be retried, even though he refuses to give his evidence for the prosecution. In this respect this section differs from sections 337 and 339(4). But an order that purports to be one of acquittal has to be regarded as one of discharge when under the provisions of law that was applied, only a discharge order could be passed, and in such a case a subsequent trial on a private complaint is not barred under s. 403(5).

Accused a competent witness against co-accused.—The effect of this section, is that as soon as an accused is discharged under this section he is taken away from the category of an accused person and becomes under general principles of law a competent witness(6). A person whose prosecution has been withdrawn under the section, can be examined as a witness in a case in which he had been an accused(7). But an accomplice witness against whom the case has been withdrawn under this section is less reliable than one to whom a pardon has been tendered under section 337 of the Code(8). His evidence must be regarded as tainted and it must be corroborated in material particulars before it can be acted upon(9). A formal order of discharge should be recorded. If the court sanctions the withdrawal of the prosecution, but omits to record an order of discharge and the accused continues to be kept in custody, his position is in no way changed from that of an accused(10). But if the accused was in fact discharged from custody by virtue of withdrawal from prosecution, the omission to record a formal order of discharge would be cured by section 537, and the accused would be a competent witness against the other accused(11). It is open for a trying Magistrate to

(1) *Gopala v. Alagunnam*, 54 M 593=32 Cr L J 690=141 I C 176=93 I W 400=1931 M W N 968=60 M. L. J 520=1931 M 770

(2) *Mul Singh v. Emperor*, 72 I C 593=21 Cr L J 433=1923 L 163

(3) *Mahadeogir v. Emperor*, 18 I. C 887=9 N L R 26=14 Cr L J 135, *Re Dudenkula*, 40 M 976=33 M L J 121, *Mengharaj v. Emperor*, 23 Cr L J 305=66 I C 657

(4) *G V Raman v. Emperor*, 33 C W N 468 (473)=56 C 1029

(5) *Tolladagu v. Ranga Rao*, 34 Cr L J 12=6 M Cr C 986=140 I C 322=(1931) M W N 1230=36 L W 611=A. I R 1933 M 98.

(6) *G V Raman v. Emperor*, 121 I C 678=31 Cr L J 315=1 I R 1929 Cal 319=33 C. W N 468=56 C. 1013,

Empress v. Harsan, 25 B 422=2 Bom L R 1095, *Banu Singh v. Emperor*, 33 C 1353=4 Cr L J 145=10 C W N 963, *Kasem Ali v. Emperor*, 47 C. 151, *Sital Singh v. Emperor*, 46 C. 700 (710)

(7) *Empress v. Hussein*, 25 B. 422=2 Bom L R 1095, *Mahadeo v. Emperor*, 27 Cr L J. 807=95 I C 471=1926 N. 426

(8) *Chhaprolia v. Emperor*, 73 I. C. 608=24 Cr. L J 696

(9) *Ibid.*

(10) *Banu Singh v. Emperor*, 33 C 1353=4 Cr L J 145=10 C W N 963

(11) *Muhammad Nur v. Emperor*, 51 C 21=7 A L J 86=11 Cr L J 21, *Sherati v. Emperor*, 18 C W. N. 1213=15 Cr L J 693=26 I C 141, see *Darya Singh v. Emperor*, 77 I C. 981=1923 Lah. CCG=25 Cr. L. J 520.

rioting or unlawful assembly) which the Crown alone in the interests of public peace and security has a right to conduct, a private person should not be permitted to conduct the prosecution(1).

Private vakils or agents.—A Magistrate is not precluded from exercising in exceptional cases, his discretion by allowing a private vakil of good character to appear in a case(2). This section leaves it to the discretion of a court to hear private vakils or agents(3). Courts are bound to exercise a discretion in each case as to permitting or not permitting the appearance of unauthorized pleaders(4).

Stranger.—It is doubtful whether the words "any person" in this section would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution was based on a personal grudge only(5).

Police Officers.—The Magistrate might permit the prosecution to be conducted even by a Police Officer if he is not below a rank prescribed by the Local Government with the previous sanction of the Governor-General in Council(6). The fact that the complainant in a case is also the Prosecuting Inspector of the court does not deprive him of his right to prosecute the case in his private capacity as a private citizen(7).

Sub-section (2).—The words "any such officer" in sub-section (2) refer only to the "Advocate-General, Standing Council, Government Solicitor, Public Prosecutor, or other officer generally or specially empowered by the Local Government in this behalf" in sub-section (1). It is only these officers who have the power to withdraw from the prosecution with the effect in section 494. If an Advocate privately engaged by the complainant and permitted by the Magistrate to appear for the prosecution, withdraws from the prosecution, the effect provided in section 494 does not follow; in other words, the trial proceeds(8). In *Sital Singh v. Emperor*(9) the pleader was not a Public Prosecutor appointed by the Governor-General in Council or the Local Government, though he was in fact acting under the directions of the Public Prosecutor duly appointed for the District. With the Pleader was a Court Sub-Inspector who was a Public Prosecutor appointed in the manner specified in section 494 and who joined him in applying for the permission of the court and in withdrawing from the prosecution. It was held that the withdrawal was not invalid. But the Court Inspector, who never went anywhere near the court when the case was being tried and took no part in the trial and as regards whom there is no order on the record to conduct the prosecution, is not the person who, under this section, would have

(1) *Malayil Kottagil v. Emperor*, 18 Cr. L. J. 329=39 I. C. 441.

(2) *Re Krishnamachariar*, 12 M. L. J. 351=2 Weir 401.

(3) 2 Weir 400=7 M. H. C. R. App. xxxvii.

(4) 2 Weir 400.

(5) *Darshan Das v. Atma Ram*, 20 I. C. 213=11 A. L. J. 313=14 Cr. L. J. 389.

(6) *Anantharama v. Muthia Tevan*,

15 Cr. L. J. 641 (612)=(1914) M. W. N. 776=25 I. C. 811.

(7) *Maung Pu v. Emperor*, 36 I. C. 166=17 Cr. L. J. 486=10 Bur. L. T. 213.

(8) *Nga Maung Gyi v. Nga Lu Gale*, U. B. R. fourth quarter of 1903, Cr. Pro. 15; *Emperor v. Yankaya*, 10 L. B. R. 375=13 Bur. L. T. 244=61 I. C. 273=22 Cr. L. J. 753.

(9) 46 C. 700=80 C. L. J. 255=21 Cr. L. J. 5=54 I. C. 53.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

Permission to conduct prosecution.—With the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person whether counsel or attorney can claim the right to conduct the prosecution of any criminal case without the permission of the court(1). The trying Magistrate has to decide for himself whether he should grant or withhold permission to the complainant to conduct the prosecution and should not be guided by the District Magistrate's opinion on a reference(2). It is not, however, improper for the District Magistrate to issue, if he considers that the too frequent appearance of pleaders for the prosecution in petty criminal cases is detrimental to the interests of justice, general instructions to the subordinate Magistracy on the subject of allowing pleaders to appear for the prosecution(3). But when a Magistrate has, after due consideration, exercised the discretion allowed him by this section and allowed counsel to appear on behalf of the prosecution, the High Court cannot as a court of revision, overrule the order of the Magistrate and direct him to refuse to allow that counsel to appear(4).

Any person.—The provisions of sub-section (1) are no doubt wide enough so as to empower a trying Magistrate to permit "any person" to conduct the prosecution but that does not mean that the trying Magistrate should grant such permission indiscriminately. He has to exercise his discretion on the basis of the facts and circumstances of the case(5). The Magistrate has to consider whether the person is fit to conduct the prosecution, whether the case is of a very heavy duty is cast on him, whether the person is a professional pleader, whether the offender does not get off, and it is for the District Magistrate and not for a private individual to see that the Crown case is properly conducted. The fact that the accused is an influential man and the allegations that the investigating Police Officer did not do his duty properly before the case was sent to the court, that the Crown case is being misbanded, and that the prosecution is not being conducted by the Public Prosecutor himself, but an officer called the Assistant Police Prosecutor who will not be able to do justice to the case, are sufficient grounds to justify the complainant being permitted to be put in charge of the Crown case(6). If the offence be of a nature affecting the public (e.g.,

(1) *Empress v. Bulokristo Dass*, 6 O 59=6 C. L. R. 374

(2) *Maung Pu v. Emperor*, 86 I C 166=17 Cr. L. J. 486=10 Bur. L. T. 913 (The fact that the complainant in a case is also the Prosecuting Inspector of the court does not deprive him of his right to prosecute the case in his private capacity as a private citizen.)

(3) *Rala Ram v. Bula*, 6 P. R. 1905 Cr.=70 P. L. R. 1905.

(4) *Re Mangiah Chetty*, 2 Weir 655 (656)

(5) *Kabul v. Emperor*, 147 I. C. 131 =A I R 1933 S 345=(1933) Cr. Cas. 1121=35 Cr. L. J. 520=37 S. L. R. 731 =6 R. S. 192.

(6) *Ibid*

CHAPTER XXXIX. OF BAIL.

496. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer, or at any stage of the proceedings before such court to give bail, such person shall be released on bail: Provided that such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or Section 117, sub-section (3).

Amendment.—The second proviso has been newly added by s. 135 of Act XVIII of 1923.

Grant of bail in bailable offences.—The principle to be deduced from ss. 496 and 497 is that grant of bail is the rule and refusal is the exception. An accused person is presumed under law to be innocent till his guilt is proved and as a presumably innocent person he is entitled to every freedom and every opportunity to look after his case. An accused person if he enjoys freedom will be in a much better position to look after his case and to properly defend himself than if he were in custody(1). In the case of a bailable offence the law expressly says that if the accused person applies for bail he shall be released(2). S. 496 is imperative, and under its provisions the Magistrate is bound to release such person on bail and recognizances(3). However serious an offence may be, if it is bailable and there is no reason, such as the likelihood of the applicant absconding if released on bail, the seriousness of the offence would not alone justify a court in refusing bail to which a convicted person is entitled under the law(4). When a man who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that in such cases the man

(1) Per Mookerji, J., in *Emperor v. Hutchinson*, 32 Cr. L. J. 1271=134 I. C. 812=16 A. I. Cr. R. 626=1931 Cr. C. 612=29 A. L. J. 515=12 L. R. A. Cr. 75=A. I. R. 1931 A. 356.

(2) *Ibid* at p. 1272 of 32 Cr. L. J.

(3) *Raghunandan v. Emperor*, 32 C. 80.

(4) *Abdul Habib v. Emperor*, A. I. R. 1928, A. 211=26 A. L. J. 363=9 A. I. Cr. R. 326=9 L. R. A. Cr. 44=109 I. C. 693=29 Cr. L. J. 450.

the powers of a Public Prosecutor(1). But a Police Circle Inspector who is permitted to conduct a prosecution can withdraw it as well with the permission of the trying Magistrate under this section(2). It is no doubt true that an officer who is either generally or specially empowered by the Local Government to conduct a prosecution is clothed with very wide powers and sub section (2) empowers such officer to enter a *nolle prosequi*. But whether an officer of the grade of an Assistant Police Prosecutor should be clothed with such authority or not is a matter for Government to decide(3).

Sub section (3).—Any person, whether a private complainant or not, when permitted to conduct a case as Prosecutor, may instruct counsel to appear(4). A Magistrate has no jurisdiction to refuse to allow any particular pleader from appearing on behalf of the complainant(5). There is nothing in this section which shows that where a person is conducting a prosecution and is anxious and permitted to prosecute, the prosecution can be taken out of the hands of his pleader and assigned to some other person who is not the Public Prosecutor(6).

Sub section (4).—A Police Inspector, who has taken part in the investigation into an offence is not qualified to conduct the prosecution of the person charged with that offence(7). It is highly objectionable for prosecutions in Sessions Courts to be conducted by officers of the Police(8). An excise officer is not a police officer within the meaning of this section(9).

Security proceedings.—This section is not applicable to security proceedings(10).

(1) *Ram Gobind v. Lallu*, 46 A 88 (90)=21 A L J. 855=25 Cr. L. J. 970=1921 A. 203=L. R 5 A. 1 Cr.

(2) *Anantharama v. Muthia Tetan*, 15 Cr L J 611 (642)=(1914) M. W. N. 776.

(3) *Kabul v. Emperor*, 147 I. C 131=A 1. R 1933 S 345=37 S L R 331=35 Cr L J. 320

(4) *In re Narayan M. Pandsho*, 11 Bom H. C R 102

(5) *Ghadially v. Emperor*, 81 I C. 59=25 Cr L J 571=18 L R 30=A I R 1925 S 99.

(6) See the case cited in the 1st note and *Janat Achar v. Emperor*, A I R. 1935 S 3

(7) *Emperor v. Tribhovandas*, 26 L. 533

(8) *Queen v. Ramchunder*, 13 W R. Cr 18

(9) *Emperor v. Laxman Iundia*, 57 B 441=A I R. 1933 B. 234=25 Bom L R 276=145 I C 138=34 Cr. L. J 903

(10) *In re Muthia Moogan*, 2621 315=21 I C 159=14 Cr L J 559.

presumed under the law to be innocent till his guilt is proved, he is entitled to freedom during trial and every opportunity to look after his own case. The only legitimate purpose to be served by keeping a person under trial in detention are to prevent repetition of the offence with which he is charged, where there is apparently danger of such repetition, and to secure his attendance at the trial(1). On general principles, and on the principles on which sections 496 and 497 are framed, the grant of bail should be the rule and refusal of bail should be the exception(2). No rule exists, however, as regards serious non-bailable offences which are punishable with death or transportation for life, that the grant of bail should be the rule and the refusal of bail should be the exception(3). It must be understood that, while a wide discretion as to grant of bail in cases other than those involving capital punishment has now been placed in the hands of Magistrates they are bound, when weighing the probability of the prisoner appearing for trial to consider the nature of the offence charged, the character of the evidence against the accused, and the punishment which in the event of conviction, is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such character that his presence at large will intimidate witnesses or where there are reasonable grounds for believing that he will use his liberty to suborn evidence(4). However serious an offence may be, if it is bailable and there is no reason such as the likelihood of the applicant absconding if released on bail, the seriousness of the offence would not alone justify a court in refusing bail to which a convicted person is entitled under the law(5). A Magistrate has jurisdiction to grant bail under sub-section (1) and he should not refuse to grant bail unless it is for such reasons as likelihood of the offender absconding in case of bail or of his terrorising prosecution witnesses, or of his committing similar or any other serious offence while on bail(6). Bail should not be refused to an accused person merely on allegations of a vague and general character that if he was released on bail the police would not be able to trace an ornament that was alleged to have been pledged with him or that he would win over the prosecution witnesses to his side(7). It is no reason for refusing bail that to grant it would be prejudicing the case(8). Where members of two parties are being prosecuted and a member

(1) *Emperor v Hutchinson*, 53 A. 931=A. I. R. 1931 A. 316=12 L. R. A. Cr. 75=29 A. L. J. 515=1931 Cr. O. 612=15 A. I. Cr. R. 526=32 Cr. L. J. 1271=134 I. C. 842.

(2) *Ibid.*

(3) *Emperor v. Joglekar*, 54 A. 115.

(4) *Mohammad Eusoof v. Emperor*, 3 Rang 538=93 I. C. 65=A. I. R. 1926 Rang 51=27 Cr. L. J. 401; *Nagendra Nath v. Emperor*, 51 C. 402=81 I. C. 220=38 C. L. J. 898=1924 C. 476=25 Cr. L. J. 732; *Krishna Chandra v. Emperor*, 8 Pat. L. T. 557=102 I. C. 209=8 A. I. Cr. R. 303; *Lakshminarayana v. Govt. of Mysore*, 6

Mys. L. J. 116; *Tularam v. Emperor*, 97 I. C. 89=27 Cr. L. J. 1063.

(5) *Abdul Habib v. Emperor*, 108 I. C. 689=26 A. L. J. 363=L. R. 9 A. 44 Cr.=A. I. R. 1928 A. 213=9 A. I. Cr. R. 326; *Narendra Lal v. Emperor*, 9 Cr. L. J. 375, decided under unamended section.

(6) *Achhaibar v. Emperor*, A. I. R. 1929 A. 614=10 L. R. A. Cr. 98=117 I. C. 99=30 Cr. L. J. 718.

(7) *Emperor v. Guru*, 32 Bom. L. R. 1131=A. I. R. 1930 B. 484=129 I. C. 341.

(8) *Crown v. Ghulam Mohammad*, 7 Lah. L. J. 331.

is ordinarily to be at liberty, and it is only if he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a court pending inquiry, that he should remain in detention(1). In all bailable offences bail may be claimed as of right and a Magistrate is not competent to refuse the same. Persons arrested under section 55 *supra* should always be given the option of being let out on bail(2). Where a person arrested under Chapter VIII claims a bail, he is entitled to bail as a matter of right(3). That one of the two brothers, who are accused persons, should be given an opportunity to arrange for the defence and for funds, is not a sufficient reason for grant of bail where the release of accused person on bail will lead to tampering with the witnesses for the prosecution(4).

Re arrest after discharge on bail.—A person who is re-arrested after having been discharged on executing a surety bond, is entitled to be released under this section, if he is not accused of a non bailable offence(5). But a person who is allowed out on bail by the High Court and afterwards breaks his bail is not entitled to be heard(6).

Directing bail before the police investigation.—Where a Magistrate upon taking the statement of the complainant sends for the accused as a witness and then without examining him binds him down to appear before the police where he sends the case for inquiry his order regarding bail is not illegal. The provisions of this section are very wide and cover not only the case of an accused but of the person complained against(7).

Decision as to sufficiency of bail.—The practice of leaving to the police the decision as to the sufficiency of bail, when bail has been ordered by the court, is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the court itself and not with the police(8).

Bond.—Under this section, a Police Officer can either demand a bail from an accused or accept his own bond without sureties but under no provision of law can he take a third party's bond for the appearance of the accused without taking an undertaking from the accused himself(9). Where the personal attendance of an accused person is

(1) *Emperor v Hashamali*, 20 Bom. L. R. 121=19 Cr. L. J. 329=44 I. C. 315.

(2) *Empress v. Daulat Singh*, 14 A. 45.

(3) *Emperor v. ...*

(4) *Emperor v. ...*

(5) *Emperor v. Sardar Jahan*, A. I. R. 1933 A. 895=1933 Cr. L. J. 1525.

(6) *Nathan Gope v. Emperor*, 10

Pat. L. T. 801=117 I. C. 628=20 Cr. L. J. 809=A. I. R. 1929 Pat. 654

(6) *Har Narain v. Emperor*, A. I. R. 1928 A. 327=1 A. I. C. L. T. 314

(7) *Waryam Singh v. Emperor*, 83 I. C. 717=1923 Lah. 663=26 Cr. L. J. 167

(8) *Empress v. Palakdhari*, 15 C. 455

(9) *Wadhawa Singh v. Emperor*, 109 I. C. 219=10 A. I. C. R. 217=29 Cr. L. J. 491=A. I. R. 1918 Lah. 315, see *Achhaibar v. Emperor*, 117 I. C. 99=1929 A. 614=10 L. R. A. Cr. 98. (The first proviso is not applicable to the Court of Session acting under sec. 498.

presumed under the law to be innocent till his guilt is proved, he is entitled to freedom during trial and every opportunity to look after his own case. The only legitimate purpose to be served by keeping a person under trial in detention are to prevent repetition of the offence with which he is charged, where there is apparently danger of such repetition, and to secure his attendance at the trial(1). On general principles, and on the principles on which sections 496 and 497 are framed, the grant of bail should be the rule and refusal of bail should be the exception(2). No rule exists, however, as regards serious non-bailable offences which are punishable with death or transportation for life, that the grant of bail should be the rule and the refusal of bail should be the exception(3). It must be understood that, while a wide discretion as to grant of bail in cases other than those involving capital punishment has now been placed in the hands of Magistrates they are bound, when weighing the probability of the prisoner appearing for trial to consider the nature of the offence charged, the character of the evidence against the accused, and the punishment which in the event of conviction, is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such character that his presence at large will intimidate witnesses or where there are reasonable grounds for believing that he will use his liberty to suborn evidence(4). However serious an offence may be, if it is bailable and there is no reason such as the likelihood of the applicant absconding if released on bail, the seriousness of the offence would not alone justify a court in refusing bail to which a convicted person is entitled under the law(5). A Magistrate has jurisdiction to grant bail under sub-section (1) and he should not refuse to grant bail unless it is for such reasons as likelihood of the offender absconding in case of bail or of his terrorising prosecution witnesses, or of his committing similar or any other serious offence while on bail(6). Bail should not be refused to an accused person merely on allegations of a vague and general character that if he was released on bail the police would not be able to trace an ornament that was alleged to have been pledged with him or that he would win over the prosecution witnesses to his side(7). It is no reason for refusing bail that to grant it would be prejudicing the case(8). Where members of two parties are being prosecuted and a member

(1) *Emperor v. Hutchinson*, 53 A. 931=A. I. R. 1931 A. 366=12 L. R. A. Cr. 75=29 A. L. J. 515=1931 Cr. O. 612=15 A. I. Cr. R. 526=32 Cr. L. J. 1271=134 I. C. 842.

(2) *Ibid.*

(3) *Emperor v. Zaidar*, 54 A. 118

Mys. L. J. 116; *Tularam v. Emperor*, 97 I. C. 39=27 Cr. L. J. 1063.

(5) *Abdul Habb v. Emperor*, 108 I. C. 689=26 A. L. J. 363=L. R. 9 A. 44 Cr.=A. I. R. 1928 A. 213=9 A. I. Cr. R. 326; *Ct. Narendra Lal v. Emperor*, 9 Cr. L. J. 375, decided under unamended section

(6) *Achhaibar v. Emperor*, A. I. R. 1929 A. 614=10 L. R. A. Cr. 98=117 I. C. 99=30 Cr. L. J. 718.

(7) *Emperor v. Guru*, 32 Bom. L. R. 1181=A. I. R. 1930 B. 481=122 I. C. 341.

(8) *Crown v. Ghulam Mohammad*, 7 Lah. L. J. 331.

of one of the parties applies for bail, the fact that a member of opposite party has been released on bail and that that party will thereby have a better chance of their case being properly represented in court and that the applicant is required to instruct his counsel is a matter which should be considered by the court(1). So, also, where the accused charged with a serious non-bailable offence is an old man and is a Government servant, and it is found that if he is released on bail there would be no body to instruct his counsel in going through the documentary evidence and that he would not be able to make a proper defence, he should be admitted to bail(2). But this matter is left to the discretion of the court, and the Magistrate may in the exercise of his discretion refuse to grant bail to a person accused of a non-bailable offence(3).

Object of bail : Tests to be applied.—The requirements as to bail are to secure the attendance of the accused and bail is not to be withheld merely as a punishment(4). The proper test to be applied in the solution of the question whether bail should be granted or refused, is whether it is probable that the party will appear to take his trial. The test is applied with reference to the nature of the accusation, the severity of the punishment which conviction will entail and in some instances, the character, means and standing of the accused(5). In granting or refusing bail the courts generally take into consideration the following points. (i) the nature of the accusation; (ii) the nature of the evidence in support of the accusation; (iii) the severity of the punishment which conviction will entail; (iv) whether accused, if released on bail, is likely (a) to tamper with the prosecution evidence or (b) to get up false evidence in support of the defence(6). The point of severity of punishment must be looked at not from what sentences in particular instances the courts have awarded but from what is possibly the maximum that the courts may award(7). In India any allegation that the accused is tampering or attempting to tamper with witnesses and thereby obstructing the course of justice would be a very cogent ground for refusing bail(8). Save in exceptional cases, persons accused of crimes punishable with long terms of imprisonment should not be

(1) *Fateh Singh v. Emperor*, 116 I O. 748=1929 A 320=1929 A. L. J. 585=30 Cr. L. J. 697=51 A. 603.

(2) *Abdram Bale v. Emperor*, 28 O O 220=12 O L J 394=26 Cr. L. J 1286=89 I O 150=1915 O. 449.

(3) *Junio v. Emperor*, 27 Cr. L. J. 859(860)=20 S. L. R. 136=95 I C. 933.

(4) *Nagendra Nath v. Emperor*, 51 O. 401=81 I C 220=33 C. L. J 388=1924 O. 476=25 Cr. L. J 732, *Emperor v. Muhammad Panah*, A. I. R. 1934 S. 131=28 S. L. R. 47. *Allahrakhio v. Emperor*, A. I. R. 1933 S. 367.

(5) See the cases cited in the last note and *Krishna Chandra v. Emperor*.

28 Cr. L. J. 621=101 I C 903=8 Pat L T 557=1927 Pat 302 *Ram Chand v. Emperor*, 120 I O 10=A 1 R. 1929 Lab. 281=11 Lah. L. J. 61.

(6) *Allahrakhio v. Emperor*, A. I. R. 1933 S. 367=146 I. C. 561=35 Cr. L. J. 144; *Emperor v. Muhammad Panah*, A. I. R. 1934 S. 131=28 S. L. R. 47. *Muhammad Yusuf v. Emperor*, 3 Rang. 538. *Achhaibar v. Emperor*, 27 A. L. J. 927.

(7) *Ram Chand v. Emperor*, 120 I. C. 10=1923 L. 284=30 Cr. L. J. 1122.

(8) *Krishna Chandra v. Emperor*, 101 I C 909=8 P. L. T. 557=23 Cr. L. J. 621=1927 P. 302.

released by Magistrate and Sessions Judges on bail. The richer the accused and the more easy it is for him to find bail the less it is desirable that he should be released, and in no circumstances whatever without an order of the High Court should any person accused of murder be allowed bail. In England a person charged with murder is never in any circumstances released on bail and the opportunities in India for the corruption of witnesses are so great that the risks involved cannot be exaggerated(1). The courts have often refused to accept the suggestion that if bail be allowed, the accused might tamper with the witnesses(2). But if there be in any case reasons for supposing that it may occur, there seems on principle to be no ground for excluding this from consideration(3). Where the accused was charged under section 307, I. P. C., and it was alleged that the accused might, if left on bail, assail the complainant, he should not be released on bail(4). Where a person is accused on a charge of a serious nature such as an attempt to murder, bail should not be allowed for the reason that the injured person was not well enough to attend the identification parade(5).

Reasonable grounds.—Under sub-section(1) any person accused of any non-bailable offence shall not be released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life(6). The section says nothing about taking into consideration the likelihood or unlikelihood of an accused absconding or any other matter, except whether or not there are reasonable grounds for believing that the accused is guilty of the heinous offence like murder charged against him(7). The main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused guilty of the offences charged. Other considerations must also arise in deciding this question, and one of these which has always guided English and Indian Courts, is whether there are any grounds for supposing that the accused would abscond(8). Under this section an accused person should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt(9). Whether there are reasonable grounds or not must be decided judicially, that is to say, there should be some tangible evidence on the record on which if unrebutted, the court can conclude that the accused might be convicted(10). The statement by a witness that he has seen a certain act of an incriminating character done by the accused might be sufficient. But if there be no evidence whatsoever or

(1) *Hilayat Singh v. Emperor*, 11 Pat. 280=A. I. R. 1932 Pat. 203=138 I. O. 27=33 Cr. L. J. 574.

(2) *In re Johur Mull*, 10 C. W. N. 1093; *Badri v. Emperor*, 5 A. L. J. 419; *Emperor v. Guru*, 32 Bom. L. R. 1131=A. I. R. 1930 B. 491.

(3) *Tondon v. Emperor*, 25 Cr. L. J. 1182=81 I. C. 958.

(4) *Emperor v. Naranji*, 30 Bom. L. R. 622 (624)=29 Cr. L. J. 901=111 I. C. 661=1928 B. 214.

(5) *Emperor v. Pritam Singh*, 33 Cr. L. J. 835=A. I. R. 1932 Lah. 433=

136 I. C. 709=33 P. L. R. 387.

(6) *Seetharama v. Govt. of Mysore*, 7 Mys. L. J. 214; *Nga San Tin v. Emperor*, 5 Bur. L. J. 170=28 Cr. L. J. 168.

(7) *Henderson v. Emperor*, 19 I. C. 171=6 L. B. R. 172=6 Bur. L. T. 73=14 Cr. L. J. 171.

(8) *Jamini v. Emperor*, 36 C. 174.

(9) See the case cited in the last note and *In re Johur Mull*, 10 C. W. N. 1093.

(10) *Jamini v. Emperor*, 36 C. 174.

of one of the parties applies for bail, the fact that a member of opposite party has been released on bail and that that party will thereby have a better chance of their case being properly represented in court and that the applicant is required to instruct his counsel is a matter which should be considered by the court(1). So, also, where the accused charged with a serious non-bailable offence is an old man and is a Government servant, and it is found that if he is an released on bail there would be no body to instruct his counsel in going through the documentary evidence and that he would not be able to make a proper defence, he should be admitted to bail(2). But this matter is left to the discretion of the court, and the Magistrate may in the exercise of his discretion refuse to grant bail to a person accused of a non-bailable offence(3).

Object of bail : Tests to be applied.—The requirements as to bail are to secure the attendance of the accused and bail is not to be withheld merely as a punishment(4). The proper test to be applied in the solution of the question whether bail should be granted or refused, is whether it is probable that the party will appear to take his trial. The test is applied with reference to the nature of the accusation, the severity of the punishment which conviction will entail and in some instances, the character, means and standing of the accused(5). In granting or refusing bail the courts generally take into consideration the following points : (i) the nature of the accusation ; (ii) the nature if the evidence in support of the accusation , (iii) the severity of the punishment which conviction will entail ; (iv) whether accused, if released on bail, is likely (a) to tamper with the prosecution evidence or (b) to get up false evidence in support of the defence(6). The point of severity of punishment must be looked at not from what sentences in particular instances the courts have awarded but from what is possibly the maximum that the courts may award(7). In India any allegation that the accused is tampering or attempting to tamper with witnesses and thereby obstructing the course of justice would be a very cogent ground for refusing bail(8). Save in exceptional cases, persons accused of crimes punishable with long terms of imprisonment should not be

(1) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(2) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(3) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(4) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(5) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(6) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(7) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(8) *Emperor v. Ram Chand*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

1286-89 I. C. 150-1925 O. 4-9

(3) *Junio v. Emperor*, 27 Cr. L. J. 859 (860)-20 S. L. R. 136-95 I. C. 939

(4) *Nagendra Nath v. Emperor*, 51 O. 401-81 I. C. 220-38 C. L. J. 888-1924 C. 476-25 Cr. L. J. 792; *Emperor v. Muhammad Panah*, A. I. R. 1934 S. 131-28 S. L. R. 47, *Allahrakhio v. Emperor*, A. I. R. 1933 S. 367.

(5) See the cases cited in the last note and *Krishna Chandra v. Emperor*, 28 Cr. L. J. 621-102 I. C. 909-8 Pat. L. T. 557-1927 Pat. 202 *Ram Chand v. Emperor*, 120 I. C. 10-A I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(6) *Allahrakhio v. Emperor*, A. I. R. 1933 S. 367-146 I. C. 561-35 Cr. L. J. 144, *Emperor v. Muhammad Panah*, A. I. R. 1934 S. 131-28 S. L. R. 47, *Muhammad Yusuf v. Emperor*, 3 Ring 538, *Alchhailar v. Emperor*, 27 A. L. J. 917.

(7) *Ram Chand v. Emperor*, 120 I. C. 10-1929 L. 281-30 Cr. L. J. 1122.

(8) *Krishna Chandra v. Emperor*, 102 I. C. 909-8 Pat. L. T. 557-29 Cr. L. J. 621-1927 P. 502

that the phrase "with death or transportation for life" in this section, must be read disjunctively as if it ran "with death or with transportation for life" and this ruling was the result of a reference by Doyle, J., who stated in his order of reference that on consideration he was convinced that the ruling that he himself had given in *Mohammad Eusoof v. Emperor*(1) was erroneous: he himself was a party to the Full Bench decision which was unanimous. The conjunctive and limited interpretation placed on it in *Mohammad Eusoof v. Emperor*(2) and followed in *Tularam v. Emperor*(3) was negative. The words "death or transportation for life" must be read as referring to offence the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments and not necessarily both(4). The court cannot enlarge on bail a person who appears, on reasonable grounds, to have been guilty either of an offence punishable with death or an offence punishable with transportation for life(5). A Magistrate has no power to grant bail in cases falling under section 409, Penal Code(6). In cases where there is a reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation for life, as regards which the legislature has thought fit to prohibit Magistrate's from granting bail at all, the grant of bail by a Sessions Judge or the High Court, who have undoubtedly power under section 498, is to be made not as a general rule but only in exceptional cases. This is particularly so when the accused is on his trial, the prosecution evidence is closed and the Sessions Judge has refused to exercise his discretion in his favour. This is a rule of practice and caution only(7). In the case of murder the fact that accused is a Gosbain and has no member in his family who can look after his case is no ground for admitting him to bail(8).

Proviso.—Under the proviso to sub section (1), the Magistrate has a discretion to direct any person under the age of 16 years or any woman or any sick or infirm person to be released on bail even if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life(9).

Sub section (2).—Sub-section (1) appears to be applicable to the stage of the case when an accused person is first brought before the court or his arrest or detention is first brought to the notice of the court. The appropriate provision applicable where the investigation or inquiry, or the trial has been proceeding is sub-section (2)(10). It is open to the committing Magistrate to release accused persons on bail even after the order of commitment is passed by him. In doing so he must be guided by the provisions of sub section (2)(11). When an accused person is first

(1) 8 Bang. 588=27 Cr. L. J. 401=93 I. C. 65=A. I. R. 1926 Rang. 61.

(2) *Ibid.*

(3) 27 Cr. L. J. 1063=27 I. C. 39=A. I. R. 1927 Nag. 53.

(4) *Emperor v. Janli*, A. I. R. 1932 Nag. 130=140 I. C. 59=83 Cr. L. J. 811=28 N. L. R. 260=(1932) Cr. C. 666.

(5) *Emperor v. Naranji*, 20 Bom. L. R. 621=11 A. I. Cr. R. 76=29 Cr. L. J. 901.

(6) *Maung Ba Maung v. Emperor*,

128 I. C. 577=A. I. R. 1930 Rang. 395=82 Cr. L. J. 148.

(7) *Emperor v. Joglekar*, 51 A. 115.

(8) *Sri Chand v. Emperor*, A. I. R. 1931 A. 815=3 A. W. R. 668=152 I. C. 802=36 Cr. L. J. 184.

(9) *Nanjamma v. Govt. of Mysore*, 7 Mys. L. J. 428.

(10) *Emperor v. Hutchinson*, 53 A. 931.

(11) *In re Bore Gouda*, 5 Mys. L. J. 56.

evidence of a very flimsy character on the face of it, the inference will be, after a reasonable time has elapsed since the beginning of the inquiry that there are no reasonable grounds for supposing the accused to be guilty. The prosecution must, however, have a fair opportunity of adducing evidence of a really incriminating nature. At all events, the first Information Report should indicate with sufficient exactness, the character of the evidence likely to be forthcoming(1). If the application for bail is made in an initial stage of the trial, the Magistrate may expect the prosecution to satisfy him that it is a genuine case and that they will be able to produce good *prima facie* evidence in support of the charge, but he cannot expect at that stage to have evidence establishing the guilt of the accused beyond reasonable doubt(2). The policy of the law is to allow bail in the case of under-trial prisoners rather than to refuse it. It is no ground for refusing bail that to grant it would prejudice the case(3). What weighs with the court in granting bail is the guarantee that the accused will not either abscond or obstruct the prosecution in any way. The principal ground for the grant of bail is the certainty that it must be a very protracted and complicated case(4).

Appellate court's power to release on bail—When an accused person has been convicted of a non-bailable offence by a competent court after regular trial, the court of appeal should not ordinarily release the accused on bail unless there is an error of law or a mistake or a mis-statement of fact apparent on the face of the record or for any of the reasons mentioned in the proviso to sub section (1)(5). The mere previous respectability of a man is *per se* no sufficient reason for granting bail when he has been convicted of a criminal offence nor is it a ground that he is able to furnish reasonable security, for the question of granting bail is not only to be dealt with from the point of view of there being likelihood or not of the accused person absconding. In the case of a man who has been convicted of a criminal offence the principle which should guide a court in deciding whether or not to grant bail is whether there are reasonable grounds for believing that the man committed the offence(6). Bail should not, however, be refused on the ground that the accused has been sentenced to a long term of imprisonment or that the granting of bail has a tendency to increase the number of appeals and of protracting the appellate proceedings(7).

Offence punishable with death or transportation.—In *Emperor v. Nga San Htwa*(8) a Full Bench of the Rangoon High Court held

(1) *Ibid*(2) *Keshav Vasudeo v. Emperor*, A. I. R. 1933 Bom 491=35 Bom L. R. 1071=1933 Cr. C. 1596(3) *Emperor v. Ghulam Mohammed*, 92 I. C. 590=56 P. L. R. 440=7 Lah. L. J. 217=1933 F. R. 410

Cr. L. J. 470=A. I. R. 1929 S. 142=22 S. L. R. 435

(6) *Shaikh Karim v. Emperor*, 27 Cr. L. J. 319=94 I. C. 703=1925 Nag. 273=5 A. I. Cr. R. 575(7) *Gul v. Emperor*, 103 I. C. 118=23 Cr. L. J. 470=A. I. R. 1929 S. 142=22 S. L. R. 435.

(8) 5 Rang. 276=23 Cr. L. J. 773=10 I. C. 101=A. I. R. 1927 Rang. 225 F. R.

High Court can be cancelled only by the High Court(1). A Bench of the High Court has under proper circumstances the power to revoke an order granting bail made by a single Judge(2). A High Court has no jurisdiction to entertain an application under this section or section 498 against an order granting bail passed by a Sessions Judge in a case pending before a subordinate Magistrate. The powers of the High Court under this sub-section are restricted to the cases of persons released by the trial Magistrate and those under section 498 enable the High Court to release an accused on bail but not to order the arrest and commission to custody of persons already released on bail by the Sessions Judge(3). A District Magistrate cannot order the re-arrest of the accused who have been released on bail by the Sub-Divisional Magistrate(4). In the case of the accused who is released by the police, the Magistrate has no power under sub section (5) to commit him to custody. The words "by itself" mean by the Magistrate himself who commits the man to custody. It does not include any other Magistrate of the same class(5). Where a bail granted by the Sessions Court is cancelled by the High Court unless a new case for granting bail is made out, the Sessions Court cannot grant bail(6). In a case of sedition, when the accused is on bail, the Magistrate is not bound to cancel the bail bond after a charge is framed against him because he refused to plead and applied for time to argue his case(7).

Revision.—Where the Sessions Court allows the accused to be at large on bail it is within the jurisdiction of the High Court to consider whether the order passed by the Sessions Court under this section should or should not be maintained, and also whether under sub-section (5) the accused should be allowed to continue at large(8). But where a Sessions Judge, after considering the evidence, comes to the conclusion that there are no reasonable grounds for believing the accused guilty and admits him to bail, the High Court will not go behind the finding and discharge the bail either under section 439 or under any other provision of law(9) or when the Sessions Judge, after considering the grounds raised in the application, has in his discretion refused to grant bail in case of a non-bailable offence(10). An order admitting an accused person to bail made by a Magistrate is not reviseable by a District Magistrate. If the latter considers the order wrong, he can refer it to the High Court(11).

Emperor, 36 C. 174—13 C. W. N. 51;

" *Emperor*, 11 B. 1027 Lah.

(3) *Local Govt v. Ghulam Jalani*, 82 I. C. 755.

(4) *Maung Ba Chit v. Emperor*, 10 I. C. 774—4 Bur. L. T. 70—12 Cr. L. J. 244.

(5) *Lakhamji v. Emperor*, A. 1 R. 1933 S. 831—1933 Cr. O. 1078—27 S. L. R. 197.

(6) *Emperor v. Sardar Jahan*, A. 1.

R. 1933 A. 895

(7) *Saty Pal v. Emperor*, 121 I. C. 425—31 P. L. R. 11—A. I. R. 1930 Lah. 809—31 Cr. L. J. 266.

(8) *Emperor v. Pritam Singh*, 33 Cr. L. J. 335—33 P. L. R. 367—136 I. C. 703—A. I. R. 1932 Lah. 413.

(9) *Queen v. Thinima Reddi*, 10 M. L. J. 411; *Re Lakshman Sangor*, Rat. Un. Cr. Cas. 892.

(10) *Nga San Tin v. Emperor*, 5 Bur. L. J. 170—28 Cr. L. J. 188—99 I. C. 860.

(11) *Imperialrix v. Sadashiv*, 21 B. 549.

brought before a Magistrate and a remand is required by the prosecutor, it is ordinarily sufficient to show by the evidence of a Police Officer that the police are in possession of information, believed to be reliable, that the accused has committed an offence; but when the accused is again brought up after remand and a further remand is needed, some direct evidence of the guilt of the accused should be required to justify the Magistrate in refusing bail, and with each remand the necessity for production of evidence of guilt becomes stronger(1).

Security for appearance of accused before the police.—Where an accused person is released by an officer in charge of a police-station under this section, such officer has power to make it a condition of the bond that the accused person shall attend before the police at the time and place mentioned in the bond, and that if he fails to so attend and a Magistrate of the first class is satisfied that the bond has been forfeited, any person bound by the bond can be called upon to pay the penalty thereof(2).

Sub section (4).—This sub section provides for bail to appear on the date fixed for pronouncing judgment. Where in a Sessions case, the Sessions Judge at the end of the trial wrote a document headed "judgment" setting forth the findings of the Assessors and adding his own finding agreeing with the Assessors that the accused were not guilty and acquitted that on a later date he wrote and prefixed to that document a fuller and detailed judgment, it was held that though such a course may be an error in procedure it is a mere irregularity cured by section 537(3). The present sub-section validates such procedure.

Sub-section (5).—Under this sub section, a court has ample jurisdiction in the exercise of its discretion to order the re-arrest of any person out on bail, if it feels that the circumstances warrant or demand such a course(4). In the circumstances of this case, where the two people let on bail were a retired Police Inspector and a deposed Village Munsiff, the bail was revoked as they were two important people who might take advantage of a release to abscond and fail to take their trial. In *Changalraya Pillai v. Emperor*(5) the accused, who was a Deputy Tahsildar, was charged before the Head Assistant Magistrate with the offence of criminal misappropriation. He was at first on bail but after the examination-in-chief of a few witnesses for the prosecution, the Magistrate cancelled the bail and remanded the accused to jail but gave no reasons whatever for cancelling the bail and it was doubtful whether, assuming the facts stated by the prosecution to be true, any offence was committed at all by the accused. In these circumstances the High Court directed the release of the accused on sufficient bail being furnished. But it is open to the Magistrate to cancel the bail and remand the accused to jail, if, at a later stage of the proceedings he comes to the conclusion that there is necessity for doing so(6). A bail granted by the

(1) *Ponnam v. Queen*, 6 M 69. See *Jamini v. Emperor*, 38 C 174.

(2) *Croton v. Kantsi Ram*, 22 P. B. 1913 Cr. In *re Chandra Sekhar*, 11 C 57.

(3) *Sankaralinga v. Narayana Mudaliar*, 45 M 913 (915) F B.

(4) *Pub Pros v. Sanyasayya*, 46 Cr L J 1593=301 Cr 665=21 L. W. 135= A. I. R. 1925 M 1224.

(5) (1911) 2 M. W. N. 135=111 C. 243=141 Cr L J. 503.

(6) In *re Johar Mull*, 10 C W. N. 1093=4 Cr L. J. 221, *Jamini v.*

mentioned case lays down that this section gives an unfettered discretion to the High Court or the Court of Session to admit an accused person to bail. It is a mistake to imagine that this section is controlled by the limitations of section 497 except when there are not reasonable grounds for believing that he is not guilty, in which cases it becomes a duty to release him. The discretion is unfettered, but of course it must be exercised judicially. It is not anyone single circumstance which necessarily concludes the decision, but it is the cumulative effect of all the combined circumstances that must weigh with the court. The considerations are too numerous to be classified or catalogued exhaustively.

Rangoon cases.—A Full Bench of the Rangoon High Court has held that the High Court has an absolute discretion in granting bail in any case but though the discretion is absolute, the High Court must exercise it judicially, and since the legislature has chosen to entrust the initial stage of dealing with questions of bail to Magistrates and while giving Magistrates an unfettered discretion of granting of bail in all cases, except two classes, *i. e.* cases punishable with death and cases punishable with transportation for life, the High Court ought not to grant bail in such cases except for exceptional and very special reasons(1). This view is in full accord with the earlier cases of the same court(2).

Madras cases.—The Madras High Court held that under this section the court, have very wide powers to admit the accused to bail even when he is charged with a non-bailable offence, but the general rule in respect of non-bailable offences is that bail is not to be taken except in exceptional circumstances(3). The High Court can grant bail in cases pending anywhere in the presidency(4).

Lahore cases.—It has been held in a recent Lahore case that under this section the High Court and the Court of Sessions have an unfettered discretion in the matter of granting bail, but the discretion must be exercised judicially and not arbitrarily, and in the exercise of the powers conferred under this section, the limitations imposed by section 497 on the power of other authorities to grant bail should ordinarily be taken into consideration(5).

Patna case.—The circumstances which should be taken into consideration in deciding whether a person charged with a non-bailable offence should or should not be enlarged have been set out in *Krishna Chandra v. Emperor*(6).

Oudh case.—The point arose for decision in the Judicial Commissioner's Court at Oudh in a case reported as *Bsihambhar Nath v. Emperor*(7),

892=29 A. L. J. 773.

(1) *Emperor v. Nga San Htwa*, 5 Rang. 276=1917 R. 205=23 Cr. L. J. 775=104 I. C. 101.

(2) *Bondville v. Emperor*, 2 Rang. 546=65 I. C. 43=A. I. R. (1925) Rang. 129=26 Cr. L. J. 457; *Henderson v. Emperor*, 5 Rang. 100=14 Cr. L. J. 557.

657.

(4) *Jumna v. Ramanathan*, 52 M. 52=55 M. L. J. 690=A. I. R. 1929 M. 29 (30).

(5) *Crown v. Krishan Gopal*, 15 Lah. 39=A. I. R. 1933 Lah. 925=31 P. L. R. 1068=146 I. C. 1093.

(6) 6 Pat 601.

(7) 11 O. L. J. 527=25 Cr. L. J. 1132=10 O and A. L. R. 503=81 I. C. 926=1921 O. 435.

498. The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not direct that any person be admitted to bail or that the bail required by a Police Officer or Magistrate be reduced.

Scope of Section.—This section gives a High Court or Court of Session an unlimited judicial discretion in dealing with an application for admission to bail(1). This section gives an unfettered discretion to the High Court or the Court of Session to admit an accused person to bail. It is a mistake to imagine that this section is controlled by the limitations of section 497 except when there are not reasonable grounds for believing that the accused committed the offence or there are reasonable grounds for believing that he is not guilty, in which case it becomes a duty to release him. The discretion is unfettered, but of course it must be exercised judicially(2). But it has been said that the rule laid down in section 497 is founded on justice and equity and should be followed by the High Court as well as other courts and that the extended powers given to the High Court under this section are not to be used to get rid of this reasonable provision of the law(3).

Calcutta cases.—In *Sourindra Mohan v. Emperor*(4), Stephen and Carnduff, JJ, pointed out that although the High Court has unfettered powers to grant bail, yet in exercising these powers the High Court ought to have regard to the limitations imposed on lower courts in this connection. In another Calcutta case it has been held that the rule laid down in section 497 is founded on justice and equity and should be followed by the High Court as well as other courts and that the extended powers given to the High Court under this section are not to be used to get rid of this reasonable provision of the law(5). And similarly it has been laid down in another case that in exercising its discretion under this section the High Court should not confine its attention to the question whether the prisoner is likely to abscond or not, other circumstances may also affect the question of granting bail to accused persons charged with crimes of a grave character(6).

Allahabad cases.—The law on the subject will be found in *Emperor v. Badra Prasad*(7) and *Emperor v. Hutchinson*(8) the authority of which was upheld in *Emperor v. Joglekar*(9). The last-

(1) *Crown v. Ebrahim Ahmed*, 1 L B R 62

(2) *Emperor v. Joglekar*, 54 A. 115, *Emperor v. Hutchinson*, 53 A. 831, *Crown v. Krishan Gopal*, 15 Lah 89, *Emperor v. Naga San Haisa*, 5 Rang 276.

(3) *Ashraf Ali v. Emperor*, 42 C. 25=16 Cr. L. J 215=27 I. C. 839

(4) 37 C. 412=6 I. C. 8=11 Cr. L. J. 217.

(5) *Ashraf Ali v. Emperor*, 42 C.

25=16 Cr. L. J 215=27 I. C. 839.

(6) *Narendra Lal v. Emperor*, 30 C. 166=13 C. W. N. 43=9 Cr. L. J. 375

(7) 5 A. L. J. 419=(1906) A. W. N. 195=8 Cr. L. J. 49

(8) 53 A. 231=A. I. E. 1931 A. 356=12 I. R. A. Cr. 75=23 A. L. J. 515=1931 Cr. C. 612=15 A. I. Cr. R. 525=31 Cr. L. J. 1271=194 I. C. 842

(9) 54 A. 115=A. I. R. 1931 A. 504=135 I. C. 113=83 Cr. L. J. 94=1931 Cr. C.

where there is no order by any court in the matter(1).

Whether there be an appeal on conviction or not.—Under the Code of 1872 it was held that the Court of Session had no power to admit a convicted person to bail, a convicted person not being an accused person(2). The word "accused" has been omitted in the present section. This section gives the High Court and the Court of Session very wide powers to admit to bail, even where an accused person has been convicted and has not appealed(3). When an accused person has been convicted of a non-bailable offence by a competent court after a regular trial, the court of appeal should not ordinarily release the accused on bail unless there is an error of law or a mistake or a mis-statement of fact apparent on the face of the record or for any of the reasons mentioned in the proviso to sub sec(1) of s. 497(4). Where the accused relies merely on a technical ground against the probability of his conviction he should not be admitted to bail(5). Where an appeal petition contains attacks, which are quite irrelevant, on the trying Magistrate and on the private and public conduct of the officers of high rank, the Judge should return the petition and refuse, to admit the appellant to bail till the objectionable remarks to be found in it are expunged(6).

Grant of bail pending appeal to Privy Council.—*Queen Empress v. Subramania Ayyar*(7) is an important case. In that case special leave had been granted by their Lordships of the Privy Council and it appears that on the petitioner's application to them for bail they had expressed the opinion that the matter should be decided by the High Court which had convicted the applicant. On the application being made to the High Court a bench of three Judges held that they had jurisdiction to make an order releasing the applicant on bail pending the decision of the Privy Council. Following this case it has been held by the Allahabad High Court that the High Court has inherent jurisdiction to grant bail pending appeal to the Privy Council in a case which has been disposed of by it when the ends of justice require it(8). But there are many decisions of various High Courts which are against the view taken by the Allahabad High Court(9). After deciding a criminal case, whether on original appellate or revision side and upholding conviction of a prisoner the High Court has no power under this section to suspend the operation of his sentence and to release him on bail, on his asserting his intention to appeal to His Majesty in Council(10). The case having been completely and finally disposed of by the High Court,

(1) *Srital v. Emperor*, 27 Cr. L. J. 1185=44 C. L. J. 134=97 I. C. 945.

(2) *Queen v. Thakur Parsad*, 1 A. 151 F. B.

(3) *Emperor v. Badri Prasad*, 5 A. L. J. 419 (420)=8 Cr. L. J. 49=1908 A. W. N. 195.

(4) *Gul v. Emperor*, 109 I. C. 116=1928 S. 142=29 Cr. L. J. 470.

(5) *Clive Durant v. Empress*, Rat. Un. Cr. Cas. 480.

(6) *In re Clive Durant*, 15 B. 488 *In re Clive Durant*, Rat. Un. Cr. Cas. 482.

(7) 24 M. 161=2 Weir 637.

(8) *Emperor v. Ram Saroop*, 49 A. 247=98 I. C. 593=25 A. L. J. 97=27 Cr. L. J. 1377=A. I. R. 1927 A. 97=L. B. 8 A. 2 Cr.

(9) *Tulsi v. Emperor*, 50 C. 583=72 I. C. 362=21 Cr. L. J. 362; *Ditran Chand v. Emperor*, 15 P. R. 1908 Cr. =8 Cr. L. J. 89=49 P. W. R. 1908 Cr.; *Hanmantrao v. Emperor*, 21 N. L. R. 161=27 Cr. L. J. 185=91 I. C. 1001=1926 Nag. 278; *Pitumal v. Emperor*, 81 I. C. 160=25 Cr. L. J. 672.

(10) See the cases cited in the last note

where it was held that though the exercise of the powers under this section is entirely left to the discretion of the High Court without any fetters being imposed on the exercise of that discretion, such discretion is not to be used arbitrarily but in accordance with sound judicial principles.

Sind cases.—In an earlier case it was held that the power of a High Court to direct admission to bail under this section is unfettered and in no way limited by the provisions of section 497 (1). But the High Court will not grant bail in non-bailable offences except when special circumstances are disclosed(1). But in a later case it has been held that though this section confers very wide powers of granting bail on the High Court yet on principles and authority it must be interpreted as being controlled by the provisions of s. 497, which applies to other courts(2). In a still more recent case, however, the court appears to have reverted to the principles laid down in the earlier case(3).

Nagpur case—In a recent Nagpur case it has been held that although the High Court has unfettered powers to grant bail, yet in exercising these powers the High Court ought to have regard to the limitations imposed on lower courts in this connection(4).

Granting of bail by High Court when it has been refused by the Sessions Judge.—The High Court has power to grant bail even when it has been refused by the Sessions Judge. But the High Court will only interfere with the discretion of the Sessions Judge in refusing bail, if that discretion was manifestly wrong or if, in fact, no real discretion has been exercised(5). An order refusing bail which has not been made after a proper appreciation of the facts, is liable to be set aside by the High Court(6). But in cases where there is a reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation for life and the Sessions Judge has refused to exercise his discretion in his favour the grant of bail by the High Court is to be made not as a general rule but only in exceptional cases(7).

Person under arrest may be admitted to bail at any time.—A Judge has jurisdiction to grant bail where the applicant is in the lock-up under arrest. It is not necessary in order to invest the Judge with jurisdiction, that the accused person must be put up before the court(8). The High Court or a Court of Session can grant bail soon after the arrest of the accused by the police even before the case is sent up to a Magistrate(9). But the High Court has no power to release on bail under s. 498 or s. 497 persons who have been arrested by the police

(1) *Harshad Lal v. Emperor*, 10 C. 7.

(6) *Ram Chand v. Emperor*, 120 I. C. 10—A. I. R. 1929 Lah. 281—30 Cr. L. J. 1129.

(7) *Emperor v. Jagdekar*, 54 A. 115—A. I. R. 1931 A. 504—135 I. C. 113—23 Cr. L. J. 94—1931 Cr. C. 891—29 A. L. J. 773.

(8) *Achhailar v. Emperor*, 117 I. C. 99—1929 A. 614—10 L. R. A. Cr. 98—20 Cr. L. J. 718.

(9) *Ebrahim Ahmed v. Emperor*, 1 Bur. L. R. 8.

707.

(5) See the case cited in the last note and *Emperor v. Badri Prasad*, 5 A. L. J. 419.

Commissioners(1). When an application of an urgent nature, e.g., for cancellation of bail granted by the Sessions Judge is made by the District Magistrate, the rule that the High Court will not interfere with the order of the Sessions Judge except on an application by Government, will not hold good. It is, however, desirable that the Public Prosecutor should apply for the orders of Government in cases in which there is sufficient time to do so(2).

Arrest and detention under Extradition Act.—Where a person is arrested without a warrant either under section 54 (7) of this Code or under section 33 (g) of the Bombay City Police Act, 1902, and detained by a Magistrate under section 23 of the Indian Extradition Act, 1903, and such Magistrate has power to release the arrested person on bail under section 10 (4) of the latter Act(3).

High Court's power to reduce security.—An order made under s. 117 (3), Cr. P. C., is exempt from the provisions of Chap. XXXIX relating to bail. The security which the Magistrate orders to be furnished cannot be reduced by the High Court under this section(4).

499. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the Police Officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the Police Officer or court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other court to answer the charge.

Bond to appear before police or court.—A Police Officer in charge of a police station when taking action under s. 497, has power to make it a condition of the bond that the accused person shall attend before the police at the time and place mentioned in the bond. The provisions of this section are not limited to appearance before a court(5). But in a Calcutta case it is laid down that there is no provision in the Code authorizing a Police Officer to take security for the production of any person before the police(6).

(1) *Crown v. Krishan Gopal*, 15 Lab. 99=1933 L. 925=146 I. C. 1093=34 P. L. R. 1063

(2) *Emperor v. Wahideno*, 117 I. C. 773=1929 S. 137.

(3) *In re Shriram*, 26 Bom. L.R. 991=87 I. C. 100=A. I.R. (1925) 11 B. 101=26 Cr. L. J. 918; see also *Stallman v. Em-*

peror, 15 C. W. N. 736.

(4) *Juger Singh v. Emperor*, 125 I. C. 322=A. I. R. 1930 Lab. 629=31 Cr. L. J. 812.

(5) *Crown v. Kanshi Ram*, 22 P. R. 1913 Cr.=21 I. C. 679=6 P. L. R. 1914=6 P. W. R. 1914 Cr.=14 Cr. L. J. 631.

(6) *In re Chandra Sekhar*, 11 Q. 77.

there remains no ground on which bail can be granted(1). The High Court has jurisdiction to grant bail, under cl. 41 of the Letters Patent 1865, only in cases falling within its provisions, and especially when the court has decided the case to be a fit one for appeal to the Privy Council, or when the latter has granted special leave to appeal(2).

Power of Sessions Judge—A Sessions Judge has wide powers under this section. Where members of two parties were being prosecuted and one of them was released on bail, and the other party applied for bail for the purpose of instructing counsel, as otherwise the opposite party would have better chance of presenting their case before the court, it was held that the reasons alleged must weigh with a court, and if there was no danger of the applicant absconding if released on bail, he should be released(3). But the power of the Sessions Judge to grant bail under this section is, in cases to which the provisions of Part I of Act XIV of 1908 have been applied by section 2 thereof, abrogated by section 14 of that Act. In such a case the High Court only can grant bail(4). After a Coroner has drawn up an inquisition against a person and committed him to prison, the High Court alone is empowered to release such person on bail(5). But the provisions of this section are particularly wide, and the Sessions Judge has power under it to admit to bail, a person whose case has been referred under s. 123 (2), pending the hearing of the reference(6). But it does not give him power in any way to alter or vary his own order and he has, therefore, no power to admit to bail a person convicted by himself pending his appeal to the High Court(7).

Cancellation of bail.—The High Court is not specifically empowered by this section to cancel bail granted by itself; but under the wide powers with which it is endowed by s. 561-A, it can direct the arrest of a person who has been released on bail under its orders, for the reason that there do not appear to be reasonable grounds for believing that he has committed a non-bailable offence(8). But the High Court cannot order the arrest or commitment to custody of any person who has been released on bail by the lower courts(9). Where Commissioners, with powers of a Court of Sessions, had given their reasons for allowing bail to the respondent, against whom serious charges had been framed, and had apparently considered his case to be on the border line and the circumstances exceptional, and where the amount of security had been fixed at a very high figure, it could not be said that the Commissioners had acted without jurisdiction or that in the circumstances there was adequate ground for interference by the High Court in revision with the discretion exercised by the

(1) See the cases cited in the last but one note.

(2) *Tulsi v. Emperor*, 50 C 185=72 I. C. 262=21 Cr. L. J. 362.

(3) *Emperor v. Fateh Singh*, 51 A. 103=116 I. C. 748=1929 A. 320=27 A. L. J. 585=33 Cr. L. J. 697.

(4) *Emperor v. Lalit Kumar*, 37 C. 439=61 I. C. 10=11 Cr. L. J. 219.

(5) *Emperor v. Jogeshwar*, 31 C. 1.

(6) *Ahmed Ali v. Emperor*, 50 C. 909=75 I. C. 537=37 C. L. J. 592=1923 C. 723=24 Cr. L. J. 953.

(7) *Rasappa v. Emperor*, 4 Bom. L. R. 55.

(8) *Mohammad Ibrahim v. Emperor*, A. I. R. 1931 A. 534=50 A. L. J. 701=133 I. C. 708=33 Cr. L. J. 684.

(9) *Gulam Jalani v. Emperor*, 25 Cr. L. J. 1363=52 I. C. 755.

within which sureties must reside. An order directing an accused person to produce sureties residing within certain limits(1).

Extent of sureties 'liability'.—When an accused person is released on bail with sureties, the sureties should ordinarily be made jointly and severally liable for the same amount as the accused, and cannot be made liable for more. The total of the sums recovered from them must not exceed this amount(2). Where a surety executes a bond for the appearance of the accused but no similar bond is executed by the accused himself, the surety does become amenable to penalties contemplated by law in the event of his failure to produce the accused. The two bonds (by the accused and by the surety) contain different undertakings, and validity of the one does not depend on the validity of the other(3).

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

501. If, through mistake, fraud or otherwise insufficient sureties have been accepted, or if they afterwards become insufficient, the court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

Scope.—This section applies only to cases where there are sureties and where through mistake, fraud or otherwise insufficient sureties have been accepted; it does not apply to a case where there are no such grounds(4).

Increase of amount of bail.—A Magistrate may raise the amount of bail required from the accused at an early stage of the case, when he finds at a later stage that the case is more serious than it appeared to be when the order for bail was passed(5).

(1) *Raghunandan Prasad v. Emperor*, 20 A. L. J. 520.

(2) *Emperor v. Kaung Nga*, 2 L. D. R. 235.

(3) *Reoti Prasad v. Emperor*, A. I. R. 1934 A. 1016—4 A. W. R. 778—1934 Cr. C. 1929—153 I. C. 155.

(4) *Re Koruthan Ambolam*, 38 M. 1098.

(5) *Sita Ram v. Gobind Sahai*, 60 P. L. E. 1912—15 I. C. 314—4 P. W. E. 1912 Cr.—13 Cr. L. J. 474; *Dashiruddin v. Emperor*, A. I. R. 1932 All. 827—1932 Cr. C. 803—199 I. C. 330—33 Cr. L. J. 752.

Time and place must be stated in bond.—Sub-section (1) of this section expressly imposes on Police Officers and courts the duty of expressly stating in the bond the condition that the person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the Police Officer or court as the case may be(1). A bond cannot be forfeited for non-appearance of the accused when neither time nor place is fixed for his appearance(2). But where the surety bond was to the effect that "we shall produce (or cause to appear) the accused at the Sessions Court whenever called upon to do so", it was held that the form was not illegal so as to deprive the Judge of jurisdiction on the ground that the bond did not specify time and place in accordance with this section(3).

Forfeiture of bond.—A bond is forfeited only if on a strict construction the terms expressed in the bond are broken(4). The amount of a bail bond cannot be forfeited in case of failure of this accused to appear in a court to which the case is transferred where the obligation to appear in such a court has not been expressly specified in the bond(5). Where a surety conditioned that he would be responsible for the continued presence of an accused person at one court (Nowadah), it was held that the surety was released from liability under his recognizance by the permission which the court at Nowadah gave the accused, without the surety's consent, of leaving that place on business, and also by the subsequent transfer of the case to another Court (Gya)(6). A bail bond by which the sureties bind themselves, to be responsible for the appearance of the accused during the preliminary investigation cannot be forfeited if the accused abscond after the preliminary inquiry and during the trial at the Sessions Court(7). If a bail bond binds the surety to produce the accused in the court at Agra, an order of the Magistrate calling upon the surety to produce the accused in the court of Purnea is wholly illegal, but the bail bond is not thereby discharged(8). But when a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him(9).

Order directing accused to produce sureties residing within certain limits.—A Magistrate has no authority to lay down any limits

(1) *Maung Nga v. Emperor*, 2 Rang. 591 (583)—31 I. C. 933—26 Cr. L. J. 329. There is nothing illegal in requiring the accused to bind himself to appear from the date of the execution of the bail bond on every day until the case is disposed of; G. M. H. C. R. App. 38—2 Weir 601.

(2) *In re Chattar Singh*, (1885) A. W. N. 44; see *Re Haslararam*, 2 Weir 659, where the accused appeared on the first day of the inquiry and was ver-

undertaking.

(3) *Mon Mohan v. Emperor*, A.I.R. 1928 C. 261.

(4) *Nga Po Tin v. Emperor*, 23 Cr. L. J. 58—65 I. C. 420.

(5) *Maung Nge v. Emperor*, 2 Rang. 581—61 I. C. 933—26 Cr. L. J. 329; following *Shamsuddin v. Emperor*, 30 C. 107.

(6) *Queen v. Meera Lall*, 13 W. R. Cr. 53.

(7) *Kurremuddeen v. Queen*, 9 W. R. Cr. 36.

(8) *Emperor v. Parthu Dayal*, 42 A. 825—28 Cr. L. J. 186—25 A. L. J. 657—102 I. C. 554—1927 A. 831.

(9) *Re Vijayaraghalu*, 37 M. 116.

CHAPTER XL.

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES.

503. (1) Whenever, in the course of an inquiry, a trial or any other proceeding under this Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

When attendance of witness may be dispensed with.

Issue of commission and procedure thereunder.

(2) When the witness resides in the territories of any prince or chief in India in which there is an officer representing the British Indian Government, the commission may be issued to such officer.

(3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code.

(4) Where the commission is issued to such officer as is mentioned in sub-section (2), he may delegate his powers and duties under this commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

Scope.—This Chapter confers a wide discretion on the court to issue commission for the examination of witnesses but such discretion should be sparingly exercised and only in case of real hardship and inconvenience having due regard to the prejudice which is likely to be

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

Discharge of sureties.—Where a surety applies for a cancellation of his bond, under this section, there is, no such thing as hearing the application on the merits or dismissing it for default. The presentation of the application itself imposes upon the Magistrate the duty of issuing a warrant for the arrest of the accused(1). Where a surety applies for the discharge of his bond and the arrest of the accused, a Magistrate is not competent to forfeit the bond without first proceeding under sub-section (2) by issuing warrant of arrest against the accused(2). Where a sum of money is deposited in court by a surety as bail for the appearance of an accused person and the latter satisfies the conditions of the bail, the court has no further authority to deal with the amount of the deposit but is bound to return it to the person who had made the deposit. It has no jurisdiction to direct that the fine imposed upon the accused person on conviction should be recovered out of the deposit(3).

(1) *In re Anant Shivaji*, 9 Bom. L. R. 1185=6 Cr. L. J. 383.

(2) *Gurmulh Singh v. Emperor*, 93 I. C. 768=27 Cr. L. J. 848.
Cr. P. O.—113

(3) *Raghunandan v. Emperor*, 83 I. C. 673=26 Cr. L. J. 113=11 O. L. J. 296=1924 O. 396; *Girdhari v. Emperor*, 64 I. C. 136=19 A. L. J. 687=22 Cr. L. J. 744.

should himself present the complaint and be at once examined on oath by the Magistrate. If, however, he elects to call himself to testify to matters within his knowledge, he would, as regards such testimony, be a witness for the prosecution, and the issue of a commission for his examination under this section would be perfectly legal(1).

Witness residing within court's jurisdiction.—A court is competent to grant a commission to examine a witness who is within its own jurisdiction. There is nothing in the language of this section to prevent such a course being taken(2). It is doubtful, if a Presidency Magistrate in the Town of Calcutta has power to issue a commission under sections 503 to 507 to examine a witness residing within his own jurisdiction; but there is nothing in the Code to prevent a Presidency Magistrate examining a witness within his jurisdiction at some place other than the court-house(3).

Expert witness.—An Assistant Mint Master of the Calcutta Mint is an expert witness with regard to coins and instruments for coining and a Magistrate does not act illegally in allowing him to be examined on commission instead of insisting his personal attendance(4). But where an expert witness appears to be the principal witness in the case his examination on commission should not be granted(5).

What are or are not proper grounds for issue of commission.—As regards the grounds on which a criminal court may issue a commission to examine a witness living within its local limits in ordinary cases the provisions of O. XLVI, r. 1 of the Civil Procedure Code may be accepted as a safe guide(6). The issue of a commission for the examination of an important witness, such as an eye-witness, in a serious criminal trial is not desirable and should be adopted for the most cogent reasons(7). Sections 503 and 505 should be used sparingly and only in the clearest possible case. In a criminal prosecution above all, the witnesses should be examined in open court, giving an opportunity for the accused to examine them and it is only in those circumstances which are stated in ss. 503 and 506 that an order directing examination of witnesses on commission can be made. The mere fact that a person is temporarily ill, is not a ground for allowing him to be examined on commission(8). If a witness is unable to attend the court owing to illness (e.g., weak heart and a painful internal malady) the proper course for the Magistrate would be to first ascertain whether it would be possible for the witness to come to court within a reasonable time; and if not possible, then the Magistrate will have to reluctantly come to the conclusion that his evidence should be taken on commission(9).

(1) *Sarb Dyal v. Empress*, 10 P. R. 1896 Cr.

(2) *Empress v. Dal Gangadhar Tilok*, 6 B. 285 (267)—6 Ind Jur. 482

(3) *Heni Commari v. Empress*, 24 C. 551—1 O. W. N. 233.

(4) *Gilli v. Emperor*, 89 I. C. 818—2 O. W. N. 377—12 O. W. N. 497—A. I. R. (1925) O. 616—26 Cr. L. J. 1232.

(5) *McGrath v. Brachis*, 12 Cr. L. J. 64—9 I. C. 817—(1911) M. W. N. 97—9 M. L. T. 834

(6) *1904-25 Cr. L. J. 443*—(1905) 159

(7) *Muhammad Shafi v. Emperor*, A. I. R. 1932 Pat. 212—13 Pat. L. T. 315—33 Cr. L. J. 942—140 I. C. 291.

(8) *Jamunna Singh v. Emperor*, 3 Pat. 291 (394).

thereby caused to the opponent(1). The taking of evidence on commission in criminal cases is unknown to English practice, and ought, in this country, to be most sparingly resorted to—only in extreme cases of delay, expense or inconvenience(2). The issue of a commission to examine a witness is not very satisfactory mode of proceeding either in civil or criminal cases. On the one hand the court has no opportunity of noting the demeanour of the witness and on the other of controlling irrelevant and unnecessary or harassing cross examination of the witness(3). It would appear that the courts have no power to issue a commission out of the jurisdiction, except in cases provided for by this section itself(4). There is no provision for taking evidence by commission in foreign countries(5).

In the course of inquiry, etc.—An application for commission applied for by the prosecution, during the trial and after jury had been sworn, was refused on the ground that the trial and commission could not go together(6).

Presidency Magistrate, District Magistrate, Court of Session or the High Court.—If an inquiry, trial, or other proceeding is pending before a Presidency Magistrate, District Magistrate, Court of Session or the High Court, then the court concerned may, if it thinks fit, make an order under this section. If, however, the proceedings are pending in the court of any Magistrate not being one of those specified in this section, then the procedure to be followed is as provided in s. 506(7). But an officer appointed as Additional District Magistrate and authorised to exercise all the powers of a District Magistrate as contained in Sch III, part V (18) of the Code is empowered to issue a commission under this section for the examination of a witness within his own jurisdiction(8). But s. 10 of the Malabar (Restoration of Order) Ordinance (I of 1922) read with this section does not give a special Judge acting under the Ordinance power to issue a commission for the examination of witnesses(9).

Examination of a witness.—This section authorises the examination of any "witness" which includes a complainant(10). But a District Magistrate is not entitled to issue a commission under this section, for the examination of the complainant as a complainant under s. 200 of the Code, inasmuch as (i) s. 503 relates to commissions for the examination of witnesses and in the preliminary stages of the proceedings. A complainant is not a witness, and (ii) under ss. 198 and 200 of the Code, the Magistrate is not entitled to take cognizance of offences except upon a complaint. The complainant

(1) *Vishnoo v. Dip Chand*, 5 A. I. Cr. R. 466.

(2) See remarks of Stralght, J., in *In re Farid un nissa*, 5 A. 92.

(3) *Vishnoo v. Dip Chand*, 5 A. I. Cr. R. 466.

(4) *Empress v. Moorga Chetty*, 5 B. 338, cited in *Abdul Gani v. Emperor*, 49 B. 878=27 Cr. L. J. 114=27 Bom. L. R. 1373.

(5) *Corporal Allen v. Emperor*, 10 Cr. L. J. 671.

(6) *Empress v. Jacob*, 19 C. 113.

(7) *Khan Chand v. Gomibai*, 146 I. C. 203=A. I. R. 1933 B. 278=(1933) Cr. Cas. 952=6 R. S. 60=35 Cr. L. J. 22 (1).

(8) *Bahadur Ali v. Emperor*, 73 I. C. 610=1923 Lab. 159=24 Cr. L. J. 622.

(9) *In re Ayarcali Pokkar*, 45 M. L. J. 805=19 L. W. 809.

(10) *Athayyencari Debi v. Kishori Mohan*, 41 C. 19=19 C. W. N. 1020.

Magistrate might arrange to examine a *gosha* woman as a witness at some other place than the court-house(1). But it cannot be held as a general rule that *pardanashin* ladies whose evidence is required in criminal trials are to be allowed to compel the court to examine them at some other place than the court-house itself(2). So, where a Presidency Magistrate refused on the ground of want of jurisdiction, to grant a commission for the examination of *pardanashin* lady, but offered to take her evidence in his court when cleared for the purpose, or in his private room, and she applied to the High Court for a commission to be granted, or for such other order as it might deem proper, the High Court directed that if the lady would take a house or suite of rooms not far from the Magistrate's court, and pay all the costs which the Magistrate deemed reasonable and proper, he should not enforce her attendance in court, but examine her in the place so appointed, in the presence of the parties concerned and in the manner in which *pardanashin* ladies are ordinarily examined(3). A *pardanashin* complainant may be examined by commission under this section(4). But in the case of *Farid-un-nissa*(5) there was a prosecution for defamation, and Straight, J., was of opinion that the fact of the witness being a person who had set the criminal law in action materially altered her position in considering whether a commission should issue, and directed the Magistrate that if the complainant, whom it was sought to examine on commission, was found to be a *pardanashin* lady, and if she elected to attend and support her charge, to allow her to be brought into his room in the court-house in her palki, or to make such other arrangements as might enable her to remain in it, and strictly preserve her privacy, and to subject her to the least inconvenience or annoyance for the purpose of recording her evidence according to law in the presence of the accused after identification by some approved witness. In a prosecution under s. 498, Penal Code, where the identity of the woman, alleged to have been enticed, is in question and the accused insists on issuing a commission for her examination on the ground that she is married to a zamindar who observes purdah, the better course is instead of issuing commission, the woman should be examined by the Magistrate in chambers(6). The mere fact that a woman is the daughter of a prostitute is insufficient to show that she is not a *pardanashin* lady. If she has been married to a respectable person, in whose family women observe *purda*, she is entitled to be treated with respect, despite her lowly origin(7).

Sub-section (2).—British courts have no authority to issue a process against any foreign Prince, even when he chooses to reside within British dominions and the jurisdiction of the court, and therefore, such prince cannot be examined on commission under sub section (2)(8).

(1) 2 Weir. 659.

(2) *In re Basant Bibi*, 12 A 60 (72) = (1889) A. W. N. 202.

(3) *Hem Commari v. Empress*, 24 C. 551.

(4) *Abhayeswari Debi v. Kishori Mohan*, 42 C 19=23 I. C 700=18 C. W. N. 1020=16 Cr. L. J. 348.

(5) 5 A. 92.

(6) *Muhammad v. Bacho*, A. I. R. 1930 B. 56=(1930) Cr. C. 391=120 I. C. 518=31 Cr. L. J. 115.

(7) *Abdul Ghafur v. Emperor*, 11 Cr. L. J. 3=11 P. W. R. 1913 Cr.=18 I. C. 147.

(8) *Ditran Singh v. Mohammad Akram*, A. I. R. 1933 Nag 226

WITNESSES

Delay, expense or inconvenience—This section empowers a District Magistrate to issue a commission for the examination of a witness whose evidence is necessary if his attendance cannot be obtained without unreasonable expense. It may be that the issuing of commission would not result in a saving of time(1). The power to issue a commission should be sparingly resorted to and ought not to be adopted save in extreme cases of delay, expense, or inconvenience(2). This section directs that a Magistrate should be satisfied before the issue of a commission, that the examination of a witness is necessary for the ends of justice quite apart from any question of the convenience of the witness or where the witness resides. Inconvenience to witnesses is no ground allowed under this section(3). In criminal cases the issue of a commission is a most unsatisfactory course of proceeding and one dangerous to the interests of the prisoner(4).

Public interest—Where a Government servant who had executed a recognisance to appear at an ensuing criminal sessions, when called upon to give evidence, was transferred to a very distant place, before the date of the hearing of the case, and the Government on his behalf, applied for a commission to take his evidence before his departure on the ground that he could not with due regard to public interest, be present at the trial, it was held that the application should be granted and the commission should be allowed(5).

Pardanashin lady.—In the case of *Hurro Soondery*(6) it was said by the court (Ainslie and Broughton, JJ.) that a *pardanashin lady* has a right, as a witness in a criminal case, to be exempted from personal attendance at court and to be examined on commission. But this view was not accepted by the Allahabad High Court, where it was held that *pardanashin* women were not of right exempted from personal attendance at court, but that the word 'inconvenience,' in this section empowers the courts to allow examination by commission in criminal cases, where a witness, according to the customs and manners of the country, ought not to be compelled to appear in public(7). Although it cannot be laid down that any *pardanashin* lady can claim exemption from personal attendance as of right, it has been held that in special cases such an exemption may be allowed(8). An application under this section, by a *pardanashin* woman summoned as a witness in a Presidency Magistrate's court, to be examined by commission on the ground that her appearance in the court would cause degradation to her was allowed on the grounds that she lived near the court house, that she had volunteered, to pay the expenses of the commission, and that the opposite party did not require her personal attendance. But the court objected to the word "degradation" used in the petition(9). A

(1) *Parma Nand v. Emperor*, 81 I. O. 140—4 Lah. L. J. 533—1923 Lah 73—25 Cr. L. J. 652.

(2) *In re Faridunnissa*, 5 A. 92—(1802) A. W. N. 194.

(3) *Empress v. Burke*, 6 A. 211—4 A. W. N. (1834) 55.

(4) *Empress v. Counsel*, 8 C. 806.

(5) *Empress v. Bal Gangadhar*

Tilak, 6 B. 235.

(6) 4 C. 20—3 C. L. R. 93.

(7) *In re Farid un Nissa*, 5 A. 92.

(8) *In re Basant Bibi*, 12 A. 60. *Ghulam Rakia v. Niaz Ali*, 19 P. R. 1933 Cr.—169 P. L. R. 1903.

(9) *In re Din Tarini Debi*, 15 C. 775.

(1-A) When a commission is issued under this section to a Chief Presidency Magistrate, he may delegate his powers and duties under the commission to any Presidency Magistrate subordinate to him.

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, section 3.

Amendment.—Sub-section (1-A) has been added by section 137 of Act XVIII of 1923. By this sub-section provision has been made for the delegation of the powers and duties of a Chief Presidency Magistrate to a subordinate Presidency Magistrate.

505. (1) The parties to any proceeding under this Code in which a commission is issued, may respectively forward any interrogatories in writing which the Magistrate or court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed or to whom the duty of executing such commission has been delegated, shall examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate or officer by pleader, or if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

Amendment.—The words "or to whom the duty of executing such commission has been delegated" have been inserted in sub-section (1) in view of the addition of sub-section (4) of section 503 and sub-section (1-A) of section 504.

Examination of witnesses by interrogatories.—The accused can examine the witnesses by interrogatories under this section(1). It is open to him to refrain from putting in any interrogatories when the commission is first issued, and to apply at a later stage, for re-issue of the commission together with his cross-interrogatories(2).

506. Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured

Power of provincial Subordinate Magistrate to apply for issue of commission.

(1) *Sarb Dyal v. Empress*, 10 P. R. 1696 Cr. at p. 27.

(2) *Dombrain v. Someswar*, A. I. R. 1934 O. 698—33 C. W. N. 673—59 C. L. J. 877—61 O. 844—152 I. C. 1003.

Sub-section (3).—Once a commission has been issued by a District Magistrate or by one of the other courts mentioned in this section to an officer representing the British Indian Government in the territory of a Prince or Chief it is the duty of the latter to proceed where the witness is, or to summon such witness before him and to take down his evidence, or to delegate his functions under the commission to any officer subordinate to him and competent to execute the commission; and such officer has no option to decline to execute the commission on the ground of inconvenience or some other similar reason(1). It is inconceivable that officer representing the British Government in such territory of a Prince or Chief has no power to compel the attendance before him of witnesses residing in such territory. If it is so then, the Government must consider the question of either securing such powers or of repealing this section, as it authorises criminal courts to issue commissions to such officer and it is unfair to all concerned that such courts should be expected to pass orders which they cannot enforce(2).

Evidence taken on commission in Nepal.—Where evidence of certain witnesses in Nepal is taken on commission, the onus lies on those who rely on that evidence to approximately establish that Nepal comes within India as defined by s. 3(27) of the General Clauses Act and on their failing to do so the conviction must be set aside(3).

Sub-section (4).—This sub-section was added to the Code in 1908. In the absence of any provision such as is contained in this sub-section it was held that the resident of Gwalior was a person to whom the provisions of this section applied and that if a commission was issued to him in accordance with law he was bound to execute such commission and could not delegate his functions as commissioner(4).

Commissioners' powers to make a complaint for the prosecution of a witness.—Although the Commissioners appointed under this section are not witnesses, they are not bound to observe the meaning of s. 195 and cannot make a complaint. The proper authority to make a complaint for the prosecution of the witness for perjury is the court which issued the commission(5).

504. (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or court issuing the commission may direct the same to such Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

Commission in case of witness being within Presidency town.

(1) *Sikandar v. Crown*, 9 Lah. 347—29 Cr. L. J. 201—106 I. C. 794—A. I. R. 1928 Lah. 76—30 O. L. R. 188.

(2) *Sikandar v. Emperor*, 118 I. C. 643—11 Lah. L. J. 370—1929 L. 104.

(3) *Sanghir v. Emperor*, 7 C.W. N. 635.

(4) *Empress v. Mahpal Singh*, (1896) A. W. N. 106.

(5) *Saadat Ali v. Emperor*, 6 Cr. L. J. 160—11 C. W. N. 909.

507. (1) After any commission issued under section 503 or section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another court.

Issue of fresh commission for cross-examination of witnesses is competent.—This section provides for the inspection of depositions taken on commission, and it is open to a person accused in a warrant case, to refrain from putting in any interrogatories when the commission is first issued, and to apply at a later stage, (that is to say after he has inspected the deposition taken on commission and after charge has been framed against), him for re-issue of the commission together with his cross-interrogatories(1).

Sub section (2).—This sub-section was added to the Code in 1898. Under the Code of 1882 it was held that evidence taken under a commission issued by a Presidency Magistrate during the course of an inquiry before him could not be used in evidence at the trial before the High Court, and further that upon the facts before the High Court it was also inadmissible under s. 33 of the Evidence Act(2). Evidence taken upon a commission by an order of a Presidency Magistrate would not be admissible, in the trial of the case before the High Court, except where it can be shown that such evidence was taken under an order by the High Court itself, or that it was admissible under s. 33 of the Evidence Act(3). Evidence on commission was held to have been rightly received on the trial of a seaman for an offence committed on the high seas(4).

508. In every case in which a commission is issued under section 503 or section 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

Adjournment of inquiry or trial. It would not be proper to stop a trial to issue a commission after the Jury have been sworn, and whilst the trial is proceeding. It would lead to great difficulties and to considerable inconvenience. The court cannot risk the danger of granting an adjournment and allowing the Jury to scatter(5).

(1) *Dombrain v. Someswar, A. I.R.*

19 B. 749.

(3) *Empress v. Dabee Pershad, 6 O. 532.*

(4) *Empress v. Barton, 16 C. 238.*

(5) *Empress v. Jacob, 19 C. 113 (122).*

without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application; and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

Power of subordinate Magistrate to apply for issue of commission.—A Magistrate subordinate to the District Magistrate is not empowered to issue a commission, but he may apply to the District Magistrate stating the reasons for the application and the District Magistrate may either issue a commission in the manner provided or reject the application(1). But there is no jurisdiction to make an order for the issue of commission except on a reference by the trying Magistrate under this section(2). Any party who has a case pending in the court of the Bench Magistrates and desires that his case should move the Bench in the manner stated in this request, the party aggrieved will have his remedy by an application in revision(3).

Sparing exercise of powers under ss. 503 and 506.—Sections 503 and 506 should be used sparingly and only in the clearest possible case. In a criminal prosecution above all the witnesses should be examined in open court, giving an opportunity for the accused to examine them and it is only in those circumstances which are stated in sections 503 and 506 that an order for their examination on commission can be made. The mere fact that a witness is temporarily ill is not a ground for allowing him to be examined on commission(4). Under this section mere expense is no ground for the examination of a material witness on commission but if the court finds that the examination of a witness in court will entail unreasonable and heavy expense and great inconvenience to one of the parties and the public, it has power to order the issue of a commission for his examination(5). A Magistrate is not bound to issue a commission for the examination of a witness, under this section, he is of opinion that the evidence of that witness is not necessary for the ends of justice(6).

Pardanashin ladies.—Though Pardanashin women and ladies, who lead a life of seclusion, cannot claim as a matter of course to be examined on commission, the court should issue commission for their examination in cases where their presence in court is not absolutely necessary(7).

13 Pat. L. T. 345—A. I. R. 1933 Pat 242—33 Cr. L. J. 942—140 I. C. 291.

(5) *Asst. Govt. Advocate v. Upendra Nath*, 11 Pat. L. T. 892.

(6) *Dinabandhu v. Hasan Ali*, 124 I. C. 825—33 C. W. N. 1088—31 Cr. L. J. 645.

(7) *Crown v. Chatranbai*, 9 Cr. L. J. 249.

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(1) *Dombrain v. Someswar*, A. I.R. 1934 C. 698=38 C.W.N. 673=59 O.L.J. 877=61 C. 824=152 I. C. 1005.

(2) *Empress v. Jacob*, 19 C. 113; followed in *Empress v. Ram Chundra*,

19 B. 749.

(3) *Empress v. Dabee Pershad*, 6 O. 532.

(4) *Empress v. Barton*, 16 C. 238.

(5) *Empress v. Jacob*, 19 C. 113 (122).

CHAPTER XII.

SPECIAL RULES OF EVIDENCE.

509. (1) The deposition of a Civil Surgeon of Deposition of other medical witness taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

(2) The court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition. Power to summon medical witness.

Medical evidence.—The only opinion of the Civil Surgeon which can be considered in judicially dealing with the case is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected(1). In this case in referring the case the Sessions Judge forwarded a copy of a letter received by him from the Civil Surgeon, and expressing an opinion as to the nature of the wound inflicted upon the person, of causing whose death the prisoner had been convicted, and it was held that the court could not receive or in any act upon this extra-judicial matter. Where a Medical Officer who has given a certificate as to the cause of death of a deceased person is subsequently examined as a witness, it is not sufficient to ask him merely to attest the accuracy of the statements made in the certificate. Such certificate being in itself no evidence, the witness should be examined directly as to the cause of death, character of the wounds, symptoms, etc(2). A certificate of a Professor of Anatomy at a Medical College, as to the identity of certain bones submitted to him, is not *per se* admissible in evidence at a criminal trial apart from special authority like s. 510, Cr. P. C. The certificate must be proved by examining the Professor as a witness(3). The report of a medical officer not given on oath is not evidence and cannot be used under this section(4). But a Medical officer, in giving evidence, may refresh his memory by referring to a report which he has made of his *post-mortem* examination(5). Where certain accused was discharged by the District Magistrate, and the Chief Court issued a notice to show cause against further inquiry, the order referring to a discussion of the case with the Civil Surgeon,

(1) *In re Samiruddin*, 8 C. 211 (212)
—10 C. L. R. 11.

(2) *Re Venkatroyadu*, 2 Weir 659,
660

(3) *Ahila Manaji v. Emperor*, 47 B.
71—24 Bom. L. R. 603—16 Cr. L. J. 359
—81 I. C. 643—1913 B. 183.

(5) *Raghoni Singh v. Emperor*, 9 C.
455—11 C. L. R. 559.

Lahore, and on the hearing the accused produced the opinions of a number of medical experts supporting the opinion of the Assistant Surgeon in the case, it was held that these opinions or the opinion of the Civil Surgeon were not admissible(1).

Taken and attested by a Magistrate in presence of the accused.

—The examination of a medical witness taken and duly attested by a Magistrate, though it may be given in evidence in any criminal trial under s. 223 of the Code, must, in order to be admissible against any individual accused person, have been taken in the presence of the accused person(2). In taking and attesting the deposition in the presence of the accused the Magistrate should, by the use of a few apt words on the face of the deposition, make it apparent that he has done so(3). S. 80 of the Evidence Act will be of no assistance in a case under this section, where there are "no statements as to the circumstances under which the deposition was taken purporting to be made by the person signing it," but if the Magistrate records a statement at the foot of the deposition to the effect that the deposition was taken and attested by him in the presence of the accused and signs such statement, the court would be bound under s. 80 of the Evidence Act, to presume that such statement was true, and to admit the deposition under this section(4). Before the deposition of a medical witness taken by a committing Magistrate can, under this section, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or to be proved by the evidence of witnesses to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illustration (c) of the Evidence Act (I of 1872) to have been so taken and attested(5). The evidence of a medical officer, given before a committing Magistrate is not admissible in the Sessions Court when the committing Magistrate does not certify that the evidence was given in the presence of the accused(6). Failure, however, to append certificate in the prescribed form has not the effect of making the evidence of the medical witness recorded by the committing Magistrate inadmissible if it otherwise appears that the statement was recorded and attested by the Magistrate in the presence of the accused(7). The statement of a medical witness, if only taken and attested by the Magistrate in the presence of the accused, is admissible as evidence in the Sessions Court although the medical witness is not himself called. It ought, therefore, to be recorded with utmost care and accuracy(8), and not in an untidy, slipshod and illegible fashion(9).

Magistrate inquiring into the case.—It is not necessary that

(1) *Mir Abdulla v. Crown*, 215 P. L. R., 1910=8 I. C. 1044=11 Cr. L. J. 751.

(2) *Empress v. Jhubboo*, 8 O. 739; *Kachali Hari v. Empress*, 18 O. 129.

(3) *Empress v. Pohp Singh*, 10 A. 174.

(4) *Kachali Hari v. Empress*, 18 O. 129.

(5) *Empress v. Riding*, 9 A. 720=1887 A. W. N. 228.

(6) *Bajrangi v. Empress*, 4 C. W. N. 49.

(7) *Nawab v. Emperor*, A. I. R. 1933 Lah. 131=143 I. O. 577=34 Cr. L. J. 443.

(8) *Bharat v. Emperor*, 20 O. C. 61=18 Cr. L. J. 380=38 I. O. 764.

(9) *Baldeo v. Emperor*, 19 O. C. 239=18 Cr. L. 105 (105).

CHAPTER XLI

SPECIAL RULES OF EVIDENCE.

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(2) The court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.

Medical evidence.—The only opinion of the Civil Surgeon which can be considered in judicially dealing with the case is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected(1). In this case in referring the case the Sessions Judge forwarded a copy of a letter received by him from the Civil Surgeon, and expressing an opinion as to the nature of the wound inflicted upon the person, of causing whose death the prisoner had been convicted, and it was held that the court could not receive or in any act upon this extra-judicial matter. Where a Medical Officer who has given a certificate as to the cause of death of a deceased person is subsequently examined as a witness, it is not sufficient to ask him merely to attest the accuracy of the statements made in the certificate. Such certificate being in itself no evidence, the witness should be examined directly as to the cause of death, character of the wounds, symptoms, etc.(2). A certificate of a Professor of Anatomy at a Medical College, as to the identity of certain bones submitted to him, is not *per se* admissible in evidence at a criminal trial apart from special authority like s. 510, Cr. P. C. The certificate must be proved by examining the Professor as a witness(3). The report of a medical officer not given on oath is not evidence and cannot be used under this section(4). But a Medical officer, in giving evidence, may refresh his memory by referring to a report which he has made of his *post-mortem* examination(5). Where certain accused was discharged by the District Magistrate, and the Chief Court issued a notice to show cause against further inquiry, the order referring to a discussion of the case with the Civil Surgeon,

(1) *In re Samiruddin*, 8 C. 211 (212) =10 C. L. R. 11.

(2) *Re Venkatroyadu*, 2 Weir 659, 660

(3) *Ahila Manaji v. Emperor*, 47 B. 71=21 Bom. L. R. 503=26 Cr. L. J. 329 =81 I. C. 643=1923 B. 183.

(4) *In re Chintamonee Nye*, 11 W. R. Cr. 2; *In re Samirud Din*, 8 C. 211 =10 C. L. R. 11; *Queen v. Kaminee Dassee*, 11 W. R. Cr. 25.

(5) *Raghoni Singh v. Empress*, 9 Q. 455=11 C. L. R. 559.

on this matter should be called(1). It would be unreasonable to expect the Jury to convict if a proper exposition and explanation of the medical evidence is not given *viva voce* by a doctor who can deal with the matter and satisfy the Jury(2). In a case depending almost entirely upon medical evidence, the evidence of the Civil Surgeon before the Magistrate should not be tendered or accepted as evidence(3). In a trial for murder, in which the soundness of the accused's mind was in issue, the Sessions Judge, after closing the case in open court and taking the opinions of Assessors, reserved judgment and subsequently held interviews with, and received a letter from the Civil Surgeon as to the mental condition of the accused, and it was held that the action of the Judge in discussing the condition of the accused's mind out of court was illegal in such cases, and the Civil Surgeon ought to have been examined as a witness(4).

510. Any document purporting to be a report

Report of Chemical Examiner. under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination on analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

Report of Chemical Examiner.—Under this section any document purporting to be a report under the hand of a Chemical Examiner upon any matter duly submitted to him for examination and report may be used as evidence in any inquiry, trial or other proceeding(5). It can hardly be open to the courts to render this section nugatory by refusing to attach any weight to the reports of Chemical Examiner even though he is not examined. If they are not to have any weight, there would be no object in making them admissible in evidence. The intention of the legislature is that they should have the same value as they would have if they were formally proved by sworn testimony(6). The case of *Happu v. Emperor*(7) is not against this view. In that particular case it was sought to be proved by report of the Chemical Examiner that a lethal dose of arsenic had been administered and the learned Judge held, as he had every right to hold, that the report could not be accepted unless the Chemical Examiner was subjected to cross-examination especially in view of the delicate nature of the process (Marsh Berzelius)

(1) *Emperor v. Debendra Narayan*, 56 C. 556=33 C. W. N. 632=30 Cr. L. J. 1031=119 I. C. 378=1929 C. 244.

(2) *Ibid.*

(3) *Re Mantapanipalla*, 2 Weir 660.

(4) *Empress v. Jia Lal*, (1889) A. W. N. 181.

(5) *Wali Muhammad v. Emperor*, 63 I. C. 901=21 A. L. J. 869=9 O. & A.

L. R. 994=1914 A. 193=26 Cr. L. J. 200 =L. R. 5 A. 9 Cr

(6) *Aishan Bibi v. Emperor*, A. I. R. 1934 Lah. 150 (2)=15 L. 310=152 I. C. 206=31 Cr. L. J. 14=37 P. L. R. 67.

(7) A. I. R. 1933 All. 837=146 L. C. 1059.

the evidence of a medical witness in a criminal case should be taken before the Magistrate(1). Where there is sufficient *prima facie* evidence to warrant a commitment to the Sessions Court, and the evidence of the medical witness is likely to be only of a formal character, and great inconvenience would result from his being summoned to a Magistrate's court, the examination need not be taken before a Magistrate, but his attendance before the Sessions Court must be secured. Under all other circumstances the Magistrate should invariably record the evidence of the medical witness before himself(2).

Value of medical evidence—It is not proper to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved(3). Medical experts and others such as Judges who have to form opinions and exercise their judgment should have regard primarily to the facts and not draw upon their imagination; otherwise the administration of justice would depend upon their individual idiosyncracies and become unstable and unworkable(4). A Judge should not elect himself into an expert, nor should he slightly treat proper medical evidence(5). A Judge is not entitled to discard the whole of the direct and unimpeached witnesses, who depose that with their own eyes they saw certain things done, merely upon the strength of the opinion of a medical witness to the effect, that those things could not have been done(6). The evidence of a medical man who has seen and has made a *post mortem* examination of the corpse of the person touching whose death the inquiry is made, is admissible, firstly, to prove the nature of injuries which he observed; and secondly, as evidence of the opinion of an expert, as to the manner in which those injuries were inflicted, and as to the cause of death. A medical man, who has not seen the corpse, is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness his opinion on these facts(7).

Sub-section (2): Summoning of medical witnesses.—This sub-section empowers the Sessions Judge to call the Civil Surgeon as a witness and this should be done when the deposition taken by the Magistrate is deficient and calls for further elucidation(8). Where in a Sessions trial for culpable homicide, there was serious inconsistency between the prosecution story and the report of the doctor holding the *post-mortem* examination as to the actual cause and time of death and the prosecution took no steps to have this inconsistency explained by calling the doctor as a witness or by requisitioning other medical evidence in the hearing of the Jury, and then in the High Court it was suggested on behalf of the Crown that further evidence

(1) *Empress v. Durga*, (1893) A. W. N. 180.

(2) *Anonymous*, Rat. Un Cr. C. 81.

(3) *Queen v. Ahmed Ally*, 11 W. R. Cr. 25 (28).

(4) *Emperor v. Yunus Ali*, 32 C. W. N. 783 (784).

(5) *Empress v. Harpat*, (1885) A. W.

N. 180.

(6) *Empress v. Wazir Ali*, (1889) A. W. N. 74.

(7) *Raghori Singh v. Empress*, 9 O. 455=11 C. L. R. 509.

(8) See the case in the last note and *Bharat v. Emperor*, 30 O. C. 61=8 Cr. L. J. 331=29 I. C. 764.

Evidence to prove the identity of the article sent.—The Magistrate must take the evidence necessary to prove that what was sent to the Chemical Examiner was what had been seized from the possession of the accused(1). The report can be of no use unless there is proof of the identity of articles, found during investigation and sent to the Chemical Examiner with the articles examined by him(2). The failure of the prosecution to prove satisfactorily the transmission of parcels containing incriminating exhibits (i.e., blood-stained clothes) direct to the Chemical Examiner and to prove that the articles received by that officer are the identical ones referred to at the trial, is not a mere technical defect. In important matters of this kind it is essential for the prosecution to show that ordinary diligence was exercised and that the ordinary procedure was followed(3). A Sessions Judge should warn the Jury that before using the report of a Chemical Examiner they must be satisfied on the evidence that the substances examined were in fact what they were said to be(4).

511. In any inquiry trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force :—

(a) By an extract certified, under the hand of the officer having the custody of the records of the court in which such conviction or acquittal was had, to be a copy of the sentence or order ; or,

(b) In case of a conviction, either by a certificate signed by the officer in charge of the jail, in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered ;

Together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

Proof of previous conviction.—Whenever proof of previous convictions is required whether under section 75 of the Indian Penal Code or Chapter VIII of this Code, such previous convictions must be proved strictly and in accordance with law, and unless so proved no court can

(1) *Tan Kyi v. Emperor*, 5 Bur. L. J. 100=27 Cr. L. J. 1281=98 I. C. 177.

(2) *In re Rammayya*, 20 M. L. J. 657=6 I. C. 51=(1910) M. W. N. 77 at p. 99=7 M. L. T. 814=11 Cr. L. J. 222.

(3) *Muhammad Din v. Emperor*, 26 Cr. L. J. 1420=26 P. L. R. 748=83 I. C. 814=A. I. R. 1926 Lah. 79;

Emperor v. Autal, 10 C. 1026; *Ofel Molla v. Emperor*, 22 I. C. 723=18 C. W. N. 180=15 Cr. L. J. 147; *In re Rammayya*, 20 M. L. J. 657; cf. *Tan Kyi v. Emperor*, 5 Bur. L. J. 100=27 Cr. L. J. 1281.

(4) *Ofel Molla v. Emperor*, 22 I. C. 723=18 C. W. N. 180=15 Cr. L. J. 147.

by which the latter had arrived at his conclusion. It is always open to the courts to call the Chemical Examiner when this course is deemed to be necessary in the interest of justice. He does not as a rule give any opinion as to the cause of death but merely reports the result of the Chemical Examination of the substances sent to him. It is for the court to determine the cause of death after a consideration of such report together with the *post-mortem* appearances as deposed to by the officer who conducts the autopsy and of the other evidence in the case(1). An accused was convicted by trial court under s 14, Dangerous Drugs Act. But the Sessions Judge acquitted the accused on the ground that the Chemical Examiner had not been called and examined as witness to depose to the contents of the packet and match box that were sent to him for analysis. But it was found that neither the accused nor his counsel objected to the admission of the Chemical Examiner's report, and they did not request that the Chemical Examiner be sent for and put into the witness box, nor was it pleaded that the substance in the packet and in the match box in possession of the accused was not in fact cocaine. It was held that the report of the Chemical Examiner under the circumstances was admissible in evidence as establishing the fact that the substance which was taken possession of by the Excise Inspector contained more than 3 per cent. cocaine admixed with novocaine(2).

Expert certificate as to identity of bones—A certificate of Professor of Anatomy at a Medical College, as to the identity of certain bones submitted him is not *per se* admissible in evidence at a criminal trial apart from special authority like this section. The certificate must be proved by examining the Professor as a witness(3).

Any Chemical Examiner.—The word "any" was added to this section in 1898. Under the Code of 1882 it was held that a document purporting to be a report under the hand of an "Additional Chemical Examiner" upon a matter or thing submitted to him for analysis and report, cannot be received in evidence under this section(4). This case is no longer good law.

Report to be put in evidence.—The Magistrate must take evidence in a regular manner, i.e., he should have the report formally put in evidence(5). The original report bearing the signature of the Chemical Examiner should be tendered in evidence(6). Where the report of the Chemical Examiner was not put in evidence in the trial court, and the appellate court sent for it without recording an order under s. 428, Cr. P. C. it was held, that it was wrong and the report ought not to have been perused(7).

(1) *Aishan Bibi v. Emperor*, A. I. R. 1934 Lab 150 (2)=15 L. 310=151 I. C 206=31 Cr. L. J. 14=37 P. L. R. 67.
(2) *Emperor v. Bacheha*, A. I. R. 1934 A. 873=151 I. C. 522=1934 A. L. R. 865.

(5) *Ton Kyi v. Emperor*, 5 Bar. L. J. 100=27 Cr. L. J. 1231=93 I. C. 177.

(6) *Queen v. Biswambhar Das*, C B. L. R. 122 App=15 W. R. Cr. 49; *Re Venkataswami*, 2 Weir. 661.

(7) *Wali Muhammad v. Emperor*, 83 I. C. 204=21 A. L. J. 803=9 O. & A. L. E. 294=1924 A. 193=26 Cr. L. J. 200=L. R. 5 A. 9 Cr.

the identity of an accused person with a previous convict, it should be strictly proved:—(a) that the previous print was made by the hand of the person who suffered the conviction; (b) that the subsequent print was made by the hand of the accused; (c) that an expert in the deciphering of finger impressions has found several points of agreement, and no points of disagreement, in the *minutiae* of the two impressions(1).

Clause (b).—The filing of a certificate as the kind required by this clause is not by itself proof of a previous conviction. The accused should be asked to plead to the previous conviction, and if necessary, evidence should be taken under this clause(2).

512. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the court competent to try or commit for trial such person for the offence complained of may, in his absence, examine, the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence, or beyond the limits of British India.

Scope of section.—The section must be construed strictly and must be interpreted as giving a court jurisdiction to take depositions in the absence of the accused only in cases where it has been proved to its satisfaction (i) that the accused has absconded, and (ii) that there is no immediate prospect of arresting him. These facts must be proved by evidence, and not merely by the report of the police, unless that

(1) *Emperor v. Sahdeo*, 3 N. L. R. 1
45 Cr. L. J. 220.

(2) *Nga Wan Ye v. Emperor*, 2 L.
B. R. 58

take them into consideration(1). In order to support a charge of a previous conviction, there should be on the record a copy of some judgment or extract from a judgment or some other documentary evidence of the fact of such previous conviction as is required by section 91 of the Evidence Act or this section. The examination by the Magistrate of the accused in respect of such previous conviction is without legal warrant or justification(2). Previous conviction should be proved by one of the methods laid down in this section. A mere admission of the accused is not sufficient(3). Where, however, it is proved, by record, that a person whose name, whose father's name, and whose caste, are the same as those of the accused until trial, the accused may properly be asked if he is the previous convict(4). A mere *kaifiat* from the record office is not sufficient to prove a previous conviction(5).

Proof of identity.—An extract from a record of the previous conviction is not evidence of the conviction without proof of identity. Where such an extract was admitted in evidence of the conviction, on the accused's denial of it, it was held that the procedure was more than a mere irregularity(6). Proof should be given that he and the person named therein are one and the same person and the court should record a specific finding upon that point(7).

Finger impressions as evidence of identity.—The manner in which a previous conviction may be proved is not limited to the methods laid down in this section. The papillary ridges covering the bulbous points of the human finger and thumb with which finger impressions are produced, afford a surer criterion of identity than any other comparable

by the same finger(9). But the previous conviction of an accused person is not proved by merely showing, through the testimony of a finger mark expert, that the finger-prints of the accused taken in court are similar to those on a paper which purports to record certain previous convictions of the accused. In order to prove previous conviction in such a manner there must be further evidence to identify the latter finger-prints as those of the person who was previously convicted(10). Where a comparison between two finger-prints is relied on to establish

(1) *Emperor v. Sheikh Abdul*, 43 O. 1128—20 C. W. N. 725—17 Cr. L. J. 185—33 I. C. 825; *Turemella v. Emperor*, 17 Cr. L. J. 179; *Sardar Ahmad v. Emperor*, A. I. R. 1934 Lab 693.

(2) *Yasin v. Emperor*, 28 C. 689—5 C. W. N. 670; *Basanta Kumar v. Empress*, 26 C. 49; *Emperor v. Alloomiya*, 28 B. 129 (140); *Feroze Khan v. Emperor*, 103 I. C. 673—26 P. L. R. 843—28 Cr. L. J. 961—A. I. R. (1928) Lah. 107; *Empress v. Nga Po Thei*, 1 I. B. R. 8.

P. L. R. 697.

(4) *Emperor v. Kissan Yessu*, 4 N. L. R. 163—9 Cr. L. J. 56.

(5) *Queen v. Ramzan*, 15 W. B. Cr. 53.

(6) *Re Chundi Perugadu*, 2 Welz. 393; *Dhanuk Dhari v. Gopi Singh*, 6 B. L. R. App. 151; *Empress v. Mundar*, (1881) A. W. N. 144.

(7) *Empress v. Mundar*, (1881) A. W. N. 144; *Queen v. Ramzan*, 15 W. B. Cr. 53.

(8) *Emperor v. Sahdeo*, 3 N. L. E. 1—5 Cr. L. J. 220.

(9) *Ibid.*

(10) *Ram Das v. Emperor*, 19 Cr. L. J. 462—30 I. C. 302—21 C. W. N. 469.

Emperor v. Sheoraj Singh(1), in which it was stated that "as a general rule, evidence taken from the accused has absconded should be rejected by the Magistrate who takes the evidence under s. 512. But this view of the law was not accepted by the Lahore High Court in the case of *Daya Ram v. Crown*(2). In that case in proceedings in 1922, before recording depositions of witnesses in regard to a murder, the Magistrate took the statements of constables to the effect that the accused had absconded, and that there was no immediate prospect of arresting him, and it was held that, though a finding had not been recorded to that effect, the statements of the constables being shewn to have satisfied the Magistrate, the requirements of section 512 had been fulfilled, and at the trial in 1925 the depositions of the witnesses to the murder were admissible.

Use of evidence taken for other purposes as if it were evidence specially recorded under the terms of s. 512.—Evidence given at a trial for another purpose cannot be, by an *ex post facto* operation, converted into an equivalent of what is called a deposition taken under this section when at the time of taking the evidence the question of recording a deposition under that section was not under contemplation(3). Where two witnesses, who have given evidence at a previous trial against persons then on their trial, happen to have referred in the course of their evidence at the trial to a person who is absconding and is subsequently tried, their statements cannot be read at the subsequent trial of the accused who was then absconding, merely because they happen to be absent and cannot give evidence(4).

Conditions requisite before a deposition purporting to have been recorded under the section can be admitted.—Before a deposition recorded under this section can be admitted in evidence, it must be proved that the deponent is dead or incapable of giving evidence, or that his attendance cannot be procured without an amount of delay, expense or inconvenience, which under the circumstances would be unreasonable(5). Statements previously made by a witness to Magistrates and recorded in the absence of the accused cannot be treated as evidence in the Sessions Court if the witness is living and can be procured(6). The witnesses for the prosecution should be examined again in the presence of the accused when practicable, notwithstanding that their statements have been previously recorded in his absence(7). If, in the course, of a trial, the Judge is of opinion that the prosecution has not laid a basis for the reception of the depositions taken before the Magistrate in the absence of the accused, he should adjourn the trial, and under s. 540 summon such witnesses as he may deem material(8). Where a witness, whose deposition has been taken under this section,

(1) 48 A. 875=96 I. C. 122=24 A. L. J. 394=1926 A. 840=L. R. 7 A. 85 Cr. =27 Cr. L. J. 874.

(2) 6 Lah. 469=92 I. C. 423=27 Cr. L. J. 247=1926 Lah. 83.

(3) *Emperor v. Sheoraj Singh*, 48 A. 875=27 Cr. L. J. 674=96 I. C. 122=1926 A. 810

(4) See the case cited in the last note

and *Ghurbin v. Empress*, 10 C. 1097. (5) *Nga Kyaw Tin v. Empress*, (1897-01) 1 U. B. R. 114; *Bhika v. Emperor*, 76 I. C. 81=25 Cr. L. J. 95.

(6) *Rakhia v. Emperor*, 10 I. C. 119=157 P. L. R. 1911=12 Cr. L. J. 214.

(7) *Queen v. Boocha*, 22 W. R. Cr. 83.

(8) *Empress v. Sagambar*, 12 C. L. R. 120.

report is given in the shape of evidence before the court(1). It is not open to a Magistrate to decline to call for the documents desired by the complainant or to record any evidence on his behalf, on the ground that the accused had absconded and no inquiry was being then conducted; he is bound in such a case by the provisions of this section(2).

Accused absconding after charge framed.—Where a warrant is, in the first instance, issued for the arrest of an accused person, the Magistrate trying him cannot dispense with his attendance and the whole trial must take place in his presence so that if the accused absconds before the trial is concluded, he cannot be convicted and sentenced in his absence(3).

Principal offender absconding, tender of pardon to accomplice.—In an inquiry into an offence of murder the principal offender having absconded, his accomplice was granted pardon and examined as witness under this section, it was held that the pardon was validly tendered and he was rightly examined as a witness under this section(4).

Proof of absconding.—Where an accused person has absconded and it is intended to record evidence against him in his absence, it is requisite under this section that the fact of the absconding should be alleged and established before the deposition is recorded(5). In the case of *Empress v. Sahib Singh*(6) it was held that the evidence given by witnesses since deceased on occasions when neither the accused was present and had an opportunity to cross-examine, nor was it proved to the satisfaction of the court that the accused was absconding and that was no immediate prospect of arresting him, could not be used against a person subsequently put on his trial for participation in the offence in respect of which such witnesses had given evidence. Where a Magistrate, professing to act under this section, recorded a deposition without proof that the accused had absconded, and that there was no immediate prospect of arresting him, held that the proceeding was not a "judicial proceeding," as defined by s. 4 of the Code, and that the witness could not be convicted under section 193 of the Penal Code for giving false evidence(7).

Finding as to absconding.—In the case of *Emperor v. Rustam*(8) it was said that the language of this section showed that the court which records the proceedings must first of all record an order that in its opinion it has been proved that the accused person has absconded and that there is no immediate prospect of arresting him, but a different view on this point was taken by same court in *Emperor v. Bhagwati*(9). But the remarks made in the earlier case were recently approved in

(1) *Empress v. Makhni*, (1890) A. W. N. 100.

(2) *In re Wasudeo*, 2 Bom. L. R. 501.

(3) *Crown v. Sarkar*, 36 P. R. 1917 Cr.—47 P. W. R. 1917 Cr.—42 I. C. 335 —18 Cr. L. J. 975.

(4) *In re Dagdeo Bupu*, 46 B. 120 = 23 Bom. L. R. 639 = 63 I. C. 156 = 22 Cr. L. J. 620.

(5) *Ghurbin v. Empress*, 10 C. 1097; *Wahid v. Empress*, 21 P. R. 1883 Cr. Reg. v. *Atwate*, 21 W. R. Cr. 12.

(6) *Empress v. Sahib Singh*, (1890) A. W. N. 182.

(7) *Empress v. Makhni*, (1890) A. W. N. 100.

(8) 38 A. 22—81 I. C. 517—13 A. L. J. 1013—16 Cr. L. J. 501.

(9) 41 A. 60—43 I. C. 451—16 A. L. J. 902—20 Cr. L. J. 6.

CHAPTER XLII.

PROVISIONS AS TO BONDS.

513. When any person is required by any court or officer to execute a bond, with or without sureties, such court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or government promissory notes to such amount as the court or officer may fix, in lieu of executing such bond.

Principle.—When a court orders an accused to be released on bail on his offering surety or sureties, the question of the forfeiture of the amount of surety in case the accused does not appear on the date fixed, is of secondary consideration; the primary consideration is the personal element of the surety or sureties concerned. When the accused is released on bail on his offering surety for the amount ordered, the court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case there is any attempt on the part of the accused to abscond or to avoid attendance in court. The surety or sureties must have a personal stake in seeing that the accused carries out his obligation(1).

Except in case of bond for good behaviour.—In good behaviour cases the Magistrate cannot demand the amount of security in cash. The object of the law is that sureties should be responsible for the good behaviour of the person called upon to provide security(2).

Deposit instead of recognizance—Where a person is required to execute a bond with or without sureties, the court may in most cases permit him to deposit a sum of money in lieu of executing such bond(3). The deposit is in lieu of executing a bond. A person cannot be ordered to execute a bond for good behaviour and also to deposit a certain sum in addition thereto(4). Moreover, the deposit here allowed is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which surety executes(5). The recovery from the accused of the amount forfeited by him under his bond does not relieve the surety of his liability to make good such part of his bond as he has been ordered by the court to pay(6).

Agreement to indemnify surety void.—An express or implied

(1) *In re Surja Narain*, A. I. B. 1935 Pat. 195=16 P. L. T. 223, per Mohammad Noor, J.

(2) *Queen v. Sheo Buksh*, 2 N. W. P. H. C. R. 295.

(3) *Laxmanlal v. Mulshankar*, 32 B. 449 (453).

(4) *Empress v. Tata*, Rat. Un. Cr. Cas. 671.

(5) *Laxmanlal v. Mulshankar*, 32 B. 449 (453).

(6) *Abdul Karim v. Emperor*, A. I. B. 1933 S. 320=147 I. O. 127.

is afterwards examined in the presence of the accused the deposition may, under certain circumstances, be admissible under s. 157 of the Evidence Act as corroboration of his statement at the trial(1).

Incapable of giving evidence.—Where a witness whose deposition has been recorded under this section, actually appears in court at the trial of the absconder, and gives evidence the mere fact that he is unable to remember the details of the occurrence does not render him incapable of giving evidence within the meaning of the section, and his previous deposition cannot be put in evidence against the accused person. The proper procedure in such a case is to read out his previous deposition, to the witness under the provisions of section 159 of the Evidence Act, to refresh his memory and then to ask him whether he remembers the detail of the occurrence(2).



(1) *Empress v. Ishri Singh*, 8 A. 572.

(2) *Bhika v. Emperor*, 78 I. C. 31
—25 Cr. L. J. 95

liability in respect of the bond. * * *

(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section 514-B, a certified copy of the judgment of the court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the court shall presume that such offence was committed by him unless the contrary is proved.

Amendment.—This section has been amended by section 139 of Act XVIII of 1923; and the changes introduced are the following:—*First*, in sub-section (3) the word "distress" is omitted and the word "attachment" is substituted; *Secondly*, the words "but the party who gave the bond may be required to find a new surety" which occurred at the end of sub-section have been deleted but separate provision is made in the new section 514-A. *Thirdly*, a new sub-section (7) has been newly added.

Scope.—The provisions of this section apply to all bonds whether executed by principals, sureties or witnesses for appearance in court(1). The provisions of this section indicate that two steps are to be taken: *First*, it must be proved to the satisfaction of the court that the bond has been forfeited, whereupon the court is to record the grounds of such proof: *Secondly*, the court on being satisfied as aforesaid, may call upon the person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid(2).

What constitutes breach and entails forfeiture.—A surety bond in criminal cases must be strictly construed and a surety cannot be required to pay the amount of his bond as the result of an opinion held by a court, as to what was in his mind when he signed it. He can be required to forfeit the amount only if the terms expressed in the bond are broken(3). Where, therefore, a surety binds himself to produce an accused on a particular date and he does so his liability is discharged and he is not bound for the non-appearance of the accused on any subsequent date(4). The failure of a surety to produce an accused on the day on which he has undertaken to produce him will not cause forfeiture of his bond, where the Judge does not hold court on that

(1) *Ananthacharri v. Ananthacharri*, 2 M. 169.

(2) *Mou Mohan v. Emperor*, A. I. R. 1928 C. 261.

584=1931 Cr. C. 402=138 I. C. 512=93 Cr. L. J. 628; *Maung Nge v. Emperor*, 2 Rang. 581=84 I. C. 933=26 Cr. L. J. 389.

(4) *Nga Po Tin v. Emperor*, 65 I. C. 420=(1921) 4 U. B. R. 71=23 Cr. L. J. 68; *Vithal Das v. Emperor*, 56 B. 220=A. I. R. 1932 B. 220=54 Bom. L. R. 584; 2 Weir. 693.

agreement by a person who executes a bond for his appearance in a court to indemnify his surety for the consequences of his failure to appear is void under section 23 of the Contract Act(1).

Recovery of fine from surety's money.—Fine cannot be deducted from the money deposited by a surety for the appearance of the accused, even if the surety and the accused are brothers and even if they be assumed to be members of a joint Hindu family(2).

514. (1) Whenever it is proved to the satisfaction of the court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate, or Magistrate of the first class,

Or when the bond is for appearance before a court, to the satisfaction of such court,

That such bond has been forfeited, the court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months

(5) The court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all

(1) *Jodhray v. Bisanlal*, 20 N. L. R. 166; *Fateh Singh v. Santool Singh*, 1A. 751; *Sunder Singh v. Kishen Chand*, 1 P.R. 1913 Cr.; *Larman Lal v. Afukshankar*, 32 B. 449.

(2) *Girdhari Lal v. Emperor*, 32 Cr. L. J. 744-64 I. C. 135-19 A. L. J. 637; *Raghunandan v. Emperor* 11 O. L. J. 226

discharging the accused persons held that their presence on the date of hearing was unnecessary(1).

Failure to produce accused due to his being arrested in another case or other bona-fide cause.—Where a surety is unable to produce the person for whom he has given bail owing to some circumstance which is not under the surety's control, for instance, where the accused person is arrested on a criminal charge, he is not liable to forfeit his bail(2). But the liability of the surety to produce the accused does not terminate by the mere fact that the accused is under arrest for a day or two between the date of the bond and the date when he was to be produced in the court. The important point is not mere arrest but confinement under arrest on the date when production is to be made which makes such production impossible. The surety's liability does not terminate if the production of accused becomes impossible owing to his having escaped from custody after arrest and disappeared(3). Where in a proceeding started under this section it appears that the accused and the sureties understood that the date which should be fixed for trial would be intimated to them, that the failure to intimate the date to the sureties, was due to some error on the part of some subordinate of the District Magistrate, that in any case there was abundant room for a misunderstanding and that the failure of the sureties to produce the accused was due to such misunderstanding and was not intentional or even due to negligence, the order forfeiting the amount of the bail bond cannot be sustained(4). A court will not be justified in calling upon a surety to pay the full amount of the bond on the ground that he had failed to produce the accused in court on a day of hearing as he had agreed to do where the failure is due to the fact that the complainant and accused had come to an amicable arrangement to have the proceedings against the accused dismissed for default, and the surety had knowledge of the same(5), or where according to terms of the bail bond the surety was responsible for the production of the accused in the City Magistrate's court at Agra. But as several cases were pending against the accused, the District Magistrate directed the surety to produce the accused in a court at Purnea and the accused absconded by reason of an honest attempt of the surety to carry out this order and subsequently the surety was unable to comply with a fresh order for the production of the accused at Agra(6).

Conviction involving forfeiture.—A bond to be of good behaviour under section 110 of the Code can be forfeited on a conviction under section 323, Indian Penal Code(7). But in one case it has been held

(1) *Emperor v. Godhan*, 81 I. C. 944=10 O. and A. L. R. 998=26 Cr. L. J. 400.

(2) *Alauddin v. Emperor*, 4 Pat. 259=8 Pat. L. R. 123 Cr.=6 Pat. L. T. 337=26 Cr. L. J. 893=A. I. R. (1923) Pat. 389=(1925) Pat. 46=86 I. O. 657.

(3) *Madan Mohan v. Emperor*, A. I. R. 1931 Pat. 19=1931 Cr. C. 55=130 I. C. 161=32 Cr. L. J. 467=12 Pat. L. T. 814.

(4) *Rajbansi v. Emperor*, A. I. R. 1929 Pat. 658=1929 Cr. C. 444.

(5) *Emperor v. Parbhu Dayal*, 49 A. 825=25 A. L. J. 537=28 Cr. L. J. 586=102 I. C. 554=L. R. 8 A. 98 Cr.=81 I. Cr. R. 52=1927 A. 631.

(6) *Crown v. Abdul Aziz*, 4 Lah. 461=25 Cr. L. J. 1181=81 I. O. 935=1924 Lah. 262; *Fatta v. Crown*, 6 P. R. 1915 Cr.; *Crown v. Sher Singh*, 10 P. R. 1916 Cr.

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day(1). Where the Magistrate fixed the hearing of a case on a Sunday, and on the following Monday took up the case, and on account of the non appearance of the accused, ordered the forfeiture of the bonds executed by the accused and, their sureties, it was held that it was the court's mistake to fix the date, and that they were not bound to appear on the day following that the bonds ought not, therefore, to have been forfeited(2). There is nothing illegal in requiring accused persons to execute recognizances to appear on every day from the date of executing the recognizance until the close of the trial(3). Where an accused person appeared on the first day conditioned in the bond and was verbally directed to appear on a subsequent day, but failed to do so, and his recognizance was thereon, declared to be forfeited, it was held that there was no illegality in the forfeiture of the recognizance(4). But a bail bond to produce the accused in the Sessions Court on every date fixed for the hearing of an appeal, or whenever required, is also complied with by the attendance of the accused during the hearing; and, though a requisition might be made by the Court of Session for their subsequent production in that court, the sureties are not bound to produce them thereafter before the District Magistrate(5). If an accused whose appearance before the Magistrate before whom the case is proceeding has been guaranteed by a surety, does not appear before another Magistrate to whom the case is subsequently transferred, the surety does not commit any breach of the conditions of his surety bond(6). The amount of a bail bond cannot be forfeited in case of failure of the accused to appear in court to which the case is transferred, where the obligation to appear in such a court has not been expressly specified in the bond(7). Where a surety has failed to produce the accused before the court in a certain place in a certain time, and the court has ordered the forfeiture of the bond, the surety cannot be reinstated in the Fifth Schedule, and the bond cannot be enforced to exist, can also be enforced by its successor to which the other functions of the defunct court have been transferred(9). No action shall, however, be taken under this section when the court itself by

(1) *Samman Singh v. Emperor*, 106 I. O. 108—9 Lah. L. J. 411—9 A. I. Cr. R. 218—28 Cr. L. J. 1020—1928 L. 20—29 P. L. R. 231

(2) *Empress v. Asanulla*, 2 C. W. N. 519.

(3) 2 Weir 662—6 M. H. C. Rep. XXXVIII.

(4) *Re Haslavaram*, 2 Weir. 658.

(5) *Bahari Lal v. Emperor*, 36 C. 749.

J. 399; Cf. Emperor v. Parbhu Dayal, 49 A. 825

(7) *Maung Nge v. Emperor*, 2 Rang. 581—A. I. R. 1915 Rang. 153—84 I. C. 933—26 Cr. L. J. 389—101 I. C. 551—25 A. L. J. 537—L. R. 8 A. 98 Cr.—8 A. I. Cr. R. 52—A. I. R. 1927 A. 831; *Cf. Emperor v. Parbhu Dayal*, 49 A. 825—29 Cr. L. J. 686. The fact that the case is once again transferred back to the same court reviveth the obligation of the original contract: *Emperor v. Bandhu Khan*, A. I. R. 1931 S. 152

(8) *Barudeb v. Emperor*, A. I. R. 1931 C. 783—33 C. W. N. 804—1931 Cr.

bail bond must be made upon evidence duly recorded in the case, and not upon evidence taken in other cases(1).

Illegal bonds incapable of forfeiture.—Where a Magistrate without jurisdiction obtains a bail bond from an accused person for his appearance before another court outside his jurisdiction and it transpires that the Magistrate was not competent either to admit the accused to bail or to secure a bail bond from him, the bail bond or personal recognizance of the accused is a nullity. So, where a warrant of arrest was issued by the District Magistrate of Budaun against a person and, without the warrant being executed against him, he appeared before a Magistrate at Rae Bareilly and applied for bail, which was granted on his personal recognizance for a certain amount for his appearance in the court of Budaun, it was held that the bail bond was a nullity, as the Magistrate at Rae Bareilly was not competent to grant the bail or to take the bail bond and that an order directing the attachment and sale of the moveable property of the person, under sub-section (2) upon his failure to appear in the court of Budaun, must be set aside(2). Where the proceedings were instituted under s. 110, and the order passed purported to be under the latter section, but the form for a bond under s. 107 was substituted by mistake, it was held that the error of taking the bond under s. 107 instead of under s. 110 was not cured by s. 537 and the bond being bad, by reason of no order for such bond being executed having been passed, the offender was not liable to forfeiture(3). Where in a case under s. 498, I. P. C. the Magistrate issued a warrant against the complainant's wife as a witness for the prosecution, and it was endorsed with an order directing the release on personal recognizance only, and there was no order as to surety, but the security was taken by the Police Officer and ordered to be confiscated upon failure of the witness to appear, it was held that the security taken by the Police Officer was unauthorized and the order of confiscation of the security upon failure to keep its terms, not maintainable(4). Where a warrant was issued to a woman in the first instance instead of a summons, without recording reasons under section 90, the warrant is wholly illegal, and the bond given by the surety for the woman's appearance has no legal force and cannot be forfeited if the woman does not appear(5). Where, however, a person stands surety for the attendance of another person before a court and the latter fails to attend before that court on the date fixed in the bond, the surety is liable under the bond even if it turns out that the arrest of the principal was illegal(6).

Death of accused.—The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or

(1) *In re Mohesh Chunder*, 10 C. L. R. 571; *Binkolajee v. Empress*, (1897—01) 1 U. B. R. 116.

(2) *Emperor v. Lal Bahadur*, 52 A. 94=A. I. R. 1929 A. 914 (1)=28 A. L. J. 199=120 I. C. 194=31 Cr. L. J. 2=Ind. Rul. 1930 A. 18.

(3) *Wadhawa Singh v. Emperor*, 52 P. R. 1903 Cr.=15 P. L. B. 1904.

(4) *Kala Singh v. Emperor*, 22 P. W. R. 1907 Cr.=6 Cr. L. J. 275.

(5) *Bela Singh v. Crown*, 50 P. L. R. 1918=19 Cr. L. J. 44=44 I. O. 971=7 P. W. R. 1918 Cr.

(6) *Chajju Singh v. Emperor*, 22 Cr. L. J. 662=63 I. O. 454=2 Lab. 204=3 U. P. L. R. (L) 77.

that a bond to be of good behaviour cannot be forfeited on a conviction under s. 326, Indian Penal Code(1). It has similarly been held that a surety bond entered into to keep the peace is not liable to forfeiture merely because the person bound over committed an offence of abduction(2). But this view is not universally accepted(3). According to the cases cited in the last note it is not necessary in order to constitute breach of a bond that the offence committed or attempted or abetted by the person bound over should be *ejusdem generis* with the offence for which he was bound over. A bond to be of good behaviour can be forfeited on conviction for possession of a chhavi under Act XI of 1878(4). But a security bond for good behaviour is not liable to forfeiture against the sureties where principal has been convicted of an offence in a native state(5).

Suit not involving forfeiture.—A surety bond entered into to keep the peace is not liable to forfeiture by reason of the person bound over having brought a civil suit to enforce his right(6).

Continuance of liability till appeal—Where a bond has been given in court for compliance of its order, the liability of the obliger is not discharged simply because the trial court has passed the order in his favour where such order is reversed in appeal(7).

Proof of forfeiture of bond.—A Magistrate has no jurisdiction to call on a person who has entered into a recognizance bond to pay the penalty or show cause why he should not pay it, without previous *prima facie* proof on oath or affirmation that it has been forfeited(8). Before issuing an order calling upon a person who is subject to a bond to show cause why he should not forfeit it, the Magistrate is bound to have before him sufficient proof that a good reason exists for making the order and the section requires that the grounds of such proof must be recorded(9). It is the duty of the Magistrate to record evidence and come to a definite finding that the bond has been forfeited before a notice is issued upon the bailor to show cause why the penalty should not be realized from him(10). But in recent Patna cases it has been held that
 person the
 issuing no

(1) *Udham Singh v. Crown*, 15 P. R. 1913 Cr.=21 I. C. 175=59 P. W. R. 1913 Cr.=334 P. L. R. 1913=14 Cr. L. J. 575

(2) *Muhammad v. Emperor*, 7 P. R. 1906 Cr.=4 Cr. L. J. 278

(3) *Emperor v. Sheo Janqal*, 50 A. 666 (669)=113 I. C. 740=30 Cr. L. J. 203=25 A. L. J. 443=A. I. R. 1928 A. 232=L. R. 9 A. 68 Cr.=9 A. I. Cr. R. 443; *Crown v. Abdul Aziz*, 4 Lah. 262; *Buta Singh v. Crown* 3 P. B. 1917 Cr.

(4) *Buta Singh v. Crown*, 3 P. R. 1917 Cr.

(5) *Bahadur Singh v. Crown*, 26 P. R. 1918 Cr.

(6) *Sital v. Crown*, 1 Lah. 310

(7) *Maung Po Cho v. Maung Shire*

Kin, 114 I. C. 682=A. I. R. 1929 Rang 310

(8) *In re Hariram Birkhan*, 11 Bom. H. C. R. 170, followed in *Krishna Narain v. Emperor*, 23 Cr. L. J. 478=67 I. C. 830=3 Pat. L. T. 381.

(9) *Krishna Narain v. Emperor*, 23 Cr. L. J. 478=67 I. C. 830=3 Pat. L. T. 381=1923 Pat. 212

(10) *Zulmi Kahar v. Emperor*, 192 I. C. 532=A. I. R. 1923 Pat. 643=1930 Pat. 212

(11) *Bishambar v. Emperor*, 11 Pat. L. T. 573=129 I. C. 345=32 Cr. L. J. 121, *Rajbansi v. Emperor*, 124 I. C. 85=A. I. R. 1923 Pat. 638=31 Cr. L. J. 603, *Madan Mohan v. Emperor*, 12 Pat. L. T. 614=(1931) Cr. C. 55=150 I. C. 161=32 Cr. L. J. 467.

accused persons shall attend before the police at the time and place mentioned in the bond, and that if he fails to so attend and a Magistrate of the first class is satisfied that the bond has been forfeited, any person bound by the bond can be called upon to pay the penalty thereof(1). But the Calcutta High Court holds there is no provision in this Code authorising a Police Officer to take a surety bond for production of any person before the police and that such a bond is *ab initio* void(2). The Bombay High Court holds that the Presidency Magistrate of Bombay has no jurisdiction, under this section, to order forfeiture of bonds taken under sections 106 and 107 of the City of Bombay Police Act, 1902(3).

Notice to show cause.—The Magistrate can hold an inquiry into the question of the forfeiture of surety bonds (ensuring the good behaviour of the principal) by reason of the latter having committed an offence, only after notice to the sureties. An order of forfeiture of the bonds on evidence recorded without such notice, and to the effect that he was reasonably suspected by the police to have been concerned in certain cases of house-breaking and dacoity, is illegal(4). An order directing the forfeiture of a bond without notice to the party whose bond is forfeited amounts to a failure of justice, even though an order of forfeiture would have been passed if that person had had an opportunity of being heard(5). Before a warrant can issue attaching the property of a surety, he should be called on under this section, to show cause why he should not pay the penalty mentioned in his bond, and it must appear clearly on the face of the record that he had such notice given him(6). A notice must be served on a surety calling upon him to pay the amount of his security bond or to show cause why he should not pay the same before an order can be made to levy the sum from him(7).

Procedure necessary before forfeiture of security bond.—Where a person had been bound over by a Magistrate to keep the peace, and was subsequently called upon to show cause why his recognizance should not be considered forfeited by reason of a breach of the peace committed by certain servants of his, to which breach of the peace he was alleged to be privy, it was held that the denial of the obligor that he was in any way privy to the acts alleged against him was sufficient *prima facie* cause and the Magistrate was thereupon bound to take evidence before ordering the forfeiture of the obligor's bond. The record of a case to which the obligor was not a party and which was not tried before the Magistrate by whom the bond in question had been called for, was no evidence as to the obligor's liability in the matter then before the court(8). So a Magistrate ought not to forfeit a recognizance to

(1) *Crown v. Kanshi Ram*, 22 P. R. 1918 Cr.=21 I. C. 679=6 P. L. R. 1914=6 P. W. R. 1914 Cr.=14 Cr. L. J. 631

(2) *In re Chandra Selhar*, 11 O. 77.

(3) *In re Cratford*, 42 B. 400.

(4) *Moslem Mandal v. Emperor*, 54 O. 134=44 O. L. J. 170=27 Cr. L. J. 1293=98 I. C. 189=1926 C. 1221.

(5) *Sarju v. Jai Raj*, 25 Cr. L. J. 445=77 I. C. 733=A. I. R. 1925 O. 51=9 O. & A. L. R. 118.

(6) *Khodes v. Doorga Dass*, 15 W. R. Cr. 12.

(7) *Queen v. Jeebum, Sheikh*, 9 W. R. Cr. 4.

(8) *In re Balkaran Rai*, (1891) A. W. N. 183.

the ranking of death under the category of default does not seem to be very stateable(1). The object of these surety bonds is as far as possible to ensure that the accused person shall not evade justice in the ordinary sense, that is to say, by flying from the country or from the jurisdiction of the court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety bonds, since that was an event which the sureties could not have had in contemplation, and which is not of the kind which would impose upon them any moral obligation or responsibility to the courts(2).

What court can initiate proceeding for forfeiture.—Where a surety bond has been executed for the appearance of an accused person before a particular court, under this section proceedings to have the bond forfeited can be initiated only by that court. Section 516 does not authorize the delegation of power to initiate forfeiture proceedings. It is only concerned with the power to direct levy of the amount due on a forfeited bond(3). Where the accused gave a personal bond for appearance before a Magistrate and failed to appear before him on the date fixed and a notice was issued to him to show cause why the bond should not be forfeited and in the meantime the case was transferred to another Magistrate: it was held that the latter Magistrate had no jurisdiction to order the forfeiture of the bond under this section(4). The proper court to direct the forfeiture of a bail bond is the court before which the accused was bound by the bond to appear and the forfeiture must be established to the satisfaction of such court(5). Where in a criminal case, the accused was ordered to furnish security to the effect that he would produce a minor, who was said to be in his custody, before the court or the court of the District Judge if and when required to do so, and subsequently after the discharge of the accused, on an application before the District Judge for custody of the minor by his father, the District Judge ordered the accused to produce the minor and on his denial of liability under the bond and statement that the minor was not in his custody, the District Judge forfeited the amount of the bond, it was held that the criminal court had no jurisdiction to take any bond for the production of the minor before the District Judge and that under this section it was only the court which had taken the bond that could enforce it and hence the District Judge could not take any action on the bond(6). Where a bail bond under s. 43 of the Abkari Act, Act I (Madras) of 1886 is forwarded to a Magistrate in order that payment may be compelled the Magistrate should follow the procedure laid down by this section(7).

Bond to appear before police.—A Police Officer in charge of a police-station has power to make it a condition of a bond that the

(1) *Debi Bakhsh v. Habib Shah*, 35 A 331 (336) P. O.

(2) *In re Rama Bapu*, 18 Bom L R 683=17 Cr L J 323=35 I C 825; *Vijayaraghavan v. Emperor*, 37 M. 166=13 Cr. L. J. 681=16 I C 832 (in this case the accused committed suicide).

(3) *Hiralal v. Emperor*, 14 C W N. 249=10 Cr L J 218

(4) *In re Abdul Rahman*, 16 Bom. L R 84=23 I. C. 503=15 Cr. L. J. 295.

(5) *Maung Nge v. Emperor*, 2 Rang 581=84 I C 933=26 Cr L J. 389

(6) *Kanshi Ram v. Emperor*, 34 Cr L J. 952=145 I. C. 270=A. I. B. 1933 Lab 678 (1)=6 B. L. 90

(7) *Empress v. Palayatham*, 13 M. 45=4 M. L. J. 212

accused persons shall attend before the police at the time and place mentioned in the bond, and that if he fails to so attend and a Magistrate of the first class is satisfied that the bond has been forfeited, any person bound by the bond can be called upon to pay the penalty thereof(1). But the Calcutta High Court holds there is no provision in this Code authorising a Police Officer to take a surety bond for production of any person before the police and that such a bond is *ab initio* void(2). The Bombay High Court holds that the Presidency Magistrate of Bombay has no jurisdiction, under this section, to order forfeiture of bonds taken under sections 106 and 107 of the City of Bombay Police Act, 1902(3).

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(2) *In re Chandra Selhar*, 11 C. 77.

(3) *In re Crawford*, 42 B. 400.

(4) *Moslem Mandal v. Emperor*, 54 O. 131 = 44 O. L. J. 170 = 27 Cr. L. J. 1293 = 98 I. C. 189 = 1926 O. 1224.

(5) *Sarju v. Jai Raj*, 25 Cr. L. J. 445 = 77 I. C. 733 = A. 1. R. 1925 O. 51 = 9 O. & A. L. R. 118.

(6) *Khoodee v. Doorga Dass*, 15 W. R. Cr. 82.

(7) *Queen v. Jeebum, Sheikh*, 9 W. B. Cr. 4.

(8) *In re Balkaran Rai*, (1891) A. W. N. 163.

keep the peace under this section, unless the person charged with the breach has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued(1). If a person has really forfeited his recognizances to keep the peace, the Magistrate must record evidence in the presence of the accused, proving that he was about to do something which would cause a breach of the peace(2). The mere fact of the person for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture, without any evidence taken in the presence of the surety to show that the forfeiture has been incurred(3). If the surety denies the execution of a bail bond there should be some evidence to prove its execution(4).

Proceedings to confiscate security when to be taken—If a criminal court, knowing that a person charged before it is under security to keep the peace or to be of good behaviour, in sentencing that person in the case before it makes no reference to the confiscation of that security and takes no steps towards its confiscation, it is not competent for that court or any other court in a subsequent and separate proceeding to take such steps(5). But in some cases it has been held that the mere fact that no immediate action under this section is taken against a person under recognizances to keep the peace, or against his surety, on the conviction of the former of an offence involving a breach of the peace is no bar to the taking of such proceedings at a subsequent time, as, for example, after the time for appealing has expired, or after an appeal by the principal has been dismissed(6). Where four accused persons from whom security for good behaviour had been taken, joined in a serious riot before the expiry of the period during which they had bound themselves to keep the peace and the Magistrate thereon refrained from passing a heavy sentence on them and writing in the judgment plainly that he did so considering the heavy sum of Rs. 4,000 they would forfeit personally and issued process to the sureties and confiscated the amount in full, it was held that the order of forfeiture was lawful inasmuch as the Magistrate passing the sentence in the substantive case plainly showed his intention to forfeit the security(7). Where a person who is bound over to keep the peace is convicted before the expiry of the bond and the Magistrate convicting him is not aware of the fact that a security bond has been executed by the accused with two sureties and therefore passes no order with regard to the confiscation of the security, confiscation proceedings taken by another Magistrate are not void(8).

(1) *Empress v. Nobin Chunder*, 4 O. L. R. 243=4 C 865 F. B.; *Empress v. Har Chandra*, 25 C. 440.

(2) *In re Kalikant*, 3 B. L. R. App. 155=12 W. R. Cr. 54.

(3) *Empress v. Har Chandra*, 25 C. 440.

(4) *Birendra Nath v. Emperor*, A. I. R. 1935 C 836.

(5) *Munshi v. Emperor*, 75 I. C. 692=25 Cr. L. J. 4; *Crown v. Malaraz*, 13 P. 1913 Cr.=18 I. C. 403=7 P. W. R. 13 Cr.=39 P. L. R. 1913=14 Cr. L. J.

67; *Buta Singh v. Crown*, 3 P. R. 1917 Cr.=18 Cr. L. J. 508=39 I. C. 476; *In re Ram Chunder*, 1 O. L. R. 134; *Emperor v. Raja Ram*, 26 A. 202;

(7) *Husain Khan v. Crown*, 15 P. R. 1917 Cr.=18 Cr. L. J. 506=39 I. C. 806=17 P. W. R. 1917 Cr.

(8) *B. h. v. J.* 3 P. R. 1917 Cr. J. O. 476.

When, however, a Magistrate has before him the fact that a person convicted by him of an offence of causing grievous hurt is under recognizance to keep the peace and has abstained from making any order for the forfeiture of the bond, it is not competent for him to inflict an additional penalty on a reconsideration of the circumstances by adding to his order at a subsequent period an order for forfeiture of the bond(1).

Expiry of period of bond.—Where proceedings for the forfeiture of a bond for keeping the peace have been commenced before the expiry of the period for which the bond was given, the fact that such period has expired is no bar to their continuance(2).

Moveable property.—The expression 'moveable property,' the subject of distress and sale, in the section means tangible or corporeal moveable property and does not include debts and choses in action. It may, however, include negotiable instruments, bonds and title-deeds(3). During the surety's lifetime, only moveable property can be attached and sold for recovery of the penalty(4).

"His estate if he be dead."—These words were added to sub-section (2) in 1898. Under the Code of 1882, it was held that the words "person bound" do not include the representative of a deceased surety who had bound himself under section 106, and that such representative is not liable after the death of the surety to be proceeded against as such representative in a summary proceeding under Chapter XLII(5). This case is no longer good law.

Liability of sureties.—It has been held by the Calcutta High Court that upon the forfeiture of bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal(6). But this view is opposed to that taken by the Punjab and Burma courts. According to them in no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound or his sureties individually or collectively(7). The bond contemplated by sections 112 and 118 is one bond for one amount, and is discharged, on forfeiture by the payment of the amount due either by the principal or the surety(8). When, therefore, the amount of the bond has been recovered from the principal, the sureties are not liable to any further amount. The liability of the surety is only a joint and several liability with the principal and there is no warrant to collect the amount twice over(9). It is to be noted that when

(1) *Gul Khan v. Emperor*, 26 P. R. 1904 Cr.

(2) *Emperor v. Uma Dutt*, 44 A. 657=68 I. C. 847=20 A. L. J. 693=23 Cr. L. J. 623=1922 A. 503; *Jeomal v. Emperor*, A. I. R. 1626 S. 150=27 Cr. L. J. 326=92 I. C. 742=20 S. L. R. 95

(3) *Secy. of State v. Sengammal*, 18 Cr. L. J. 1=36 I. C. 833=4 L. W. 613

(4) *Nanhe v. Emperor*, 16 A. L. J. 603=19 Cr. L. J. 711.

(5) *Gulab Shah v. Empress*, 22 P. R. 1894 Cr.

(6) *S. v. ...*

(7) *Emperor v. Nga Kaung*, 2 Cr. L. J. 463=U. B. R. (1905) 31, *Kaku v.*

keep the peace under this section, unless the person charged with the breach has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued(1). If a person has really forfeited his recognizances to keep the peace, the Magistrate must record evidence in the presence of the accused, proving that he was about to do something which would cause a breach of the peace(2). The mere fact of the person for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture, without any evidence taken in the presence of the surety to show that the forfeiture has been incurred(3). If the surety denies the execution of a bail bond there should be some evidence to prove its execution(4).

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(1) *Empress v. Nobin Chunder*, 4 C. L. R. 243=4 C. 865 F. B.; *Empress*

440.
(4) *Birendra Nath v. Emperor*, A. I. R. 1935 C. 336

(5) *Munshi v. Emperor*, 75 I. C. 693 =25 Cr. L. J. 4; *Crofton v. Maunac*, 19 P. 1913 Cr.=18 I. C. 403=7 P. W. R. 18 Cr.=99 P. L. R. 1913=14 Cr. L. J.

attachment and sale that the person bound is liable to imprisonment(1).

Sub-section (5).—See notes above under the head "Forfeiture of a reasonable sum." Under this clause the court may, at its discretion, remit any portion of the penalty mentioned in a bail bond and enforce payment in part only. It can do so where the accused has been subsequently arrested and the amount forfeited is excessive and the surety is unable to pay(2). Where the bail bond given for the appearance of a person accused who was to remain in hospital is forfeited and the sureties allege that they were not allowed to exercise any control over the movements of the accused person, there being a police guard at the hospital, the sureties should be given opportunity to prove their allegations, for if they were really interfered in their control over the movements of the accused person, the circumstance might at any rate, be taken into account in mitigation of the penalty(3). When the penalty of a bond has been enforced, though only in part, neither the principal nor the sureties remain liable for the part of the penalty remitted(4). Under the Codes of 1872 and 1861, neither the Magistrate nor even the High Court in revision had power to reduce the amount of a recognizance which had been forfeited(5). When a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him(6). But where a person stands surety for the production of an accused person in court when called upon and in default to forfeit a sum of money, the surety is not discharged from his obligation by the mere fact that the accused for whom he stood surety has paid the amount of his bail bond(7).

Sub-section (7).—This sub-section is new. It provides that proof of a conviction should be conclusive as to the breach except where such conviction has proceeded solely on the plea of guilty in which case the surety should be allowed opportunity to disprove the guilt of the principal. In absence of any provision such as is contained in the present sub-section, there was a conflict of decisions whether a judgment convicting the principal in a bond taken under the Code and ordering the forfeiture of the bond is sufficient *prima facie* proof in proceedings under this section against the sureties(8). On the one hand it was held that the mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by a bond would not be conclusive, if indeed it would be any

(1) *Maung Po v. Maung Shwe*, 30 Cr. L. J. 346—114 I. C. 682—A. I. R. 1928 Rang 310—Ind. Rul 1929 Rang. 74; *In re Mohesh Chandra*, 10 C. L. R. 571.

(2) *Das Gupta v. Emperor*, A. I. R. 1935 C. 246

(3) *Mauj Ali v. Emperor*, A. I. R. 1930 Lah. 591—1930 Cr. O 703—125 I. C. 376 (1)—31 Cr. L. J. 869 (1)—I R. 1930 Lab. 616 (1).

(4) *Empress v. Nga Hla*, (1927—01)

1 U. B. R. 117.

(5) *In re Naki Hazi*, 8 O. L. R. 72; *Empress v. Umra*, 2 P. B. 1883 Cr.; *In re Noorool Huk*, 2 O. L. R. 408—3 C. 757; *In re Nil Madhub*, 19 W. R. Cr. 1.

(6) *Re Vijayaraghavalu*, 37 M. 116; *Nrisingha Deb v. Emperor*, 16 C. W. N. 550.

(7) *Kulur v. Emperor*, 10 Cr. L. J. 291—3 I. O. 470.

(8) Statement of Objects and Reasons (1914).

three sureties sign a bond in the form given in Schedule V to the Code, they are jointly and severally liable to pay the amount of the bond, but all three of them cannot be called on to pay the whole amount; the sum named can only be recovered once(1).

Forfeiture of a reasonable sum—It is the duty of the surety to see that the accused does not run away, but where a surety has failed to produce the accused by reason of an illegal order passed by a Magistrate which the surety was not bound to carry out, and where there is no connivance and negligence, it cannot be said that the surety has acted irresponsibly so as to be penalised(2). A court will not be justified in calling upon a surety to pay the full amount where according to terms of the bail bond the surety was responsible for the production of the accused in the Magistrate's Court at Agra but as several cases were pending against the accused, the District Magistrate directed the surety to produce the accused in a court at Purnea and the accused absconded by reason of an honest attempt of the surety to carry out this order and subsequently the surety was unable to comply with a fresh order for the production of the accused at Agra(3), or where failure is due to the fact that the complainant and accused had come to an amicable arrangement to have the proceedings against the accused dismissed for default, and the surety had knowledge of the same(4) In the absence of anything to show that the surety was really responsible for the disappearance of the person for whose attendance he stood surety, and without inquiry into the circumstances under which he came to stand surety, the forfeiture of the whole amount of the bond is improper(5).

Agreement to indemnify surety void.—An express or implied agreement by a person who executes a bond for his appearance in a court to indemnify his surety for the consequences of his failure to appear is void under section 23 of the Contract Act(6).

Suit by surety against principal.—It is contrary to public policy to allow the surety to recover any sum forfeited under surety bond either from the actual person for whom he stood surety or from any person who induced him to so stand(7).

Sub-section (4).—When the penalty of the bond is not paid, the first step which the court should take is to recover the sum by issuing a warrant for the attachment and sale of moveable property belonging to the person liable under the bond or his estate if he be dead. It is only when the penalty is not paid and cannot be recovered by

Empress, 26 P. R. 1824 Cr.; *Abdul Aziz v. Crown*, 4 Lah. 461=82 I. C. 173=1925 A. I. R. L. 129=25 Cr. P. J. 1131; *Emperor v. Nga Shwe*, (1897-01) 1 U. B. R. 119

(1) *Muhammad Ibrahim v. Emperor*, 16 Cr. L. J. 100 (101)=27 I. C. 148=8 S. L. R. 173

(2) *Emperor v. Parbhu Dayal*, 49 A. 825 (826)=28 C. L. J. 556=25 A. L. J. 537=102 I. C. 554=L. R. 8 A. 98 Cr. =8 A. I. Cr. R. 52=1927 A. 831.

Cr. P. C.—115.

(3) *Ibid*

(4) *Ali Muhammad v. Emperor*, 97 I. C. 672=8 Lah. L. J. 401=27 Cr. L. J. 1152=A. I. R. 1926 Lah. 636=27 P. L. R. 616.

(5) *Ibid*.

(6) *Jadhraj v. Bisantal*, 20 N. L. R. 100=100 P. R. 100=100 P. R. 100.

(7) *Emperor v. Parbhu Dayal*, 49 A. 825 (826)=28 C. L. J. 556=25 A. L. J. 537=102 I. C. 554=L. R. 8 A. 98 Cr. =8 A. I. Cr. R. 52=1927 A. 831.

section 107 of the Code is not given to any particular person but to the court, a private party, therefore, is not entitled to appeal against an order refusing to forfeit it, though it is open to the District Magistrate to take action in revision(1). Where an appeal is not admitted, a revision on an order passed under s. 514 can be entertained by the District Magistrate himself, for such revision the case need not be sent to High Court(2).

High Court's power of revision.—The power of revision given to the District Magistrate by this section does not take away the general power of the High Court to revise his order under section 439 and 423-C(3) the High Court is competent to revise orders passed by Magistrates under section 514 or by District Magistrate under this section, sections 435 and 439 being sufficiently comprehensive to justify revision of such orders(4).

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct
levy of amount due
on certain recogni-
zance.

Scope.—This section is only concerned with the power to direct levy of the amount due on a forfeited bond. It does not authorise the delegation of power to initiate forfeiture proceedings(5).

(1) *Sarju v. Jai Raj*, 77 I. C. 783-9 O. & A. L. R. 118-25 Cr. L. J. 445.

(2) *Emperor v. Pandhi Khan*, A. I. R. 1931 B. 151-1934 Cr. C. 1144-152 I. C. 874.

(3) *Karam Daberdin v. Crown*, 5

S. I. R. 179-13 I. C. 223-13 Cr. L. J. 31

(4) *Masta v. Crown*, 15 P. R. 1905 Cr.-97 P. L. R. 1605-2 Cr. L. J. 191.

(5) *Hiralal v. Emperor*, 14 C. W. N. 259-10 Cr. L. J. 219-3 I. C. 119.

evidence, against the surety in a proceeding under this section(1). On the other hand, it was held that the production of the conviction and, if necessary, of proof of the identity of the principal was sufficient evidence upon which the Magistrate was authorized to issue notice to the surety under this section and it was not incumbent on the Magistrate to re try the case.(2) "The amendment permits the use of such a judgment as evidence in such proceedings and directs that the court shall presume that such offence was committed unless the contrary is proved"(3).

514-A. When any surety to a bond under this

Procedure in case of insolvency or death of surety or when a bond is forfeited.

Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 514, the court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such court or Magistrate may proceed as if there had been a default in complying with such original order.

This section both makes up for the deletion of words omitted from s. 624, cl. 6 (q. v.) as also covers the case of a surety who becomes insolvent(4).

514-B. When the person required by any court or

Bond required from a minor.

officer to execute a bond is a minor, such court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

Bond on behalf of minor.—This section specifically provides that when the person required to execute a bond is a minor, the court or Police Officer may accept in lieu thereof a bond executed by a surety or sureties only. There is no such provision for a major(5).

515. All orders passed under section 514 by any

Appeal from and revision of orders under section 514.

Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable, to the District Magistrate, or, if not so appealed may be revised by him.

Appeal and revision.—Under this section, all orders passed by subordinate Magistrates under s. 514 are appealable to the District Magistrate. The following cases(6) are no longer law. A bond under

(1) *Empress v. Har Chandra*, 25 C. 410.

(2) *Empress v. Man Mohan*, 21 A 86.

(3) Statement of Objects and Reasons (1914).

(4) See Woodroffe's Cr P. C. p. 594.

(5) *Wadhwa Singh v. Emperor*, A. I. R. 1923 1 sb. 318=29 Cr. L. J. 491 =109 I. C. 219=10 A. I. Cr. R. 247.

(6) *Ananthachari v. Ananthachari*, 2 M. 162=2 Weir 663; *Empress v. Shambhaji*, Rat. Un. Cr Cas 384.

the criminal court for purposes which could only be achieved by a successful civil action(1). There was a dispute between A and B with regard to the possession of a house and the police took possession of the house and locked it. A filed a complaint against B in respect of the house, under ss. 143, 380 and 488, Penal Code, and during the pendency of the case the key of the house was handed over to A under the orders of the Magistrate. B was acquitted in the end and he applied to the Magistrate for an order directing A to deliver the key to him (B). It was held that the Magistrate had no power either under s. 517, or under s. 516 (c) to make an order in favour of B as neither the house nor the key was property in the custody of the court in respect of which an offence was committed(2).

"Property used for the commission of an offence."—Where a motor driver is being prosecuted for an offence under s. 338 it cannot be said that the car has been used by the accused for the commission of the offence within the meaning of this section and it is illegal for the Magistrate to detain the motor car pending conclusion of the trial(3).

"Is produced before any criminal court"—Where the police having seized certain goods hand it over to a supurdar, on the latter executing a bond to produce them on demand before the court, but on being called upon to produce them fails to do so, and being directed by the court, executes another bond undertaking to produce them on demand, the latter bond is covered by the provisions of this section and it is not open to the petitioner to raise the objection that the bond was not executed under the section merely because the goods were not actually produced in court. Hence the bond is one taken under the Code, and as such section 514 applies to it(4).

Restitution.—Restitution proceedings under this section are proceedings of a *quasi* civil nature and where a party against whom an application for restitution has been made fails to appear after notice, *ex-parte* proceedings can be taken against him(5).

517. (1) When an inquiry or a trial in any criminal court is concluded, the court may make such order as it thinks fit for the disposal; by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

(1) *Brojendra v. Sama*, 85 O. W. N. 198.

(2) *Dansi Dhar v. Brij Basi*, 120 I. C. 197=31 Cr. L. J. 6=Ind. Rul. (1930) A. 21=A. I. R. 1930 A. 85.

(3) *Phula Singh v. Emperor*, A. I. R. 1931 Lah. 565=1931 Cr. U. 853; see also *Ilahi Baksh v. Croton*, 4 P. L. R. 1904

=1 Cr. L. J. 83.

(4) *Shangara Singh v. Emperor*, 1929 Lah. 659=115 I. C. 765=30 Cr. L. J. 827=1929 Cr. O. 215=12 A. I. Cr. R. 347.

(5) *Maung Po Cho v. Maung Shwe Kin*, 114 I. C. 692=A. I. R. 1928 Rang. 810.

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

516-A. When any property regarding which any offence appears to have been committed or which appears to have been used for the commission of any offence, is produced before any criminal court during any inquiry or trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Order for custody and disposal of property pending trial in certain cases.

This section is new. The reasons have been thus stated in the Statement of Objects and Reasons (1914): "It is proposed to add to the Chapter a new section to enable the court to pass orders for the custody or disposal of property during an inquiry." Under the previous law, no order for the custody of property could be made during an inquiry(1).

Scope.—This section deals with property appearing to have been used for the commission of any offence or property regarding which any offence appears to have been committed. That is the first thing. In such case, the court may make an order for the custody of the property pending the conclusion of the inquiry or trial the reason being that in some cases it becomes necessary to preserve the property either as evidence or in order to make a proper order after the criminal case has come to an end(2).

Property regarding which any offence appears to have been committed.—When a complaint is made of theft regarding a property which at the time is in the possession of the person complained against, an order may be made under this section for the production of the property and its temporary custody with the complainant. But if after the complainant has thus got back the property it appears that he has abandoned further pursuit of his complaint and that his whole object was not the investigation into any criminal offence but recovery of the property, the proper order to make under section 517 is to hand over the property back to the person with whom it was. It is utterly wrong to let it remain with the complainant which is assisting him in abusing

(1) *In 're Valji Muhammad*, Rat. Un. Cr. Cas. 957, *Nur Muhammad v. Jafar Meher*, 5 Cr. L. J. 147=5 O. L. J. 239.

(2) *Brojendra v. Sama*, A. I. R. 1931

C. 455=35 C. W. N. 193=1921 Cr. C. 107=132 I. C. 901=32 Cr. L. J. 239; see also *Shangara Singh v. Emperor*, 312 I. C. 765 (1906)=1921 Lab. C. 27=37 Cr. L. J. 527.

committed or which has been used for the commission of an offence(1), whereas the language of the present Code is quite clear and extends the mischief of the section to any property produced before the court or in its custody(2). The following cases holding that the order cannot be passed unless it has been shown that the property with regard to which the order is made is such that an offence appears to have been committed with respect to it or that it has been used for the commission of an offence(3) are not tenable as they do not notice the change in the law in the 1898 Code. Upon general principles, where there has been an inquiry or trial and the accused is discharged or acquitted by any criminal court, that court is bound to restore the property into the possession of the person from whom it was taken, unless, as provided by this section, such court is of opinion that "any offence appears" to have been committed regarding it, or that it has been used for the commission of an offence. Then such order as appears right for the disposal of the property may be made(4). This section applies only to property produced before the criminal court or in its custody or regarding which an offence appears to have been committed or which has been used for the commission of any offence(5). The essential of this section is that the property or document must be proved to have been used in commission of the offence or regarding which any offence appears to have been committed, so cash found on a person convicted of illegally importing opium cannot legally be confiscated(6). The court has jurisdiction to pass the order only if the case falls within the section. Otherwise, the only legal order which the court can pass is one restoring the previous possession(7). The object of the section is to enable the Magistrate to direct the property to be given to some person to whom it appears to belong or allow it to continue in the possession of the person in whose possession it was found(8).

Property: Property produced in court.—Under this section the Magistrate has power to pass an order regarding the property produced before, or in custody of the court, even though no offence has been committed in respect of it(9). The contrary view taken in the under-mentioned(10) cases is no longer law. The section has however, no application to a case where the property concerned has never been produced before the criminal courts and it is not denied that no offence has

(1) *In re Pydi Ramanna*, 42 M. 9

1888 Cr. at p. 119; *Devidin v. Empress*, 22 B. 844; *In re Moti Ghose*, 1 C. W. N. 561; *Ratanlal Rangildas v. Empress*, 17 B. 748.

(5) *Zainul Abidin v. Emperor*, A. I. R. 1932 O. 218 = 9 O.W.N. 424 = 138 I. C. 156

(6) *Govind Ram v. Emperor*, 25 Cr. L. J. 615 = 81 I. C. 103

(7) *Devidin v. Empress*, 22 B. 844.

844.

(2) *In re Pydi Ramanna*, 42 M. 9 (12, 13); *Russul Bibee v. Ahmed Moosajee*, 34 C. 347; *Zainul Abidin v. Emperor*, A. I. R. 1932 O. 218 = 9 O. W. N. 434.

(3) *Surendra Nath v. Rai Mohan*, 80 C. 630; *In re Gorindraja*, 31 I. C. 827.

(4) *In re Anannapurnabai*, 1 B. 630; *In re Anant Ramchander*, 10 B. 197; *Abdul Khalik v. Empress*, 46 P. R.

(10) *In re Annapurnabai*, 1 B. 630; *In re Anant Ram Chander*, 10 B. 197; *Abdul Khalik v. Empress*, 46 P. R.

(2) When a High Court or Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such court may direct that the order be carried into effect by the District Magistrate.

(3) When an order is made this section, * * * such order shall not, except where the property is live-stock or subject to speedy and natural decay, and save as provided by sub-section (4), be carried out for one month, or when an appeal is presented, until such appeal has been disposed of.

(4) Nothing in this section shall be deemed to prohibit any court from delivering any property under the provisions of sub-section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties to the satisfaction of the court, engaging to restore such property to the court if the order made under this section is modified or set aside on appeal.

Explanation.—In this section the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

Amendment explained.—This section has been amended by section 142 of Act XVIII of 1923. In sub-section (1) the mode of disposal is indicated by addition of the words “by destruction, delivery to claimant or otherwise” (1). Sub-section (3) is re-drafted and allows one month for the presentation of an appeal or an application for revision where this is allowed” (2). Sub-section (4) has been newly added, and provides for delivery to any person entitled on his executing a security bond for restitution by producing it in court when called upon (3).

Scope of section.—The operation of this section has been enlarged so as to enable a Magistrate to pass orders for the disposal of any property produced before him (4). The language of the old Code was limited to property in respect of which an offence appears to have been

(1) Statement of Objects and Reasons (1914).

(2) Report of the Select Committee of 1916.

(3) Statement of Objects and Reasons (1914).

(4) *Russul Bibes v. Ahmed Moosa-jee*, 34 C. 317; *In re Pydi Itamanna*, 42 M. 9.

Cash.—Cash is not property within the meaning of this section except in so far as it is capable of being possessed and identified in specie. If it is certain that the actual coins found on a thief or receiver of stolen property are the actual coins which have been the subject of theft, then it is permissible to treat such cash to inflict a fine and to apply the coins found in the person of the accused towards the payment of fine and then to apply the amount of the fine, if necessary, towards compensation(1). But in no case can coins which have been put into circulation and passed on to the public be treated in the same way as stolen coins actually remaining in the possession of the thief(2). Where in an embezzlement case, the trial court, being satisfied that the applicant was in possession of certain property in respect of which the offence had been committed and to which the complainant claimed to be entitled, ordered the said property to be handed over to the complainant under the provisions of this section, it was held that the High Court could not compel the complainant to return the property to the court or to the applicant(3). The rule that title to money passes by delivery is limited to cases where the receipt of money is *bona-fide*(4). Therefore, where an accused stole certain money and handed it over to another person under circumstances sufficient to show that the receipt by this person was not *bona-fide*, a Magistrate would be justified under this section in ordering restoration of the money to the

Property regarding which no
the accused was convicted of the offence under section 279, Indian Penal Code passed an order under this section that the cart, pony and harness, which the accused was driving, should be sold and the sale-proceeds paid over to the complainant it was held that the order was illegal(5).

Property stolen in British but seized in foreign territory.—A Magistrate has jurisdiction under this section to deal with property stolen in British territory, notwithstanding that it may be seized in foreign territory and brought into British territory by the police(7).

Property used for the commission of an offence.—The words "which has been used for the commission of any offence" refer to cases of the same nature, *i. e.*, to instruments like guns or swords produced in court. A printing press cannot be said to have been used for the commission of sedition, inasmuch as the offence consists in the publication, and not the printing, the press being only a remote instrument(8). A boat cannot be regarded as an instrument for the commission of an offence such as is contemplated under this section(9). Only such

(1) *Pursu v. Emperor*, 89 I. O. 259=18 S. L. R. 218=26 Cr. L. J. 1315; see *In re Samant*, A. I. R. 1934 B. 193=36 Bom. L. R. 324.

objection that the coins ordered to be restored are not the identical coins stolen is unsustainable in view of the explanation to the section.)

(6) *Crown v. Ilahi Bakhsh*, 4 P. L. R. 1901.

(7) *Kishen Kour v. Crown*, 20 P. R. 1878 Cr.

(8) *Abinash Chandra v. Emperor*, 34 C. 988=11 C. W. N. 1046=6 Cr. L. J. 293; *Pindi Dass v. Crown*, 37 P. W. R. 1907=6 Cr. L. J. 411.

(9) *Jarip Gazi v. Emperor*, 8 C. W. N. 687.

Mainur Laloni, 15 D. 304.

(5) *Soni v. Emperor*, 11 I. O. 581=4 S. L. R. 255=12 Cr. L. J. 397 (An

been committed in relation to the property claimed(1). When a portion of salt earth, salt or other article in bulk is produced and received in evidence as sample of the bulk the whole bulk is to be taken to have been produced before the court within the meaning of this section(2).

Property regarding which an offence has been committed.—The first part of this section refers to cases of offences relating to property or documents, *e.g.*, where the court directs, as in cases of theft or criminal misappropriation or offence of a similar description, that the property stolen or misappropriated be restored to its owner(3). Where the accused was convicted under s. 182, Penal Code, of giving false information regarding a case of theft, the jewels alleged to have been stolen having been found in the house of the accused, and the Magistrate passed an order under this section, confiscating them held that such an order could not be made under this section(4).

Moveable and immoveable.—In this section the clause "property regarding which any offence appears to have been committed" includes within its meaning moveable property regarding the possession of which a quarrel or a fight is begun whatever may be the offence that might ultimately be committed in the course of the quarrel or the fight(5). Where a dispute between the Mohammadans and the Fishermen in respect of certain nets and boats culminated in a riot and the death of one of the persons concerned, the court had jurisdiction under this section to pass an order for the disposal of their boats and nets as the offence could be said to have been committed regarding the boats and nets(6). The words under comment include immoveable property(7). Where, therefore, the petitioner's case, in which he charged the opposite party with having forcibly dispossessed him of a bungalow and its contents, was found to be true and the opposite party was convicted under section 323, I. P. C., for having forcibly dispossessed him of both; *held*, that it was the duty of the Magistrate to pass order under sections 522 and 517, directing restoration to the petitioner of the bungalow and its contents(8). But in some cases it has been held that this section is limited in its application to moveable and has no application to immoveable property(9). So, where the accused dispossessed the complainant of his garden by breaking the padlock of its gate, but used no force or violence and were convicted of the offence of criminal trespass, it was held that the court had no power to order the restoration of the garden to the complainant under section 522 nor under section 517(10).

1900 C. 1212 = 1901 M. 606 = 1901 I. C. 65 =

27 L. W. 192 = A. I. R. 1928 M. 194 = 54

M. L. J. 312 = 1 Mad. Cr. Cas. 80.

(6) Ibid

(7) Tun Hla v. Shwe Ngo, 4 L. B.

R. 229 = 7 Cr. L. J. 490

(8) Ahmed Ali v. Keenoo Khan, 9

Cr. L. J. 294.

(9) Adepu Reddi v. Ramayya, 22

Cr. L. J. 110 = 59 I. C. 414 = 12 L. W.

227; Biswasar Singh v. Bhola Nath,

22 L. C. 751 = 15 C. W. N. 1147 = 15 Cr.

L. J. 175

(10) Bistassur Singh v. Bhola

Nath, 22 L. C. 751 = 15 C. W. N. 1147 =

15 Cr. L. J. 175

v. Kesaji, 43 D. 434

(1) Zainul Abidin v. Emperor, 33

Cr. L. J. 569 = 193 I. C. 156 = 9 O. W. N.

434 = A. I. R. 1932 O. 218 = Ind. Bul.

(1932) O. 992 = (1932) Cr. Cas. 521.

(2) 2 Weir, 670

(3) Abinash Chandra v. Emperor,

31 C. 986

(4) Lakshmi Narayan v. Ureagan,

9 O. W. N. 59 = 2 Cr. L. J. 273.

(5) Shaik Dawood v. Velayuda

Semmanotti, 51 M. 606 = 1901 I. C. 65 =

27 L. W. 192 = A. I. R. 1928 M. 194 = 54

M. L. J. 312 = 1 Mad. Cr. Cas. 80.

(6) Ibid

(7) Tun Hla v. Shwe Ngo, 4 L. B.

R. 229 = 7 Cr. L. J. 490

(8) Ahmed Ali v. Keenoo Khan, 9

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(9) Adepu Reddi v. Ramayya, 22

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22 L. C. 751 = 15 C. W. N. 1147 = 15 Cr.

L. J. 175

(10) Bistassur Singh v. Bhola

Nath, 22 L. C. 751 = 15 C. W. N. 1147 =

15 Cr. L. J. 175

Order of destruction.—The courts had no power under this section before its amendment in 1923, to order the destruction of property in respect of which an offence appeared to have been committed(1). Accused having been convicted of an offence under section 241 of the Penal Code, and a counterfeit rupee which it was not shown had been delivered or attempted to be delivered to any one having been found in his possession, the Magistrate ordered its destruction, and it was held that even if the order was not strictly covered by the terms of section 517, the order should not be interfered with(2). This is now expressly provided for in this section(3).

Order of restoration of property.—Under this section, if no crime is made out the Magistrate has a discretion to decide the question of possession, but as a rule, the article seized should be returned to the person from whom it was seized unless there are special circumstances which would render such a course unjustifiable(4). The mere fact that two parties are quarrelling about possession is not one of the special circumstances which take a case out of the general rule(5). If there is a *bona fide* dispute the Magistrate may impose a condition upon that person(6). It is not competent to the court to restore the goods found in possession of the accused to the complainant under this section. The proper order in such a case is that the goods should remain in the possession of the person in whose custody they were found(7). Where a person accused of theft is acquitted and claims as his own the property seized from him by the police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary(8). The District Magistrate has no jurisdiction to set aside an order made by a trying Magistrate under this section, directing property to be restored to the accused person who is acquitted(9). The property taken out of the possession of the accused who are acquitted should be handed over to them in the

(1) *In re Ponnuswamy Pillai*, 9 Cr. L. J. 149=1 I. C. 79; *Empress v. Indarman*, 3 A. 837=(1881) A. W. N. 94; *Prithwiger v. Emperor*, 9 Cr. L. J. 539

(2) *Re Aiyavaiyan*, 2 Weir. 669.

(3) *Ram Khelawan v. Tulsi*, 28 C. W. N. 1094.

(4) *Vaiyapuri Chetti v. Sinniah Chetty*, 32 Cr. L. J. 355=129 I. C. 458=59 M. L. J. 901=A. I. R. 1931 M. 17=(1930) M. W. N. 1106=33 L. W. 86=Ind. Rul. (1931) M. 266=(1931) Cr. Cas. 80; *Saradi Karuppan v. Gurusami Pillai*, 26 M. 654=A. I. R. 1933 M. 434 (2)=(1933) M. W. N. 88=37 L. W. 415=1933 M. Cr. O. 64=64 M. L. J. 431; *Srinicasamurti v. Narasimhalu Naidu*, 50 M. 916=104 I. C. 719=A. I. R. 1927 M. 797=28 Cr. L. J. 879=26 L. W. 168=39 M. L. T. 18=53 M. L. J. 309=(1927) M. W. N. 692=9 A. I. Cr. R. 89; *In re Syed Mohidin*, 2 Weir. 667; *In re Annapurnabai*, 1

ress, 9 M. 448

(5) *Vaiyapuri Chetti v. Sinniah Chetty*, 129 I. C. 458=1931 M. 17=32

C. 482; *Emperor v. Debi Ram*, 40 A. 623; but see *Maung Mra v. Ma Kra*, 6 Rang. 259=29 Cr. L. J. 958.

(8) *Saradi Karuppan v. Gurusami Pillai*, 26 M. 654; *Saltar Ali v. Afzal*, 54 C. 283.

(9) *Emperor v. Debi Ram*, 46 A. 623=22 A. L. J. 605.

property can be attached as is proved to have been used in the commission of an offence. Where, therefore, a person who has illegally imported opium into British India is convicted of an offence under section 9 (e) of the Opium Act and money is found on him which he has received from a person whom he proposes to sell the imported opium, the money cannot be attached under the provisions of this section as it cannot be said to have been used in importing the opium(1). On a conviction for gambling under sections 6 and 7 of the Madras Towns Nuisance Act (III of 1889), an order to confiscate money found with the gamblers can only be passed under this section, and only in respect of such money as has been actually employed in gambling and not in respect of other money found on the person of the gambler(2). A genuine currency note cannot be regarded as being the original from which counterfeits were prepared, and therefore as having been used for the commission of an offence(3). But where the accused stole two bullocks and killed them, it was ordered that the axe and the knives with which he slaughtered the animals and which were found with the accused when he was arrested, should be confiscated and sold(4). But an order for demolition of a wall on a conviction for building in contravention of Municipal rules is *ultra vires*, and section 517 cannot apply to a case of this kind(5).

Non-existing property.—An order under this section cannot be passed as regards property not in existence when the offence was committed. An innocent purchaser of a stolen cow cannot be ordered to deliver up the calf also which was brought forth when the cow was in his possession(6).

Time for passing of order for disposal of property.—The jurisdiction of the court is confined to an order at the conclusion of the trial for the disposal of the property which has been stolen and which is before it in the criminal proceedings(7). An order, under this section, ought to be made at the time of passing judgment in the criminal case itself, and where the Magistrate has before him the evidence given for the prosecution in the inquiry, it is not, necessary that the order should follow a fresh inquiry after giving opportunity to the party to produce new or further evidence(8). In *Abdul v. Ghulam Mohammad*(9) it was held, that an order under this section which cannot be made before the final order in the case is passed, can equally not be made after, and must apparently be contemporaneous. But in a later Lahore case it has been held that an order for disposal of property passed 14 days after the date of the passing of the judgment in the trial is not invalid(10). This section does not limit the power of the trying Magistrate or Judge, who has omitted to pass an order for disposal of exhibits as part of his

(1) *Govind Ram v. Emperor*, 81 I. C. 103=25 Cr. L. J. 615=1924 A. 618.

(2) *Re Appaji Ayyar*, 41 M. 644=31 M. L. J. 253.

(3) *Gopal Raghunath v. Emperor*, 53 B. 344=31 Bom. L. R. 148=30 Cr. L. J. 583=116 I. C. 243=1929 B. 123.

(4) *Bhura v. Emperor*, 26 Cr. L. J. 1495 (1496)=90 I. C. 151.

(5) *Nanhu v. Empress*, 1900 A. W. N. 81.

(6) *In re Rangan*, 10 M. 25=2 Weir. 670.

(7) *Nainsi Mal v. Emperor*, 74 I. C. 703=24 Cr. L. J. 804.

(8) *In re Vemireddy*, 18 Cr. L. J. 469=39 I. C. 309.

(9) 4 Lah. 460=1924 Lah. 261=25 Cr. L. J. 81=76 I. C. 20.

(10) *Kishan Chand v. Nanak Chand*, 89 I. C. 973=26 Cr. L. J. 1453=7 Lah. L. J. 635=A. I. R. 1926 Lah. 9.

a stolen currency note has been delivered to a *bona fide* holder for value, the court will not on conviction of the accused for theft, restore the note to the person from whom it was stolen(1). Where in a trial for a criminal breach of trust it appeared that the accused had transferred one of the misappropriated currency notes to the petitioner, and on the conviction of the accused the trying Magistrate ordered the note to be returned to the Crown, it was held that this was a case for the application of the general rule that property in a currency note passes by mere delivery and that there being no allegation of fraud or bad faith on the part of the petitioner, he was entitled to retain it(2). Where a question arises between two persons who shall bear a loss resulting from the fraud of a third, the one who has been guilty of negligence shall suffer. Hence where A made over to B halves of certain currency notes as security for payment to B of the price of goods delivered, having previously parted with the other halves to C., it was held that B was entitled to recover possession of the halves originally made over to him, from C, to whom they had been delivered under an order of the court, or to obtain compensation from C, if C had parted with them, inasmuch as it was C's negligence which enabled A to perpetrate fraud upon B(5).

Order in respect of Bank note—Property in a bank note passes, like that in cash, by delivery and a party taking it *bona fide* and for value is entitled to retain it as against a former owner from whom it has been stolen(4).

Order disposing of money given as a bribe.—The accused was convicted of giving Rs. 25 as a bribe to R.D., Deputy Inspector of Police. R. D. took the bribe and at once informed against the accused. The court convicting the accused directed that under this section, the Rs. 25, which were produced in court at the trial, should be disposed of as follows: Rs. 10 should be paid to R. D., and the balance confiscated and credited to Government. It was held that this order was legal(5).

Order when rights of third parties are concerned.—Where the question of right to possession is not one between the complainant and the accused but between the complainant and a third person, an order for the restoration of the property to the complainant should not be made without first giving the third party an opportunity of being heard(6). Where property in respect of which an offence has been committed is seized from the possession of a person to whom it has been pledged by the accused and there can be no doubt whatsoever that

J. 309=(1927) M. W. N. 692=A. I. R. 1917 M. 797; *Subramaniya Iyer v. Javali Angadi*, 11 I. C. 584=(1911) 2 M. W. N. 370=12 Cr. L. J. 400; *In re Collector of Salem*, 7 M. H. O. R. 233=2 Weir. 664; *In re Pandharinath*, 40 B. 186=17 Bom. L. R. 912=31 I. O. 883=16 Cr. L. J. 783; *Nizam v. Jacob*, 19 C. 52; *Abadi Begam v. Ali Husen*, (1897) A. W. N. 26

(1) *In re Mitchell*, 1 C. L. R. 339.

(2) *In re Pandharinath*, 40 B. 186=17 Bom. L. R. 922=31 I. O. 883=16

Cr. L. J. 783; *In re Collector of Salem*, 7 M. H. O. R. 233=2 Weir. 664; *Empress v. Juggessur*, 3 C. 379.

(3) *Abdur Razzag v. Rahmatullah*, 27 A. 630; *Foster v. Green*, 7 H. & N. 681.

(4) *Hodomal v. Emperor*, 13 I. C. 213=5 S. L. R. 153=13 Cr. L. J. 21.

(5) *Crown v. Bala Singh*, 9 P. E. 1873 Cr.

(6) *Shree Wa v. C. I. Mehla*, 5 Rang 553.

absence of a finding in the case that it belongs to anybody else(1). Where a Magistrate had after the acquittal of certain persons on a charge of theft, made an illegal order for the restoration of the property alleged to have been the subject of the theft to the complainant; the High Court had no power to interfere with the possession of such property, further than by quashing the Magistrate's order, leaving the parties concerned to their remedy, if any, by a civil suit(2).

Exception to the above rule.—Where the Magistrate, though he discharges the accused, believes that the property in his custody is the subject of some offence, he is not bound to restore the property to the person from whom it was taken, but can make any order of disposal under this section(3). Where an accused person says, that certain alleged stolen property is not his, the court is not justified in ordering that it should be given to him. It should be retained by the court until one or other of the parties has established his right to it. If it has been paid or given to the accused the court has power to call upon him to return it(4). Where a complaint of theft brought on behalf of a *talukdar* against his tenant in respect of some fallen trees which the tenant had cut down and taken is dismissed on the ground of uncertainty of ownership, the proper order to be passed with regard to the wood is that it should be sold, if it has not been already sold, and the proceeds should be retained by the court until they are shown to be payable to one or other of the parties, either in virtue of a decree of court or in virtue of an agreement amongst themselves(5). On the discharge of an accused person on a charge of theft of articles admittedly found in possession of that person, on the ground that the accused had a *bona-fide* belief in a claim of right to their possession; that person cannot claim return of the articles under this section, as a matter of course. Under this section, even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made for the delivery of the subject matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft(6). Property, part of which is joint family property and part the self-acquisition of an undivided member of the family may rightly be handed by the court to the manager of the undivided family and the undivided member, on their joint receipt(7).

Order in respect of currency notes.—Title to a currency note passes by mere delivery and, therefore, where a stolen currency note is recovered from an innocent third person, it should be returned by the criminal court, after disposal of the proceedings in connection with the theft of the note, to the person from whom it is recovered and not to the person from whom it was stolen(8). Where

(1) *In re Goparaju*, 3 M L T 334
= 7 Cr L J. 899.

(2) *Empress v. Bachhi Lal*, (1896)
A. W. N 56

(3) *Ahmed v. Empress*, 9 M 448 =
2 Weir 672

(4) *Chanan v. Emperor*, 21 I C 468
= 14 Cr L J. 590 = 37 F W R 1913 Cr

(5) *In re Vesa Sunta*, 16 Cr. L. J.

111 = 27 I C. 159 = 16 Bom. L. R. 951;
Chaitu Reddi v. Ramasamy, 1 L.

W 1032 = 27 I C 152 = 16 Cr L J. 101.

(6) *Kanaga Sabai v. Emperor*, 31
M. 94 = 20 M L J. 425.

(7) *Ibid*

(8) *Srinivasamoorthi v. Narasim-
hulu Naidu*, 101 I C 719 = 50 M. 916 =
26 L. W. 118 = 39 M. L. T. 18 = 63 M. L.

with jewels with the intention of disposing them for money(1). But where certain jewels were given to a broker for sale and the broker sold the jewels and misappropriated, the sale proceeds it was held that the jewels ought to be returned to the applicant with whom they were pawned by the purchaser and not to the owner(2). A Magistrate should not order that the stolen debentures produced in court by the pledgee thereof in a prosecution of the pledger under s. 411, I. P. C., should be made over to the rightful owner when there is a question between the pledgee and the owner at the time of the theft as to which of them was the rightful owner, which question can only be determined in a civil suit(3). But where a goldsmith was entrusted with a certain quantity of gold and diamonds for making a comb for the complainant and when the article was nearly completed the goldsmith pledged it for Rs. 800 with a diamond merchant who had no knowledge that the property was the property of the complainant but the court ordered the jewel to be returned to the complainant and it was held that the order was justifiable(4).

Question of title.—Where stolen property has passed into the hands of a third person, and a question of *bona fide* and of title by purchase or otherwise clearly arises, the duty of the criminal court, so far as the restoration of the property is concerned, is to leave the complainant to his remedy in the civil court if he thinks he has one(5). Where there are conflicting claims as to the ownership of such stolen property and the dispute cannot be definitely adjusted by the Magistrate the property should be kept in the custody of the court subject to any order that may be passed by a court of competent civil jurisdiction(6). Where the title to seized property is doubtful, it should be returned to the person from whom it was seized unless there are special circumstances which would render such a course unjustifiable(7). If the property produced in court or in its custody, does not come within the provisions of this section, then, the only proper order that the court may pass, is to restore the property to the person from whom it was originally taken. It cannot detain the property until title of the rightful owner is declared by a civil court(8).

Illegal and improper orders : *Order allowing one party to reap the crops.*—When a Magistrate cancels proceedings under section 145, Cr. P. C., on the ground that there is no likelihood of a breach of the peace, he has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other. Such an order, if passed under this section, is fit to be set aside under section 520(9).

Conditional order.—An order under this section that the petitioner is to receive the property on condition of her producing the property or

(1) *Stephen Aviel v. Emperor*, 4 L. J. 801=74 I. C. 709.

B. R. 25=6 Cr. L. J. 125.

(2) *Nanalal v. Maung Tun*, 4 Bar. L. T. 170=12 Cr. L. J. 467=11 I. C. 1003.

(3) *Narendra v. Studd*, 19 Cr. L. J. 769=46 I. C. 709.

(4) *Changanlal v. Maung Po Kank*, 2 Bar. L. J. 162.

(5) *Naini Mall v. Emperor*, 21 Cr.

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the pledgee is not entitled to retain possession of the property pledged because it had been obtained from the original owner by what is palpably and unmistakeably an offence or fraud, or because the circumstances clearly indicate impropriety, or an absence of good faith on the part of the pledgee, a Magistrate is justified in directing its return to the original owner(1). But where there is a doubt, not necessarily a strong doubt, not even a reasonably arguable one, such as may arise where the decision involves a contentious point of civil law, the normal course of restoring the property to the person from whom it was seized should be followed and the dissatisfied party should be left to seek his remedy in a civil court(2). Where certain jewels were given to the accused to sell, but the accused instead of selling them gave them to another person who pledged them to a third person, it was held that the jewels should be restored to the pledgee and not to the owner; because the owner, having parted with the jewels to be disposed of for money, was not entitled to the assistance of a criminal court in recovering them from a pawnee to whom they were so disposed of(3). But where a large amount of jewellery has been handed over by a lady to another person that he might deposit it for safe custody in a bank and that person has pawned that jewellery and kept the proceeds, the jewellery ought to be restored to the lady(4). But where a servant has authority to pledge a property the pawnee is a person entitled to possession of such property within the meaning of this section and it makes no difference that though the pledger had originally come into possession of the property in a lawful manner, he had subsequently changed his mind and after pledging the property had misappropriated the proceeds(5). But a pledgee who has not acted in good faith in receiving the articles in pledge from the accused is not entitled to have them given back to him(6). If a pawnor removes from the possession of the pawnee the articles pawned by him and passes them on to a third person for good consideration, on pawnor's conviction of theft the trial court is justified to direct, in the exercise of its discretion under this section, that the stolen articles be returned to the pawnee, who was the proper person to recover their possession because he had a lien on them(7). Where the owner parted possession with certain jewels to the accused in order that they might be sold and the accused committed breach of trust by giving the jewels to another person who pledged to a certain third person, the jewels should be restored to the pledgee, the owner having parted

(1) *Vallappa Chetty v. Joseph*, 81 I. C. 154=2 Bur. L. J. 65=1923 Rang. 248=25 Cr. L. J. 666, *Kong Lone v. Mahay*, 4 L. B. R. 13=6 Cr. L. J. 125; *Palaniappa v. Kosaye*, 3 Bur. L. T. 111=12 Cr. L. J. 88 (89)=81 C. 1201.
(2) *Vallappa Chetty v. Joseph*, 81 I. C. 154=2 Bur. L. J. 65=1923 Rang. 248=25 Cr. L. J. 666.

3 Luck 494=29 Cr. L. J. 983=112 I. C. 103=1923 O. 277.

(b) *Sharaf Din v. Gokal Chand*, 12 Lah. 301=32 P. L. R. 724=A. I. R. 1931 Lah. 526=102 I. C. 835=1931 Cr. C. 750=32 Cr. L. J. 900.

(c) *Emp. v. Nga Po Chit*, 1 Rang. 199=A. I. R. 1923 Rang. 221=74 I. C. 1050=24 Cr. L. J. 858, *Vallappa Chetty v. Joseph*, 2 Bur. L. J. 65=25 Cr. L. J. 666.

(7) *Gaur Mohan v. Bansidhar*, 21 Cr. L. J. 238=71 I. C. 702.

silver ornaments and the exchange of notes for cash(1). In this case the accused fraudulently obtained a decree upon a forged pro-note and in execution of that decree purchased a garden, and it was held that the case was not covered by the explanation, and that the court could not look at the garden as property acquired by the conversion or exchange of the forged pro-note into a decree.

Property in custody of police.—This section is not applicable to a case where the property has already passed out of the custody of a court. Therefore a party who has taken delivery from the police of crops attached cannot be ordered to return the same to the opposite party(2).

Babashahi coin.—Babashahi coin which is not legal tender or currency in British India can be delivered to the complainant from whom it is stolen. The rule as to current coin does not apply to such coins as these are simply in the nature of any other property and not money(3).

Appeal.—See section 520.

Revision.—The powers of revision conferred upon the High Courts under ss. 435 and 439 may be exercised to correct illegal or improper orders made by Magistrates under this section(4). But in one case it has been held that the order as to delivery of the property cannot be interfered on revision(5).

Appellate Court's power to pass orders for the disposal of property.—Under section 423 (1) (d) as well as under section 520, the appellate court is competent to pass appropriate orders for the disposal of moveable property produced at the trial, even though the trial Magistrate had not passed any order in respect of it under this section(6). But in one case it has been held otherwise(7).

518. In lieu of itself passing an order under section 517, the court may direct the property to be delivered to the District Magistrate or to a Sub-Divisional Magistrate, who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

Reference.—An order of reference under this section can be made only in respect of property regarding which any offence appears to have been committed or which has been used for the commission of any

(1) *Emperor v. Nga Ke Maung*, 12 I. C. 81=4 Bur. L. T. 211=12 Cr. L. J. 473.

(2) *Jhumak Singh v. Tota*, 65 I. C. 491=1921 Pat. 128=3 Pat. L. T. 228=23 Cr. L. J. 110.

(3) *In re Mathur Lalbhai*, 25 B. 702.

(4) *Re Gangamma*, 2 Weir. 638 and 669; *Pandhar Nath v. Emperor*, 49 B. 160=10 Cr. L. J. 763; *Hagu v.*

Manmatha, 18 C. W. N. 939=15 Cr. L. J. 161; *U. Po Hla v. Ka Po Shein*, 7 Rang. 315.

(5) *Bhagat Ram v. Emperor*, 11 I. C. 581=96 P. L. R. 1911=12 Cr. L. J. 400.

(6) *Thiraj v. Crown*, 10 Lah. 187;

Gopi Nath v. Emperor, 3 A. I. J. 770;

Azmat Shah v. Emperor, 35 A. 374=14 Cr. L. J. 526.

(7) *Leconada Aiyar v. Seethal*, 2 Weir. 674.

its equivalent value when ordered by a competent civil court is bad(1). If, however, a *bona-fide* doubt exists as to the ownership and the property is claimed by a person other than the person from whom it was taken the Magistrate may impose conditions on the person to whom it is delivered in order that the property or the value thereof may be forthcoming in case the rival claimant establishes a title to it(2).

Power to bestow in charity.—This section does not place the property at the disposal of the Magistrate in the sense of enabling him to bestow it in charity. The Magistrate should make such legal disposition thereof as seems right, that is, direct its restoration to some one to whom it seems to belong or permit it to continue in the possession in which it is found or otherwise(3).

Order regarding custody of children.—It is not competent to a Magistrate, under this section, to make orders regarding the custody of children(4).

Order requiring security.—An order requiring security from the accused to produce any property with reference to which an offence is alleged to be committed is an illegal order(5).

Order for demolition of wall.—An order for demolition of a wall on a conviction for building in contravention of Municipal Rules is *ultra vires*(6).

Sub-section (4).—This section does not preclude the operation of the ordinary rule that, when no offence is shown to have been committed, the property brought before a court ought to be restored to the party from whose possession it was last taken(7).

Explanation.—Where a party has been ordered by a criminal court to restore certain property to another but such party has already converted the property to its own use; the court has power to order the production of such property as may be capable of production, and the production of the money equivalent of such property as may be incapable of production(8). An objection that the coins ordered to be restored are not the identical coins stolen is unsustainable in view of the explanation(9). Where, however, the thief sold the stolen property to petitioner for Rs. 184-4 and he sold it to others, and the court asked the petitioner to produce Rs. 184-4 and directed this sum to be paid to the defendant under this section, it was held that the money deposited was not property within this section in respect of which an offence had been committed as it was not the actual sum paid by the petitioner to the thief or the sums realised by the petitioner by his resale(10). The words "conversion" or "exchange" must be taken in their ordinary sense. They apply to such acts as the melting down of gold and

(1) *In re Mamhuan*, 19 M. L. J. 516; *Purna Chandra v. Shashi*, 7 C. W. N. 522.

(2) *In re Syed Mohidin*, 2 Weir. 667.
(3) 2 Weir. 666.

(4) 2 Weir. 665 = 1 Weir. 319.

(5) *Purna Chandra v. Shashi*, 7 C. W. N. 522.

(6) *Nanhu v. Empress*, (1900) A. W.

N. 81.

(7) *Naqaratnam v. Rukhmani*, 2 Weir. 608.

(8) *Nagendra Nath v. Emperor*, A. 1 R. 1934 C. 431 = 61 C. 433 = 159 I. C. 982 = 39 C. W. N. 489.

(9) *Sone v. Croich*, 4 S. L. R. 277.

(10) *Anant v. Emperor*, 22 Bom. 1. R. 604 = 19 Cr. L. J. 721 = 42 L. C. 171.

revision" in this section have a wider meaning and are not restricted to a court to which either of the parties to the criminal case has appealed or could appeal, or has applied for revision(1). Any court of appeal, confirmation, reference or revision may under this section, revise any order passed under sections 517, 518 or section 519 by a court subordinate to it irrespective of the fact whether an appeal or application for confirmation or reference or revision might be made in respect of what may be called the main charge before it(2). The narrow interpretation of the terms of this section adopted in some of the recent rulings(3) has not met with approval of the High Courts of Rangoon and Bombay(4). An order passed under s. 517 may be revised by a court of appeal although no appeal has been preferred in the case in which such order was passed(5). In the case of an acquittal by the trial court, the Sessions Judge or District Magistrate as a court of revision has power under this section to interfere with the order of the trial court passed under s. 517, regarding the disposal of the property in respect of which the offence was committed(6). This has been decided after examination of a mass of conflicting authorities(7) by a Full Bench of the High Court of Rangoon(8) and has received an additional support by a Full Bench of the High Court of Bombay(9). In the case of a conviction by a first class Magistrate the District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under section 517 by the trial court(10). The contrary view taken by the Bombay High Court in the under mentioned case(11) is likely to lead to inconvenience. The legislature intended to confer concurrent jurisdiction on the District Magistrate and the Court of Session so that where neither of them has had any opportunity of exercising jurisdiction under this section, an applicant may go for redress to either and the court which first obtains seisin of the case has power to act in the matter(12). When a Magistrate has discharged an accused person and passed orders as to the disposal of the property, the

(1) *U Po Hla v. Ko Po Shein*, 7 Rang. 345=A. I. R. 1929 Rang. 97=115 I. C. 901=30 Cr. L. J. 540 Overruling *Maung Awa Tun v. Ma Kra Toe*, 6 Rang. 259.

Cr. L. J. 859=A. I. R. 1923 Rang. 227.

(7) Compare *In re Khema Hukhad*, 42 B. 664; *Emperor v. Debi Ram*, 46 A. 623; *Maung Awa Tun v. Ma Kra Toe*, 6 Rang. 259 with *Emperor v. Nga Po Chit*, 1 Rang. 199; *Empress v. Nilambar*, 2 A. 276.

(8) *U Po Hla v. Ko Po Shein*, 7 Rang. 345=A. I. R. 1929 Rang. 97 F. B. =115 I. C. 901=30 Cr. L. J. 540.

(9) *Walchand v. Hari Anant*, 66 B. 369=139 I. C. 433=33 Cr. L. J. 807=A. I. R. (1932) Bom. 534.

(10) *U Po Hla v. Ko Po Shein*, 7 Rang. 345; *Emperor v. Na Po Chit*, 1 Rang. 199.

(11) *In re Larman*, 35 B. 253=9 I. C. 947=18 Bom. L. R. 131=12 Cr. L. J. 163.

(12) *Emperor v. Nga Po Chit*, 1 Rang. 199=74 I. C. 1050=2 Bur. L. J. 241=1923 Rang. 227=24 Cr. L. J. 859.

1846, 407.

(1) *U Po Hla v. Ko Po Shein*, 7 Rang. 345 F. B.; *Walchand v. Hari Anant*, 66 B. 369 F. B.

(5) *Emperor v. Ahmad*, 9 M. 418; *Empress v. Joggesur*, 3 O. 379; *U Po Hla v. Ko Po Shein*, 7 Rang. 345.

(6) *U Po Hla v. Ko Po Shein*, 7 Rang. 345=A. I. R. 1929 Rang. 97 F. B. =115 I. C. 901=30 Cr. L. J. 540; *Emperor v. Nga Po Chit*, 1 Rang. 199=24

offence(1). When a court makes no inquiry under the preceding section, it is competent to make a reference under this section(2).

519. When any person is convicted of any offence which includes or amounts to theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing or having reason to believe that the same was stolen, and that any money on his arrest has been taken out of the possession of the convicted person, the court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

Compensation to innocent purchaser of stolen property.—Under this section, an innocent purchaser of stolen property may be compensated out of any money found in the possession of a person convicted as a thief or receiver of stolen property who has sold the property to such innocent purchaser but where no money is found in the possession of the person convicted as the thief or receiver of the stolen property, it is not open to the Magistrate to grant compensation to the innocent purchaser out of the amount of a fine imposed on the convicted person(3). An order

stolen property can obtain compensation, is when money has been found in possession of the thief at the time of his arrest, in which case the whole, or a portion of such money, may be directed by the court holding the trial to be handed over to the innocent purchaser at the time of his restoring the stolen property to the true owner(4). An order for compensation cannot be made in favour of the pledgee of a stolen article either under this section or section 545 of the Code(5).

520. Any court of appeal, confirmation, reference or revision may direct any order under section 517, section 518, or section 519, passed by a court subordinate thereto, to be stayed pending consideration by the former court, and may modify, alter or annul such order and make any further orders that may be just.

Court of appeal or revision.—The words "court of appeal, or

(1) *Emperor v. Girji*, Rat. Un. Cr. C. 496.

(2) 14 C. W. N. cxxv cited in Rangnadhajyar's Cr. P. C. page 682.

(3) *In re Puyuthinnu Pramutha*, 2 Weir. 671; *Emperor v. Dhondu*, 3

Bom. L. R. 761.

(4) *In re Karim Bakhsh*, (1890) A. W. N. 221.

(5) *In re Srinivasa Dhatta*, 2 Weir. 672.

nor a court of reference or confirmation(1).

Notice.—Notice should ordinarily be given unless there is good reason to dispense with it before reversing on appeal an order passed under section 517(2).

Limitation.—An application made under this section to a 'court of appeal,' is not in the nature of an appeal and is not, therefore, governed by the period of limitation prescribed for appeals(3). Such an application can always be made within a reasonable time of the termination of the proceedings in which the property in dispute was produced(4). Where an appellate Magistrate erroneously refuses to entertain a petition on the ground that it is time barred, the High Court can interfere in revision under s. 439(5).

"And make any further orders that may be just"—These words were not to be found in the Codes of 1872 and 1882, but were added by Act V of 1898. It was held under the old Codes that restitution could not be made by the court of reference or revision(6). This section differs from the corresponding provision in the Code of 1882 and contemplates that the court of reference or revision shall order restitution if justice so requires(7). The fact that an order for delivery of property has been carried out does not deprive the High Court of its power to order restoration of the property to the rightful owner(8). The words "and make any further orders that may be just" in this section are intended to cover cases of this nature and to enable superior courts to pass proper orders in cases where property has been erroneously disposed of under section 517(9). Under section 423 (1) (d) as well as under section 520, the appellate court is competent to pass appropriate orders for the disposal of moveable property produced at the trial, even though the trial Magistrate had not passed any order in respect of it under section 517(10). The question directly arose in *Emperor v. Azmat Shah*(11), and it was held that section 520

(1) *Sonu v. Krishna Pillai*, 82 I. C. 176—47 M. L. J. 481—20 L. W. 541—(1921) M. W. N. 806—25 Cr. L. J. 1217—1921 M. 699.

(2) *In re Arunachala Thevan*, 40 M. 162; *In re Laxman*, 35 B. 253; *Kanshi Ram v. Crown*, 4 Iah. 49 (52)—73 I. C. 977—3 P. W. R. 1923 Cr.—24 Cr. L. J. 713.

(3) *Kanshi Ram v. Crown*, 4 Iah. 49—73 I. C. 977—3 P. W. R. 1923 Cr.—24 Cr. L. J. 713.

(4) *Kanshi Ram v. Crown*, 4 Iah. 49—73 I. C. 977—3 P. W. R. 1923 Cr.—24 Cr. L. J. 713.

(5) *Srinivasan.oorthi v. Narasimhulu Naidu*, 104 I. C. 719—26 L. W. 164—39 M. L. T. 18—53 M. L. J. 809—(1927) M. W. N. 692—A. I. R. 1927 31,

707—29 Cr. L. J. 879—50 Mad. 910.

(6) *Hasudeb v. Empress*, 14 C. 831; *Abhram Umar v. Empress*, 8 B. 875; *In re Devidin*, 21 B. 811.

(7) *Hadrul Hasan v. Chameela*, 49 I. C. 175—19 Cr. L. J. 935; *In re Arunachala Thevan*, 40 M. 162 (167); *Hagu v. Manmatha*, 18 C. W. N. 959; *Ma Wei v. Mg. P'o Tuik*, 85 I. C. 858.

(8) *Shree Wa v. C. J. Mehta*, 6 Rang. 553—105 I. C. 452; *Bodomal v. Emperor*, 58 I. B. 183—15 I. C. 213—13 Cr. L. J. 91.

(9) *Kanshi Ram v. Crown*, 4 Iah. 49—73 I. C. 977.

(10) *Thiraj v. Crown*, 10 Iah. 187—31 P. L. R. 61—111 I. C. 314—A. I. B. 1919 Iah. 567; *Gopi Nath v. Emperor*, 3 A. L. J. 770—4 Cr. L. J. 370; *Haleram v. Chinta Ram*, 9 C. W. N. 649; *Ma Wei v. Mg. P'o Tuik*, 85 I. C. 354.

(11) 53 A. 874—16 Cr. L. J. 676—20 I. C. 1006.

Sessions Judge is a Court of appeal, and any one aggrieved by the order should apply to him(1).

Court to which appeals ordinarily lie.—The words "court of appeal" in this section merely imply the court to which appeals ordinarily lie and do not mean that an appeal must lie in the particular case in which an order has been passed as to property(2). An appeal from an order passed under section 517 by a stationary Sub-Magistrate directing the return of the subject matter of a charge to the complainant, lies to a District Magistrate and not to a Sub-Divisional Magistrate inasmuch as the latter exercises appellate powers only on delegation by the former(3). But when a District Magistrate has directed a case or a certain class of cases to be heard by a Sub-Divisional Magistrate, and under section 407 he hears the appeal, his court comes within the words "court of appeal" as used in this section for that particular case or class of cases and he has jurisdiction to pass an order as to the disposal of property under this section(4). Where there is no appeal except against the order under section 517 the proper *forum* is the court of the District Magistrate(5). But when an appeal has been preferred to one of the courts from the main case, the jurisdiction of the other courts as to revision of the order, is suspended owing to the seizure of the whole case by the court of appeal(6). But where the appeal has been disposed of, and an order under s. 517 has been left untouched by the court of appeal, there exists no bar to an application for revision of that order being made in any one of the courts indicated by the section (7). Where in setting aside a conviction for theft, an appellate court omits to pass orders under this section for restoration of the property taken from the accused if the omission is accidental, it can be subsequently corrected under section 369 of the Code(8). Where an Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it by s. 10 (2), with the powers of a court of revision, he is competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of the property, under this section(9).

Sessions Judge's power to vary order of Sub-Divisional Magistrate passed in appeal.—A Sessions Court has no power under this section to vary or revise an order of a Sub-Divisional Magistrate passed in appeal against a conviction by a Sub-Magistrate as in respect of such orders the Sessions Court is neither a court of appeal or revision

(1) *Empress v Nilambar*, 2 A. 976

nathan, (1923) M. W. N. 557.

(6) *Emperor v. Husain Shah*, 1 Cr. L. J. 764 (766)=17 C. P. L. R. 107.

(7) *Ibid.*

(8) *In re Subba Raidu*, 71 I. C. 511=15 L. W. 661=43 M. L. J. 87= (1922) M. W. N. 424=A. I. R. (1922) M. 329=31 M. L. T. 357=24 Cr. L. J. 159.

(5) *In re Arunachala Thevan*, 46 M. 162 (165); *Maria Pillai v. Rama-*

(9) *Nagappan v. Ramaram*, 126 I. C. 594=A. I. R. 1930 M. 769=1930 Cr. C. 595=3 Mad. Cr. C. 259.

under this section, staying or modifying, altering or annulling an order of a subordinate court can be made only when the order of the subordinate court is one relating to property and made under ss. 517, 518 or 519. Under it order relating to custody of child cannot be passed(1).

522. (1) Whenever a person is convicted of an

Power to restore
possession of im-
moveable property.

offence attended by criminal force or show of force or by criminal intimidation, and it appears to the court that by such force or show of force or criminal intimidation any person has been dispossessed of any immoveable property, the court may, if it thinks fit, when convicting such person or at any time within one month from the date of the conviction, order the person dispossessed to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest to or in such immoveable property which any person may be able to establish in a civil suit.

(3) An order under this section may be made by any court of appeal, confirmation, reference, or revision.

Amendment explained.—The amendment made in the section by Act XVIII of 1923 has been thus explained in the Statement of Objects and Reasons :—“ This amendment provides for the order of restoration being passed within one month from the date of conviction ; secondly, it extends the scope of the section to ouster from possession by show of criminal force or criminal intimidation ; and thirdly, it gives power to an appellate court or to the High Court in revision to pass such an order.”

Scope of section.—Under this section two conditions must be satisfied : (i) some person must have been convicted of an offence attended by criminal force (ii) some person must have been dispossessed of immoveable property by such force(2). An order under this section can be made only when the offence in respect of which the accused is convicted was attended by criminal force or show of force or by criminal intimidation(3). The object of the provisions of this section is to enable the criminal court, by a summary order, to restore the state of things which existed at the time of the dispossession by the convicted person or persons, and the criminal court cannot go behind the state of affairs at the time of the forcible ejectment which led to the criminal prosecution(4).

“ Is convicted. ”—For the purpose of exercising the powers granted

(1) *Siraj Din v. Khalil Shah*, 94 I. C. 142=27 Cr. L.J. 574=A. I. R. 1926 Lah. 487.

(2) *Pottiwadu v. Veerayya*, 12 M. L. J. 447.

(3) *Teja Singh v. Emperor*, 104 I. C. 435=9 Lah. 322=29 F. L. R. 696 ;

Ishan Chandra v. Dina Nath, 27 C. 174 ; *Harj Chand v. Emperor*, 16 P. R. 1919 Or ; *In re Bata Kala Pottivadu*, 26 M. 49 ; *Chiraman v. Ilam Lal*, 25 A. 341.

(4) *Rameshwar v. Biswa Nath*, 5 C. W. N. 374.

gave to an appellate court the same power as the court which originally tried a case to pass orders under section 517. Similarly in *Onkar v. Emperor*(1), Suleman, J. upheld the order of the appellate court under s. 520 directing restoration of property to the complainants, even though the trial court had refused to do so and had referred them to a civil court. The only ruling to the contrary is a decision of the Madras High Court in *Locanada Aiyar v. Seethal*(2), in which it was held that where no order under section 517 has been passed by a Magistrate the appellate court has no jurisdiction to pass an order under section 520. But in a later Madras case *Krishnan, J.*, remarked: "In fact, it is the common practice in this Presidency for such Magistrates to pass orders under section 520, if necessary, *when disposing of the appeal*. I see no reason to interfere with this practice. Objection has never been taken to such orders as having been passed without jurisdiction. It will also be noted that section 423 (d) authorizes appellate Magistrates to pass consequential orders based on the findings in the appeal"(3).

Revision.—An order made under section 517 may be revised by the High Court either under section 520 or by virtue of the powers conferred on it by section 439 read with sections 435 and 423 (d) of the Code(4). The High Court has jurisdiction to interfere with an order of the Magistrate passed under section 517(5), though there is authority to the contrary also(6). Where the Sessions Judge in dealing with an

petition for revision and not by way of appeal(7).

521. (1) On a conviction under the Indian Penal Code, section 292, section 293, section 501 or section 502, the court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the court or remain in the possession or power of the person convicted.

(2) The court may, in like manner, on a conviction under the Indian Penal Code, section 272, section 273, section 274, or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

Order relating to custody of child.—An order by an appellate court

(1) 21 A. L. J. 577.

(2) 2 Weir. 674.

(3) *In re Arunachala Thevar*, 46 M. 162, 164.

(4) *Hagu v. Manmatha*, 22 I. C. 760=18 C. W. N. 959=15 Cr. L. J. 184; *U Po Hla v. Ko Po Shein*, 7 Rang. 345.

(5) *Re Gangamma*, 2 Weir. 539 and 669; *Pandharinath v. Emperor*, 40 B. 186=16 Cr. L. J. 783.

(6) *Bhagat Ram v. Emperor*, 11 I. C. 584=96 P. L. E. 1911=12 Cr. L. J. 400.

(7) *Debi Parshad v. Puran*, (1899) A. W. N. 40.

committed in the absence of the complainant(1), or where applicants were convicted of an offence under section 447 of the Indian Penal Code by reason of their having continued to cultivate certain field in spite of their ejectment(2). But where a person is obliged to run away by reason of some others rushing at him with sticks and lathis and using threats towards him, the act of the latter amounts to a resort to criminal force as defined in sections 349 and 350, and if by such act the person attacked is deprived of property, an order under this section restoring the property to him is justified(3).

Possession taken in absence of opposite party.—"Force" contemplates the presence of the person using the force and of the person to whom the force is used. Where, therefore, a person breaks open the lock of a house in absence of the person in possession and enters into possession thereof the possession is taken without any "force or show of force" and an order under this section cannot be passed(4). It is different, however, where the complainant when he returns is driven out by force(5). Where, however, it appeared that there was no occasion for the use of any force or show of force on the part of the accused when they took possession of the property as the complainant was absent and no one on behalf of the complainant appeared to prevent the accused from committing the offences of which they were convicted and it appeared that the complainant still was fighting out the question of his dispossession from the property in certain criminal cases, it was held that an order for restoration of possession to the complainant was not proper(6).

Offence of which criminal force forms an ingredient.—The words "an offence attended by criminal force" in this section mean an offence of which criminal force forms an ingredient. This section is not applicable to cases where there had been no conviction for criminal force either separately or as an ingredient of the offence for which there was a conviction and where there was no finding that any person had been dispossessed of any immovable property by any criminal force(7). But in some cases it has been held that the words "attended by criminal force" do not mean an offence of which criminal force is an ingredient(8).

Absence of finding.—In the absence of a finding that the accused has used criminal force, etc., in dispossessing the complainant of his property, no order for restoration can be passed under this section(9).

(1) *Mangiram v. Emperor*, 105 I. C. 676=29 P. L. R. 500; *Hari Chand v. Emperor*, 16 P. R. 1919 Cr.

(2) *Chuni v. Baldeo*, 21 A. L. J. 593=75 I. C. 780=1924 A. 84=25 Cr. L. J. 42

(3) *Emperor v. Ashiq Hussain*, 45 A. 25=(1913) A. 833=24 Cr. L. J. 857=74 I. C. 1049.

(4) *Bihari Lal v. Emperor*, 15 L. 786=36 Cr. L. J. 59=1934 Lab. 454; *Mangi v. Emperor*, A. I. R. 1927 Lab. 830; *Sota Binal v. Dochi*, 12 C. W. N. 269=7 Cr. L. J. 108.

(5) *Maruthavees v. Apparau Pillai*,

72 I. C. 892=31 M. L. T. 388=1923 M. 237=24 Cr. L. J. 476

(6) *Zamin Hussain v. Emperor*, A. I. R. 1934 O. 185(1)=11 O. W. N. 472=(1934) O. L. R. 356=148 I. C. 790.

(7) *Gulab Singh v. Ram Prasad*, A. I. R. 1934 O. 199=11 O. W. N. 372=1934 O. L. R. 307; *Ram Chandra v. Jityandria*, 25 C. 434=2 O. W. N. 305

(8) *Pottivadu v. Veerayya*, 26 M. 49(50)=12 M. L. J. 447; *Mohini v. Narendra*, 81 C. 691(696) F. B.; *Adepu Reddi v. Ramayya*, 22 Cr. L. J. 110.

(9) *Teja Singh v. Crown*, 9 Lab.

by this section, it is necessary that there should have been a conviction for an offence(1). A Magistrate, after acquitting an accused person of trespass under section 447, I. P. C., cannot proceed to pass an order under this section and put the complainant in possession of the land in dispute, inasmuch as this section gives jurisdiction to the criminal court only when a person is convicted of an offence attended by criminal force(2). Where, however, some out of several accused persons are convicted of an offence attended by criminal force and it appears that the complainant has been dispossessed of immoveable property, it is competent to the court to restore the complainant to possession of the property, under this section. It is not open to any of the acquitted accused to impeach the order by reason of his acquittal(3). Where a conviction is set aside an order under this section must also be set aside and the property should be restored to the accused even though the equities are clearly in favour of the complainant(4). A criminal court is empowered to restore possession to a party who has been dispossessed by its order under section 522, when such order has been set aside as illegal by superior authority(5). An order under this section which is never carried out does not bar the jurisdiction of a criminal court under section 145(6).

Criminal force.—The term "criminal force" used in this section must be understood as defined in s. 350 of the Penal Code(7) and to support an order under this section, restoring possession of immoveable property, it is necessary for the court to find as a fact, not only that the person in whose favour such order is made was deprived of possession by an offence, but that such offence was attended by the use of criminal force(8). Where an act of criminal trespass was not attended by criminal force or show of force or by criminal intimidation possession of the property trespassed upon cannot be restored to the complainant under this section(9). An order to restore possession of immoveable property cannot, therefore, be made in a case where a trespass was

(1) *Tulsi Ram v. Abrar Hussain*, 37 A 654

(2) *Emperor v. Ali Bahadur*, 24 O. C. 852 = A. I. R. 1922 O 144 = 66 I. C. 324 = 23 Cr. L. J. 260

(3) *In re Garbad Yadav*, 55 B. 165 = 32 Bom. L. R. 1496 = A. I. R. 1931 Bom 77 = 32 Cr. L. J. 275 = 129 I. C. 337 = 1931 Cr. O. 46; *Mohini Mohan v. Harendra Chandra*, 31 C. 691 at p 695; *Narayan v. Visaji*, 23 B 491 at p 499.

I. C. 676 = 29 P. L. R. 500; *Shrihari v. Lal Khan*, 5 C. W. N. 250.

(6) *Churaman v. Ram Lal*, 25 A.

Emperor v. Ali Bahadur, 24 O. C. 852 = A. I. R. 1922 O 144 = 66 I. C. 324 = 23 Cr. L. J. 260; *Rajathammal v. Rajamanickam*, (1922) M. W. N. 356 = 23 Cr. L. J. 502 = A. I. R. 1922 M. 188.

(6) *Prabhat Chandra v. Prasanna Kumar*, 26 I. C. 148 = 18 C. W. N. 1083 = 15 Cr. L. J. 700.

(7) *Hari Chand v. Crown*, 16 P. R. 1919 Cr.; *Mangiram v. Emperor*, 105

(9) *Shera v. Emperor*, 100 I. C. 514 = 28 P. L. R. 238 = 29 Cr. L. J. 320.

of criminal trespass and threats to use force against the complainant and his party, and were in consequence convicted under sections 488 and 143, Indian Penal Code, it was held that the court was competent to pass an order under this section, restoring possession of the house to the complainant(1).

Dispossession.—No order under this section can be passed unless there has been dispossession from immoveable property(2). Where there is no evidence that a person has been dispossessed of property by the use of criminal force, no order as to possession of the property can be passed under this section(3). The foundation of an order under this section should be the finding of the court to the effect that the person in whose favour the order is made has been dispossessed of specific immoveable property by the use of the criminal force, which force formed a material ingredient in the matter of a criminal conviction; and when such a finding has been arrived at, the order should be in terms to restore the person, who has been so dispossessed, to the property from which he had been dispossessed(4). In *Mohini Mohan v. Harendra Chandra*(5) it was held by the Full Bench of the Calcutta High Court that a Magistrate while convicting an accused under ss. 341-114 I. P. C., for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction had no jurisdiction to order that the hut or other means of obstruction should be removed. To the same effect is the ruling reported as *Mohan Khan v. Gayzuddin*(6). Where the accused having been convicted of rioting, an order purporting to be passed under this section was embodied in the Magistrate's judgment to the effect that one of the witnesses be put in possession of certain land until ousted by the court of competent jurisdiction and there was no evidence that the person in whose favour the order was made had been dispossessed by criminal force proved in the particular case, it was held that the order under this section was bad(7). This section is inapplicable where neither party is found to be in actual possession(8).

Order affecting possession of third person.—A third person who was not a party may be dispossessed if the court finds that possession was in the complainant and the latter was dispossessed by force; *a fortiori* in the case of an accused person who had an opportunity of disproving the complainant's possession and proving his own, such an order is in law good(9). But an order restoring possession under this section can only be binding between the parties to the order, and can have no finality in favour of one who is not a party and does

(1) *Rameswar Singh v. Emperor*, 91 I. C. 809=A. I. R. 1925 Pat. 689=4 P. 438=27 Cr. L. J. 137=7 Pat. L. T. 285; *Sitaram v. Tylok Chand*, 28 N. L. R. 298 (301)=A. I. R. 1933 Nag. 36=1933 Cr. C. 78.

(2) *Mohar Khan v. Gayzuddin*, 23 I. C. 510=18 C. W. N. 399=15 Cr. L. J. 302.

(3) *Kaon v. Emperor*, 18 Cr. L. J. 98=42 I. C. 130=62 P. L. R. 1917=89 P. W. R. 1917 Cr.; *Re Vadamalai*,

2 Weir 674.

(4) *Lachmidas v. Pallat*, 23 W. R. Cr. 54.

(5) 31 C. 691 F. B.

(6) 18 C. W. N. 399=15 Cr. L. J. 302=23 I. C. 510.

(7) *Re Vadamalai*, 2 Weir 674.

(8) *Bhatri v. Allu*, 2 Weir 675.

(9) *Emperor v. Garbao*, 55 B. 155 (158, 159)=A. I. R. 1931 Bom. 77=31 Cr. L. J. 275=129 I. C. 337=1931 Cr. O. 46=32 Bom. L. R. 1496.

A conviction for an offence of criminal trespass will not entitle the complainant to seek his remedy under this section, unless there is a finding of the court convicting the accused that the offence with which the dispossession was effected was attended with the use of criminal force, as defined in section 350(1). But in one case it has been held that the finding of a Magistrate in an order of conviction under section 349 Penal Code that the accused broke open the lock of the complainant therefrom and put a lock of his own on the house thereafter, is sufficient to show that the element of criminal force, within the definition contained in s. 350, was present to justify an order of restoration of possession under this section(2).

Use of force as against property.—The definition of "criminal force" given in this section contemplates criminal force being used as against a person and does not take into account such force being used as against any matter or substance. The provisions of this section are, therefore, inapplicable to a case where the dispossession was effected by the use of force as against the property and not as against a person(3). Where, for instance, an accused is convicted of the offence of rioting for causing violence to a fencing and not to any person, an order under this section should not be passed inasmuch as there is no use of criminal force to any individual(4).

Show of criminal force.—The amendment of this section by adding the words "show of criminal force" puts an end to the difference of opinion which existed prior to the introduction of these words. On the one hand, it was held that in order to support an order under s. 522 there must be a finding that the dispossession was by the use of the criminal force and not by a mere show of criminal force(5). On the other hand, it was held that whenever an accused is convicted of an offence attended by show of force, the court has the power to order the person who has been dispossessed by the accused of any immovable property by such show of criminal force to be restored to the possession of the same(6). The amendment gives effect to the latter view. Where, therefore, it is found that the accused were still putting a fence round the land when complainant arrived at the spot and prevented him from taking possession by show of force an order restoring possession is justifiable(7). And where certain persons had succeeded in taking possession of the complainant's house by means

322=101 I. C. 485=29 P. L. R. 696, *Ishan Chandra v. Dina Nath*, 27 C. 174=4 C. W. N. 807, *Hari Chand v. Crown*, 16 P. R. 1919 Cr., *Pathradu v. Veerappa*, 26 M. 49; *Churaman v. Ram Lal*, 25 A. 341.

(1) *Balram v. Chamru*, 22 Cr. L. J. 829=61 I. C. 57=2 Pat. L. T. 120

(2) *Usmannuya v. Amiruniya*, 99 I. C. 863=28 Cr. L. J. 191=(1927) Nag. 131

(3) *Balram v. Chamru*, 22 Cr. L. J. 829=61 I. C. 57=2 Pat. L. T. 120; *Sadasib v. Emperor*, 18 C. W. N. 1150, *Hasul v. Emperor*, 4 P. R.

1889 Cr.

(4) *Sadasib v. Emperor*, 18 C. W. N. 1150=15 Cr. L. J. 720=26 I. C. 168.

(5) *Ram Chandra v. Jitendra*, 25 C. 434 (439); *Ishan Chandra v. Dina Nath*, 27 C. 174; *Narayan v. Visaji*, 23 B. 494; *Bundi Singh v. Emperor*, 19 Cr. L. J. 516=45 I. C. 276=4 Pat. L. W. 329; *Maresh v. Emperor*, 20 I. C. 20=20 Cr. L. J. 270.

(6) *Chandra v. Emperor*, 11 C. W. N.

(7) *Chandra v. Emperor*, 11 C. W. N.

extent of the powers of the trying Magistrate but also without any limitation of time(1).

Notice.—Before passing orders under this section, it is imperative in law to give notice to the parties(2). But the Magistrate should give the party an opportunity to show cause as a matter of due exercise of judicial discretion(3). Where the accused have been convicted under s. 448, Penal Code, after which the complainant applies to the trial court for restoration of possession of the house of which he has been alleged to be deprived, under this section and the court passes an order granting such possession *ex parte*, the non-applicants accused not having been served with a notice for the same, such an order cannot be upheld, as it is passed without the opposite party having been given an opportunity of raising objections to it(4). An order under this section ought not to be declared as of no effect without hearing what the complainant who is the party most interested in the maintenance of the order, has to urge in support of it(5).

Sub section (2).—See notes above under the head "order effecting possession of third person".

Sub-section (3).—Under the Code, as it stood before September, 1923, there was considerable doubt as to whether an appellate court had power to pass an order under this section where the trial court had made no order at all(6). Under the new Code, the High Court, under sub-section (3), has, in a reference or revision, power to make an order even though no such order may have been made by the trial or appellate court(7). The words "court of appeal, confirmation, reference or revision" in this sub-section refer to the courts dealing with the original conviction or trial and do not apply to the High Court in reference from the order restoring possession(8). But a contrary view was expressed in *Rameshwar Singh v. Emperor*(9).

Time limit.—Sub section (3) does not impose any time limit within which a court of appeal, confirmation or reference or revision must act. It is, therefore, competent to such a court to pass an order for restoring the property to the complainant even after the expiry of one month from the original conviction or from the disposal of appellate or revisional proceedings(10). The order may be passed by the courts of

(1) *Gudri v. Jangji*, A. I. R. 1934 Pat. 154=15 P. L. T. 163=150 I. C. 787=35 Cr. L. J. 1159; *Fida Hussain v. Sarfaraz Hussain*, 12 Pat. 787.

(2) *Emperor v. Gorbao*, 55 B. 155; *Jatindra v. Emperor*, 19 I. C. 172=14 Cr. L. J. 172.

(3) *Pan Nyun v. Maung Nyo*, 3 L. B. 20=2 Cr. L. J. 377.

(4) *Miran Balhah v. Bhag Mal*, A. I. R. 1932 Lab. 17=135 I. C. 206=32 P. L. R. 758=33 Cr. L. J. 123.

(5) *Majid Ali v. Ali Asrab*, 53 I. C. 912=23 C. W. N. 862=20 Cr. L. J. 846.

(6) *Emperor v. Lachman*, 46 A. 92=83 I. C. 910=21 A. L. J. 871=1924 A. 212=26 Cr. L. J. 206=I. R. 5 A. 11 Cr.; *Bhagbat Shaha v. Sadique*

Ostagar, 89 O. 1050=16 I. C. 176=16 C. W. N. 811=13 Cr. L. J. 608; *Asiz Ahmad v. Buddhin Khan*, 45 A. 553=73 I. C. 773=21 A. L. J. 459=21 Cr. L. J. 677; *Muhammad Din v. Crown*, 14 P. R. 1919 Cr.=20 Cr. L. J. 30=48 I. C. 510.

(7) *Emperor v. Lachman*, 46 A. 92, (8) *Ghazan v. Bhag Bhari*, 135 I. C. 679=Ind. Rul. (1932) 1 ab. 151=33 Cr. L. J. 191=A. I. R. 1932 Lab. 210=33 P. L. R. 481=(1932) Cr. Cas 254.

(9) 4 Pat. 438=91 I. C. 809=A. I. R. 1925 Pat. 689=27 Cr. L. J. 137=7 Pat. L. T. 265.

(10) *Fida Hussain v. Sarfaraz Hussain*, 12 Pat. 787=A. I. R. 1933 Pat. 617=145 I. C. 377=34 Cr. L. J. 910;

not claim under a party(1). Sub-section (2) provides that any right or interest which a third party may have in the property cannot be affected and such third party in the case of eviction under an order under this section, must seek his remedy in the civil court(2).

Nature and form of order.—An order under this section is passed not against any person, but in favour of the party dispossessed, provided the conditions necessary to give the court jurisdiction to make that order are present(3). Where the petitioner's case, in which he charged the opposite party with having forcibly dispossessed him of a bungalow and its contents, was found to be true and the opposite party was convicted under section 323, I. P. C., for having forcibly dispossessed him of both; *held*, that it was the duty of the Magistrate to pass order under sections 522 and 517, Cr. P. C., directing restoration to the petitioner of the bungalow and its contents(4).

Order must be passed within one month—Under the old section the Magistrate was required to pass an order of restoration immediately upon the conviction of an accused and it was held that the order of restoration must have been passed simultaneously(5), or immediately, so that it could be regarded as having arisen out of the judgment of the court convicting in the case(6). In view of those decisions one month's time is now given to the Magistrate to pass an order of restoration after the conviction of an accused(7). The section as amended specifically limits the power of a Magistrate to direct the restoration of any immoveable property at any time within one month from the date of the conviction. Any such order after one month is without jurisdiction(8). All that this section authorizes a Magistrate is to pass an order within one month of the conviction; it does not authorise him to pass such an order upon an application presented to him within one month of the date of conviction(9). If an application for restoration of possession is made within one month, the Magistrate is not justified in adjourning the application on the ground that an appeal by the accused against his conviction is pending in the appellate court and in making the order after the dismissal of the appeal(10). It is open to the appellate court to pass an order under this section not only on the date of the disposal of the appeal and within one month thereafter which is the

(1) *Adinarayana v. Nambaran Suramma*, 86 I. C. 711=48 M. L. J. 372=A. I. R. 1925 M. 799

(2) *Rameswar v. Biswa Nath*, 5 C. W. N. 374

(5) *Monun v. Nat Onana*, 4 C. W. N. 808, *Contry Narayan v. Visaji*, 23 B. 491, *Ghulam Muhammad v. Karam Singh*, 15 P. R. 1914 Cr.=15 Cr. L. J. 275

(6) *Jatindra Nath v. Emperor*, 13 I. C. 172=14 Cr. L. J. 171, *Khub v. Bahhtayal*, 16 A. L. J. 489=19 Cr. L. J. 731=46 I. C. 414; Or' with this a

reasonable time from the date of conviction. *Nqu'Po'Zok v. Emperor*, U. B. R. (1916) 3rd Qr. 111=20 Cr. L. J. 115.

(7) *Rameshwar Singh v. Emperor*, 4 Pat. 438 (439,440)=91 I. C. 609=1925 P. 689.

(8) *Ashwini Kumar v. Shashanka*, 69 C. 1153=1932 C. 750=36 C. W. N. 624, *Ghazan v. Bhag Bhari*, 195 I. C. 679=A. I. R. 1932 Lab. 210.

(9) *Gudri v. Janji*, A. I. R. 1931 Pat. 151=15 P. L. T. 163=150 I. C. 787=35 Cr. L. J. 1158.

(10) *Ashwini Kumar v. Shashanka*, 59 C. 1151=35 C. W. N. 624=A. I. R. 1932 C. 750.

Scope of section.—This section must be confined to property seized by the police of their own motion, in the exercise of powers conferred on them by law, which seizure requires to be reported to a Magistrate, for instance, seizure under ss. 51, 54 (4), 165 and 166(1). This section cannot be held to apply to property which is produced before a court in the course of an inquiry under a search warrant issued by it. To such property s. 517 alone would apply, and if no offence is found in respect thereof, the court can make no order; the property must be given back into the possession from which it came(2). But in one case it has been held that the words "seized by the police" apply equally whether the seizure is made under a Magistrate's warrant or without a warrant. In the one case as in the other, the seizure is made under the authority of some law requiring the police to execute the warrant or empowering them to seize property without a warrant. In both cases, the seizure must forthwith be reported to the proper Magistrate, who can then proceed in the manner prescribed by this section(3). This section does not apply where the police obtains possession of the property in the course of an investigation into an offence which in no way relates to the property in question (4), or where the property is seized by the police on the complaint of certain persons claiming as owners thereof(5).

Disposal of property : Discretion, how to be exercised.—Clause (1) of this section gives a Magistrate power either to deliver the property to the person entitled to its possession or to pass such order as he deems fit, respecting its disposal. If he adopts the first alternative, he has to find out the person entitled to possession, and, if no one succeeds in establishing his title to possession, the property should be at the disposal of Government. If he adopts the second alternative, the section does not specifically state what the nature of the order regarding the disposal of property should be. There is nothing in the section to prevent a Magistrate from ordering that property should be at the disposal of the Government if such order is proper in the circumstances of the case(6). The discretion given to a Magistrate by the words "such order as he thinks fit respecting the disposal of property" must be judicially exercised, and in the absence of any thing to show the title in the property, it should be ordered to be delivered to the person in whose possession it was at the time of the attachment(7). But the fact that the accused had been in possession of the property when the charge was made is not conclusive. The Magistrate may order the delivery of the property to the complainant. The Magistrate has not to decide the question of title but merely the question of possession. The question to be decided is,

(1) *In re Ratanlal*, 17 B. 748; *Chuni Lal v. Ishar Das*, 4 Lab. 38 (43)=73 I. C. 702=24 Cr. L. J. 670= (1924) A. I. R. (Lab.) 70.

(2) *In re Ratanlal*, 17 B. 748.

(3) *In re Lalshman*, 26 B. 552=4 Bom. L. R. 276.

(4) *Chuni Lal v. Ishar Das*, 4 Lab. 38 (42)=73 I. C. 702=24 Cr. L. J. 670.

(5) *In re Kuppammal*, 29 M. 375=4 Cr. L. J. 233

(6) *Ramaswami Aiyar v. Venkateswara Aiyar*, 18 I. C. 171=24 M. L. J. 1=(1913) M. W. N. 851=14 M. L. T. 431=14 Cr. L. J. 27.

(7) *Emperor v. Bahiner*, 6 Bom. L. R. 25; *In re Kareppa Channasappa*, 16 Cr. L. J. 207=17 Bom. L. R. 79; *Kyn Ton v. E. Cho*, 4 L. B. R. 14=6 Cr. L. J. 126; *Aslum v. Emperor*, 8 S. L. R. 141=16 Cr. L. J. 138

appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate(1).

Appeal or revision—Under s. 423 cl. (d), a Magistrate of the first class specially empowered to hear appeals from subordinate Magistrates has jurisdiction to hear an appeal with reference to an order passed by a subordinate Magistrate under this section(2). Where an order of delivery of property was passed by a Sub Magistrate some time after conviction and an appeal was preferred separately against that order, *held*: that no appeal lay(3). Where an appellate court reverses a conviction on the ground that no force was used, it ought also to reverse the order awarding possession and to restore the parties to their *ay set aside an order under*

Under section 423 (1) (d) the High Court has power, as a court of revision, to interfere with an order passed by a Magistrate under this section(6). The order of the High Court, setting aside the order for restoration, carries with it the incident of restoration of the property to the accused(7).

523. (1) The seizure by any Police Officer of property taken under section 51 or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation.

Rameshwar Singh v Emperor, 4 Pat 439, *Gudri v Jangi*, A. I. R. 1934 Pat. 154.

(1) *Rameshwar Singh v. Emperor*, 4 Pat. 438 (440)—91 I.O. 809, cf. *Uman Miya v. Amir Miya*, 1927 Nag. 131=28 Cr. L. J. 191.

(2) *Gourhari v. Alay*, 29 C. 721 (*Ramchandra v. Nobin*, 25 C 630=2 O. W. N. 225 declared obsolete.)

(3) 25 L. W. 17 n=39 M. L. T. 15 n Cr. P. O.—117

=53 M. L. J. 14 n.

(4) *Rajathammal v. Rajamanikam*, 68 I. C. 33=15 L. W. 533=(1912) M. W. N. 356=31 M. L. T. 20=23 Cr. L. J. 502=A I. R. (1912) M. 169.

(5) *Ujir v. Syed Ali*, 16 Cr. L. J. 607=19 C. W. N. 920=30 I. C. 159.

(6) *Ahmad Ali v. Keenoo*, 36 C. 44.

(7) *Biswaswar v. Bhola*, 15 Cr. L. J. 221=21 I. C. 1006=18 C. W. N. 1147.

applies only to a person other than the original possessor(1).

Property.—Crops are not such property as is referred to in this section(2).

Question of title.—A Magistrate's order under this section, delivering possession of property, does not conclude the right of any person(3). The Magistrate does not decide the question of title, but merely decides the question of possession(4).

Revision.—The High Court has jurisdiction to interfere with an order made under this section(5) where a proper case is made out(6). But it will not interfere with the judicial discretion exercised by the Magistrate if it appears that he had applied his mind as to who was entitled to possession and come to a conclusion with such materials as were placed before him(7).

Review.—A Magistrate has no jurisdiction to vary an order once passed directing that the property taken by the police should be returned to the person from whom it was taken(8).

524. (1) If no person within such period estab-

Procedure where
no claimant appears
within six months.

lishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, or a Magistrate of the first class empowered by the Local Government in this behalf.

(2) In the case of every order passed under this section, an appeal shall lie to the court to which appeals against sentences of the court passing such order would lie.

Procedure where no claimant appears within six months.—

When the proclamation has been issued, and the six months have expired, then under the provisions of this section, the person in whose possession the property was found can come forward and show that it is his own(9). Where no claimant comes forward within the time allowed by the proclamation issued under section 523, and the evidence adduced by the person, from whose possession the articles were seized, though not satisfactory is not proved to be false, the proper and safest

(1) *Yara v. Emperor*, 67 I. C. 968=26 Cr. L. J. 1018.

(2) *Narayan v. Visaji*, 23 B. 494.

(3) *In re Ahmed Sahale*, Rat Un. Cr. C. 365 (366); *Empress v. Tribhovan*, 9 B. 131.

(4) *Husentha v. Mashaksha*, 11 Cr. L. J. 339=12 Bom. L. R. 232=5 I. C. 572.

(5) *Ma Thim Nu v. Ma The Hnut*, 67 I. C. 81=21 Cr. L. J. 661=12 Bur. L.

T. 266.

(6) *Chuni Lal v. Ishar Das*, 4 Lah. 38=73 I. C. 702=24 Cr. L. J. 670=(1924) A. I. R. (Lah) 76.

(7) *Husentha v. Mashaksha*, 11 Cr. L. J. 339=12 Bom. L. R. 232=5 I. C. 572.

(8) *Sahitran v. Jaisam*, 4 P. C. L. R. 12.

(9) *Empress v. Mashalaluddin*, 22 C. 761.

who is entitled to possession(1).

Conditional order.—There is no law enabling a Magistrate to demand security from the person in possession of the articles for their production, when required(2). But in order to avoid the serious loss to the property the Magistrate is competent to make an order under this section on terms(3).

Inquiry.—It is not incumbent on a Magistrate to hold a judicial enquiry on oath before passing an order under this section. Such an order can be passed on police reports and papers alone, without any independent inquiry regarding the ownership of the property(4). But in some cases it has been held that as the bases of an order under this section, the Magistrate should make a specific investigation touching the rights, not of property, but of possession, claimed by the applicants(5). The section itself does not make any Magisterial inquiry imperative. It appears that the Magistrate has to satisfy himself, on such material as is before him who is entitled to possession of the property concerned(6). Sub-section (2) does not require a Magistrate to make any inquiry at all. He proceeds on such materials as are available before him and has to decide the question not who was in possession at the time the property was seized by the police but who was entitled to possession(7).

Proclamation.—In disposing of property seized by the police, if the Magistrate finds that the person entitled to possession is known, he need not issue any proclamation. If he has issued proclamation that will not prevent him from ordering immediate delivery of the property to a person to whom he might have ordered delivery without issue of proclamation(8). If, however, there is doubt about the person entitled to the possession of property no final steps should be taken by the Magistrate nor is he bound to take any final steps to ascertain whether the property seized on suspicion belongs to the person in whose possession it was found, until after the expiry of the six months mentioned in the section; but when the proclamation has been issued and the six months have expired, then the provisions of s 524 come in and the person in whose possession it was found can come forward and show that it is his own(9). The period of six months prescribed by this sub section

(1) *Husensha v. Mashaksha*, 12 Bom. L. R. 232=11 Cr. L. J. 339=5 I. C. 972.

(2) *Puran Chandra v. Sasi*, 7 C. W. N. 522.

(3) *Nasib Ali v. Rukmini*, 5 C. W. N. 415.

(4) *Chuni Lal v. Ishar Das*, 4 Lah. 38=1924 Lah. 76=73 I. C. 702=24 Cr. L.

L. J. 85=1923 R. 248=25 Cr. L. J. 666.

(6) *Chuni Lal v. Ishar Das*, 4 Lah. 38 (42)=1924 Lah. 76=73 I. C. 702=24 Cr. L. J. 85=1923 R. 248=25 Cr. L. J. 666.

(7) *Puran Chandra v. Sasi*, 7 C. W. N. 522.

(8) *Po Lwin v. Empress*, 3 L. B. R. 197=4 Cr. L. J. 203; *Empress v. Mahabuddin*, 22 C. 761.

(9) *Po Lwin v. Empress*, 3 L. B. R. 197=4 Cr. L. J. 203; *Empress v. Mahabuddin*, 22 C. 761.

(5) *In re Ratanlal*, 17 B. 748; *Empress v. Joti Rajnak*, 8 B. 338; *In re Lalshman*, 26 B. 552; *Valliappa Chetty v. Joseph*, 81 I. C. 154=2 Bar.

517 and 524 do not empower the Government to confiscate the property or conclude the right of the person from whose possession the property has been taken, or of any other person to contest the decision of the criminal court by civil suit(1). This view is in accordance with the decision of their Lordships of the Bombay High Court in *Queen-Empress v. Tribhuban*(2), and *Wassappa v. Secretary of State*(3). In *Secretary of State v. Wakhut Singhji*(4), however, their Lordships of the Bombay High Court expressed the view that as sub-section (2) allows an appeal from the order passed under sub-section (1) it is doubtful whether the law allows a remedy by way of suit.

525. If the person entitled to the possession of such property is unknown or absent and perishable property. the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner or that the value of such property is less than ten rupees, the Magistrate may at any time direct it to be sold; and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

The operation of this section has been enlarged so as to enable a Magistrate to sell property when its value is less than ten rupees. If a Magistrate, not empowered by law in this behalf, erroneously but in good faith orders the sale of property under this section, the order will not be set aside on the ground merely of his not being duly empowered—see s. 529 (h) *infra*.

(1) *Secretary of State v. Loon*
Karan 5 Pat. L. J, 321.
(2) 9 B. 131.

(3) 40 B. 200.

(4) 19 B. 669.

course for the court is to follow the presumption laid down in section 110 of the Evidence Act and to hold him to be the owner. The words "is unable to show that it was legally acquired" used in this section are not intended to reverse the presumption arising under section 110 of the Evidence Act(1). When certain property was recovered from the house of a person charged with theft, but the complainant did not claim it as his, a Magistrate acts illegally in entering upon an inquiry as to how such person came to be in possession of the property. His duty is simply to restore the property to the custody of the person from whom it came. The fact that the account given by such person as to how he came by the property did not satisfy the Magistrate will not justify him to inquire and pass an order under s. 523 or this section(2).

Limitation inapplicable to possessor of property.—The period of six months prescribed by this section applies only to a person other than the original possessor. If no claimant appears within the period fixed, then the question arises, whether the person in whose possession the property was found is able to show that it was legally acquired by him; and, therefore, the Magistrate should hold an inquiry as to whether that person is entitled to retain possession of the property(3).

Property shall be at the disposal of Government.—A Magistrate cannot pass an order placing the property at the disposal of Government and directing its sale without holding an inquiry as to whether the person in whose possession the property was found is entitled to retain possession of the property(4). The power of a criminal court is limited to making arrangements for the custody and protection of the property while in the custody of the Government and to making a transfer of possession to such person as it thinks proper(5). The words "at the disposal of Government" in this section may reasonably be interpreted as meaning that Government shall be free to sell the property or to hold it as a trustee for the true owner(6).

Orders of specially empowered Magistrate, when necessary.—In the case of property seized by the police, it is the business of the Magistrate to whom the report is made under section 523 to dispose of the matter in the first instance. It is only when section 524 applies that the orders of the Sub-Divisional Magistrate or other specially empowered first class Magistrate intervene(7).

Appeal.—The appeal allowed by sub-section (2) comes under Chapter XXXI and its provisions govern the appeal. It is a regular appeal on the merits and cannot be disposed of by the appellate court in a summary way without a notice to the other party(8).

Civil suit.—It has been held by the Patna High Court that sections

S. 1925 S. 316.
 C. (5) *Secretary of State v. Lowen*
 R. *Karan*, 5 Pat L. J. 321.
 " (6) *Ibid.*
 " (7) *Yaru v. Emperor*, 19 S. L. R. 133
 " 26 Cr. L. J. 1048=87 I. C. 968=1925
 " S. 316.
 " (8) *Empress v. Din Dayal*, (1831)
 8= A. W. N. 150.

(3) The High Court may act either on the report of the lower court, or on the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court may under this section award by way of compensation to the person opposing the application.

(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6-A) Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case.

(7) Nothing in this section shall be deemed to affect any order made under section 197.

(8) If in any inquiry under Chapter VIII or Chapter XVIII or in any trial, any party interested intimates to the court at any stage before the defence closes its case that he intends to make an application under this section, the court shall, upon his executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon:

Provided that nothing herein contained shall require the court to adjourn the case upon a second or

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

High Court may
transfer case or
itself try it.

526. (1) Whenever it is made to appear to the High Court—

- (a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto, or
- (b) that some question of law of unusual difficulty is likely to arise, or
- (c) that a view of the place in or near which any offence has been committed, may be required for the satisfactory inquiry into or trial of the same, or
- (d) that an order under this section will tend to the general convenience of the parties or witnesses, or
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code ;

it may order—

- (i) that any offence be inquired into or tried by any court not empowered under sections 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence ;
- (ii) that any particular * * * case or appeal, or class of * * * cases or appeals, be transferred from a criminal court subordinate to its authority to any other such criminal court of equal or superior jurisdiction ;
- (iii) that any particular * * * case or appeal be transferred to and tried before itself ; or
- (iv) that an accused person be committed for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any court other than the court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that court would have observed if the case had not been so withdrawn.

this subject has now been set at rest by deleting the word "criminal" from this section(1).

Object of the section.—This section is enacted to maintain full confidence in the administration of justice, which can only be done by giving every citizen an assurance so far as practicable that no one will be forced to undergo a trial before a Judge or a Magistrate whom he has reasonable ground for suspecting to be prejudiced against him(2). The position of the accused persons is at all times of grave anxiety and courts trying criminal cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety(3). It is of paramount importance that persons arraigned before criminal courts should have full confidence in the impartiality of those courts, and if a person has a reasonable apprehension that the court before which he is to be tried is not completely free from bias, a transfer should be directed(4). The trial of a case should be in an atmosphere which does not create even a suspicion that there has been or is likely to be an improper interference with the course of justice. It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly be seen to be done(5).

Transfer application direct to High Court.—The High Court will not ordinarily entertain an application for a relief which could equally well be granted by a subordinate court until recourse has first been had to the court. It will not, therefore, entertain an application for transfer unless the District Magistrate or the Sessions Judge has been moved in the first instance(6). But there is nothing in the statute which renders it necessary to move the District Magistrate in the first instance. If an accused desires to go direct to the High Court for transfer of his case under this section, instead of first proceeding under s. 528, his right to do so as a matter of law, cannot be excluded under the Code, since the passing of the present sub-section (8)(7). A party to a criminal case pending before a Presidency Magistrate can apply direct to the High Court for a transfer of the case under this section, and

(1) *Lakshmi Narain v. Ratni*, 27 Cr. L. J. 476=93 I. C. 700.

(2) *Girish Chandra v. Emperor*, 20 C. 857 at p. 866.

(3) *Yusuf v. Buni Lal*, 51 I. C. 847=20 Cr. L. J. 559.

(4) *Sardari Lal v. Crown*, 8 Lab. 443; *Bans Gopal v. Emperor*, 21 I. C. 951=1 O. L. J. 271=15 Cr. L. J. 543; *Kali Charan v. Emperor*, 33 C. 1182; *Afachal v. Afatru*, 10 N. L. R. 15=15

Cr. L. J. 196=22 I. C. 980; *Emperor v. Abdul Latif*, 26 A. 636; *Srilal v. Emperor*, 45 I. C. 680=19 Cr. L. J. 632; *Rang Bahadur v. Kariman*, 22 Cr. L. J. 708=63 I. C. 868=2 Pat. L. T. 297

(5) *Hari Krishan v. Emperor*, 111 I. C. 451=A. I. R. 1923 Lab. 757=29 Cr. L. J. 867=29 P. L. R. 667; *Sargeant v. Dale*, (1887) 2 Q. B. D. 559; *R. V. Suss ex Justices, Ex parte McCarthy*, (1911) 1 K. B. 256; *Amar Singh v. Sadhu Singh*, 6 Lab. 396

(6) *Ravi Chander v. Sundar Singh*, 87 I. C. 112=1915 A. 610=1 L. R. 6 A. 87 Cr.=26 Cr. L. J. 960; *In re Fonseca*, 1 Cr. L. J. 589=6 Bom. L. R. 460; *Ghulam Nabi v. Jamala*, 72 I. C. 882=A.

(7) 129 I. C. 399.

subsequent intimation from the same party, or, where an adjournment under this sub-section has already been obtained by one of several accused, upon a subsequent intimation by any other accused.

(9) Notwithstanding anything hereinbefore contained; a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it

Explanation.—Nothing contained in sub-section (8) or sub-section (9) restricts the powers of a court under section 344.

(10) If before the argument (if any) for the admission of an appeal begins, or, in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the court that he intends to make an application under this section, the court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the court, postpone the appeal for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon.

Amendment.—Act XVIII of 1923 has amended this section by omitting the word "criminal" which occurred in cls. (ii) and (iii) of sub-section (1). It has further amended the section by substituting the words "any amount application" for the words "the costs of the prosecutor". By the same Amendment Act sub-section (6-A) and (9) have been newly added. The provisions of this section have been further amended by Act XXI of 1921. By this Amendment Act sub-sections (5) and (6-A) have been amended, sub-section (8) has been recast, and the explanation to sub-section (9) as well as sub-section (10) have been newly added. The amendments have been explained in their proper places.

Scope of the section.—The scope of this section has now been considerably enlarged and every case tried by a criminal court comes within the purview of the amended section (1). Under the old law there was a conflict of opinion as to whether a case under Ch. VIII or under s. 145 of the Code could be called a criminal case(2), but all doubt on

(1) *Lakshmi Narain v. Ratni*, A. I. R. 1926 L. 199=27 Cr. L. J. 476=93 I.C. 700.

(2) Compare *Jaggu v. Murli*, 24 A. 533=10 A. L. J. 27=13 I. C. 84=13 Cr. L. J. 452; *Arumuga v. Tegundan*, 26

Cases cannot be transferred before initiation and after disposal.—The powers of interference by way of transfer possessed by the High Court cannot be exercised so as to interfere with an acquittal or discharge(1). The High Court can transfer actual appeals only; it cannot direct that appeals that may be filed in future should, when filed, not be heard by the authority to which they are presented(2).

Clause (a): Reasonable apprehension of not having a fair trial.—It is only where there is reason to suppose that a prisoner will not have a fair trial, that the High Court will transfer a case from one Magisterial officer to another(3). It is not necessary, when supporting an application for transfer to establish that there is any actual bias in the mind of the Magistrate concerned. It is the cumulative effect likely to be produced on the mind of an ordinary reasonable accused person that has to be seen(4). Where incidents have occurred giving rise to a reasonable apprehension in the mind of the accused person that he would not receive a fair and unprejudiced trial at the hands of the Magistrate, although there may not be any real bias in the latter, the accused is entitled to have a transfer(5). If there are circumstances shown which may reasonably lead the petitioner to believe that the Magistrate has, to some extent, prejudged the case against him, and will in consequence be prejudiced against him, there ought to be a transfer(6). Where an accused person is under the *bona-fide* impression that he may not have an impartial trial before a Magistrate it is desirable that the case should be transferred from his court to another court(7). The question to be considered is not whether the Magistrate before whom the case is pending is really biased against the accused but whether the latter has or has not a reasonable cause to apprehend that the said Magistrate is not completely free from bias(8). No hard and fast rule

(1) *Corporation of Calcutta v. Bheechun Ram*, 2 C. 290; *Empress v. Fakira*, 1 Bom. L. R. 782.

(2) *Empress v. Lagma*, Rat. Un. Cr. C. 973.

(3) *Queen v. Kisto Chunder*, 2 W. R. Cr. 58.

(4) *In re Vakils*, 26 A. L. J. 1250 = 110 I. C. 686 = 29 Cr. L. J. 750 (752) = 1928 A. 396; *In re Wilson*, 18 C. 247; *Dupeyron v. Driver*, 23 C. 495; *Legal Remembrancer v. Bhairab Chandra*, 25 C. 727; *Lalit Mohan v. Surya Kanta*, 28 C. 709 (719); *Baktu v. Kali*, 29 C. 297; *Kali Churn v. Emperor*, 33 C. 1183; *In re Pandurang*, 25 B. 179; *Rang Bahadur v. Kariman*, 2 Pat. L. T. 297 = 22 Cr. L. J. 708 = 63 I. C. 868; *Din Dyal v. Emperor*, 1 Pat. L. T. 522 = 58 I. C.

(5) *Baktu v. Kali*, 28 C. 297; *Dupeyonyon v. Driver*, 23 C. 495; *Kali Churn v. Emperor*, 33 C. 1183; *In re Wilson*, 18 C. 247; *Emperor v. Ram Kishen*, 35 A. 5; *Farzand v. Hanuman*, 19 A. 64; *In re Pandurang*, 25 B. 179 (183); *Sardari Lal v. Crown*, 3 Lah. 443 = 24 Cr. L. J. 286 = 71 I. C. 1006; *Rang Bahadur v. Kariman*, 2 Pat. L. T. 297 = 63 I. C. 868; *Benode Behari v. Emperor*, 5 Pat. L. T. 63 = 25 Cr. L. J. 590 = 61 I. C. 78.

(6) *In re Wilson*, 18 C. 247; *U. Gaudama v. Emperor*, A. L. R. 1933 Cr. C. 723 = 6 Rang. 41 = 34 Cr. L. J. 950 = 145 I. C. 344; *Emperor v. Waheed Ali*, 32 A. 642 = 7 A. L. J. 813 = 11 Cr. L. J. 512 = 6 I. C. 874.

(7) *Jit Singh v. Emperor*, 19 I. C. 718 = 4 P. W. R. 1913 Cr. = 154 P. L. R. 1913 = 14 Cr. L. J. 296; *Abdulla v. Emperor*, 95 I. C. 755 = 22 N. L. R. 99 = 27 Cr. L. J. 835 = 6 A. I. Cr. R. 806.

(8) *Ahmed Din v. Crown*, 1 Lah. Cas. 8 = 81 I. C. 126 = 25 Cr. L. J. 638 = A. I. R. 1925 Lah. 101.

is not obliged to go first to the Chief Presidency Magistrate under s. 528 before applying to the High Court(1).

Case in a court without jurisdiction.—A case in a court without jurisdiction cannot be transferred(2). Proceedings instituted in a court which has no jurisdiction in respect of them cannot be regarded as legally instituted at all, and the High Court has no power to transfer them to any other court. The High Court can, however, in such a case, in the exercise of its inherent powers of superintendence, direct the court not to proceed further in the matter(3). When a case has been committed for trial to a Sessions Court which has no jurisdiction to try it, it is open to the High Court to transfer it from that court to another court having jurisdiction to try the case(4).

Cases which can be transferred.—As already stated the scope of this section has now been considerably enlarged and every case tried by a criminal court comes within the purview of the amended section(5). Under the old law there was a conflict of opinion as to whether a case under Chapter VIII or under s. 145 of the Code could be called a criminal case(6), but all doubt on this subject has now been set at rest by deleting the word "criminal" from this section(7). "The word 'criminal' has been omitted to make it clear that the power of a High Court to transfer criminal cases extend to the transfer of miscellaneous proceedings, under the Code"(8). An inquiry under the provisions of Act No. XIII of 1859 (Workman's Breach of Contract Act) is not outside the purview of this section but may be transferred by the High Court to any other court subordinate to it of equal or superior jurisdiction to that in which it was initiated(9). An inquiry into the conduct of a legal practitioner is neither a civil nor a criminal proceeding though being penal in its nature it resembles in many respects a criminal, but may be transferred by the High Court in the exercise of its powers of general superintendence under s. 107 of the Government of India Act(10).

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(3) See the case cited first in the last note

(4) *Wahid Buz v. Emperor*, 120 I. C. 81=Ind. Rul. 1929 Sind. 225=30 Cr. L. J. 1121=1929 Sind. 250; *Empress v. Ram Dei*, 18 A. 350=(1896) A. W. N. 96; *Empress v. Traku*, 8 B. 312; *Empress v. Alma Ram*, 2 Bom. L. R. 394.

(5) *Lakshmi Narain v. Ratni*, 27 Cr. L. J. 476=93 I. C. 700=1926 L. 199.

(6) *Wazed Ali v. Emperor*, 41 C. 719; *Emperor v. Wahid Ali*, 22 A. 612 (614); *Baggu Mal v. Crown*, 17 I.

C. 58=254 P. L. R. 1912=42 P. W. R. 1912 Cr.=1 P. B. 1913 Cr.=13 Cr. L. J. 716; *Muhammad Shah v. Emperor*, 18 L. R. 98=8 Cr. L. J. 356 (360); *Guruday v. Ganganendra*, 2 O. L. J. 614=3 Cr. L. J. 83; *Arumuga Tegundan, In re*, 26 M. 188; *Jaggu v. Murti*, 34 A. 533; *Karam Singh v. Hearsey*, 11 O. O. 61 with *Crown v. Ahmad Bakhsh*, 5 P. R. 1914 Cr.; *In re Pandurang*, 25 B. 179; and see *Lalit Mohan v. Suraja Kanta*, 28 C. 709.

(7) *Lakshmi Narain v. Ratni*, 27 Cr. L. J. 476=93 I. C. 700=1926 L. 199.

(8) Statement of Objects and Reasons (1914)

(9) *Bans v. Lakshmi Das*, 45 A. 700=1924 A. 76=21 A. L. J. 619=4 L. R. A. Cr. 140=75 I. C. 984=25 Cr. L. J. 72.

(10) *Lakshmi Narain v. Ratni*, 27 Cr. L. J. 476=93 I. C. 700.

administration of justice, and this can only be done by giving to every citizen an assurance, that, so far as practicable, he will never be forced to undergo a trial by a Judge or Magistrate whom he has reasonable grounds of suspecting to be prejudiced against him(1). Nor will that duty be discharged if the High Court allow it to be supposed that their confidence in the impartiality of the subordinate court is insecure and easily shaken(2). The policy of law is to inspire confidence in the minds of the accused persons in the administration of justice and in the integrity of the Magistracy. The superior courts are expected to have due regard to the susceptibilities of the accused persons and if they are satisfied that there are reasonable grounds, that is, grounds which a reasonable person placed in the position of an accused person considers to be sufficient, for entertaining an apprehension that the accused will not have a fair and impartial trial in the court of a Magistrate then an order for transfer should be made(3). The law has regard not so much to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object is to clear away every thing which might engender suspicion and distrust of the tribunal(4). A criminal case may be transferred from one district to another if it is in the interest of ensuring confidence in good Government, which is the essence of all proper administration and which it is the duty of the High Court to maintain(5).

Impartiality of Judge.—Next to the importance of deciding a case fairly and impartially, is the importance of conducting oneself in such a manner as to inspire in the mind of the parties a confidence that nothing but absolute justice would be done to them; if by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it would be expedient for the ends of justice to transfer the case from his file to that of some other officer competent to try it, though there may not be any actual bias(6). Where a Magistrate offers a seat on the dais while he is hearing a case, to a gentleman whom the accused alleges is interested in the prosecution and also receives visits from the complainant during the hearing of the case and accepts a lift in the complainant's car and sits in it with the complainant's

(1) *Crown v. Muhammad Shah*, 9 Cr. L. J. 251=18 L. R. 8.

(2) *Abdullah Khan v. Emperor*, A. I. R. 1933 8, 17=26 S. L. R. 255=139 I. C. 791=33 Cr. L. J. 908.

(3) *Amar Nath v. Emperor*, 29 Cr. L. J. 295=107 I. C. 783=A. I. R. 1928 Lah. 460.

(4) *Per Taylor J. in Lolit Mohan v. Surja Kanta*, 28 C. 709 (718)=5 C. W. N. 749; *Legal Remembrancer v. Bhairab Chandra*, 25 C. 727; *Emperor v. Muhammad Akbar*, 47 A. 298=23 A. L. J. 133; *Sikhandar Lal v. Crown*, 118 I. C. 321=1928 L. 975=10 Lah. 778=30 Cr. L. J. 129; *Vellu Theras v. Emperor*, 10 Rang. 180=1932 Cr. C. 472 (473)=33 Cr. L. J. 550=137 I. C. 675=1932 Rang. 90.

7 Lah. L. J. 241.

(5) *Chandekar v. Emperor*, 83 I. C. 723=26 Cr. L. J. 163=7 N. L. J. 165=1024 N. 243.

(6) *Per Taylor J. in Lolit Mohan v. Surja Kanta*, 28 C. 709 (718)=5 C. W. N. 749; *Legal Remembrancer v. Bhairab Chandra*, 25 C. 727; *Emperor v. Muhammad Akbar*, 47 A. 298=23 A. L. J. 133; *Sikhandar Lal v. Crown*, 118 I. C. 321=1928 L. 975=10 Lah. 778=30 Cr. L. J. 129; *Vellu Theras v. Emperor*, 10 Rang. 180=1932 Cr. C. 472 (473)=33 Cr. L. J. 550=137 I. C. 675=1932 Rang. 90.

can be laid down under which transfers of criminal cases should be made, for the circumstances of one case would differ from those of another, but the general principle is that if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he will not receive fair dealing at his trial, the case should be transferred to a calmer atmosphere(1). The fact that the Magistrate trying a case appears to have been influenced by a private individual with regard to the disposal of the case, is a sufficient ground for directing that the case be transferred from the court of that Magistrate to some other court competent to try the same(2).

Duty of court not to create suspicion.—The trial of a case should be in an atmosphere which does not create even a suspicion that there has been or is likely to be an improper interference with the course of justice. It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly be seen to be done(3). The principle, to be followed in questions of transfer, is that it is not so much a matter of convenience nor of possible injustice which has to be considered, it is the apprehension in the minds of the accused person and incidentally the public which ought to be taken into account. It is of course most undesirable that there should be any feeling on the part of the accused persons, or of the general body of citizens, that any trial which may lead to a conviction should have been tainted with the slightest suspicion of unfairness(4).

Confidence in the administration of justice—Confidence in the administration of justice is an essential element in good government, and a reasonable apprehension of failure of justice in the mind of the accused should be taken into consideration on an application for transfer(5). It is of paramount importance that persons arraigned before the courts should have confidence in the impartiality of those courts, and if a person has a reasonable cause to apprehend that the court before whom he is being tried is not completely free from bias, a transfer should be directed(6). One of the most important duties of a High Court is to create and maintain confidence in the

(1) *Benode Behari v Emperor*, 81 I. C. 78=2 P. L. R. 69 Cr.=25 Cr. L. J. 590=5 Pat. L. T. 63

(2) *Awadh Singh v Puran Kandu*, 22 Cr. L. J. 726=64 I. C. 38=2 Pat. L. T. 198

(3) *Hari Krishen v. Emperor*, 111 I. C. 451=23 Cr. L. J. 867=29 P. L. R. 667=A. I. R. 1928 Lah. 757; *Sargeant v. Dale*, (1877) 2 Q. B. D. 538=46 L. J. Q. B. 781=37 L. T. 153, *R. v. Sussex Justices, ex parte McCarthy*, (1924) 1 K. B. 256=93 L. J. K. B. 129=180 I. T. 570=88 J. P. 3=22 L. G. R. 46=27 Cox. C. C. 590=68 S. J. 253=40 T. L. R. 80; *R. v. Essex Justices, ex parte Perkins*, (1927) 2 K. B. 475=96 L. J. K. B. 530=137 L. T. 455=28 Cox. C. C. 405=91 J. P. 94=43 T. L. R. 415; *Sardari Lal v. Crown*, 3 Lah. 443=71 I. C. 1006=A. I. R. 1923 Lah. 264=24

Cr. L. J. 286, *Amar Singh v. Sadhu Singh*, 6 Lah. 356=86 I. C. 709=2 Lah. Cas. 28=A. I. R. 1925 Lah. 361=26 Cr. L. J. 853=7 Lah. L. J. 241.

(4) *Emperor v. Pateewari Singh*, A. I. R. 1933 Rang. 9=1933 Cr. C. 179=147 I. C. 126.

(5) *Emperor v. Pateewari Singh*, 147 I. C. 126=25 Cr. L. J. 638.

transferred(1). In dealing with an application for the transfer of a criminal case, the court must see whether there is an apprehension in the mind of the applicant that he will not get justice from the court before whom the case is pending and whether that apprehension is reasonable. The court must try and place itself in the position of the applicant and look at the matter from his point of view(2). To decide what is reasonable, regard must be had to the degree of intelligence possessed and the standard of honesty and impartiality observed by the accused(3). Where sufficient grounds are made out for a transfer, the High Court is bound to act under this section. It is precluded from considering the possible effect which the transfer may have on the reputation or authority of the Magistrate concerned(4). Where good grounds are made out for a transfer, the application ought not to be refused merely because the case has reached an advanced stage or that the transfer might entail expenses and trouble(5).

Points to be considered.—On an application for transfer the court has to consider not merely the question whether there has been a real bias in the mind of the presiding Magistrate against the applicant for transfer but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate, nevertheless are such as are calculated to create in the mind of the person desiring the transfer a reasonable apprehension that a trial in that Magistrate's court may not be fair and impartial(6). An application by an accused person for a transfer of his case based on the allegation that he believes the Magistrate is not impartial, must be granted if it appears that that belief does in fact exist(7). Where there does exist a reasonable apprehension in the mind of the accused, a transfer of the case should be ordered, even when the circumstances are not such as would make the court doubt the possibility of a fair and impartial trial(8). The court must, however, be satisfied that such a reasonable apprehension exists and it can only be so satisfied from the circumstances of the case and from the conduct and behaviour of the accused

(1) *Mussadi Lal v. Emperor*, A I R. 1927 Lah. 700=101 I. C. 227=28 Cr. L. J. 787.

(2) *Pulin Behari v. Ashutosh*, 81 I. C. 560=33 C. L. J. 330=25 Cr. L. J. 944; *Kali Charan v. Emperor*, 83 C. 1183; *Gaijri Prusunno v. Empress*, 15 C. 455; *Kishori Gir v. Ram Narayan*, 8 C. W. N. 77; *Surat Lal v. Emperor*, 22 C. 211.

(3) *Machal v. Mathu*, 10 N. L. R. 15=22 I. C. 980=15 Cr. L. J. 196.

(4) *Narain v. Hovrah Municipality*, 10 C. W. N. 411=3 Cr. L. J. 379.

(5) *Sikandar Lal v. Crown*, 10 Lah. 778=30 Cr. L. J. 139=113 I. C. 321=1929 I. 975=Ind. Rul. (1929) Lah. 163=31 P. L. R. 87.

(6) *Gayacharan v. Kuntwar Bahadur*, 81 I. C. 58=9 O. & A. L. R. 368=

25 Cr. L. J. 570; *Amar Singh v. Sadhu Singh*, 6 Lah. 396=7 Lah. L. J. 241; *Farzand Ali v. Hanuman Prasad*, 19 A. 64=(1896) A. W. N. 77; *Dupeyron v. Driver*, 23 C. 495; *Ghulam Nabi v. Emperor*, 117 I. C. 377=1929 Lah. 429=30 Cr. L. J. 760.

(7) *Abdulla v. Bahram*, 22 N. L. R. 92=27 Cr. L. J. 835=95 I. C. 755.

(8) *Fasiuddin v. Emperor*, 30 Cr. L. J. 728=117 I. C. 213=A. I. R. 1929 Nag. 172=Ind. Rul. (1929) Nag. 197; *Machal v. Mathu*, 10 N. L. R. 15=15 Cr. L. J. 196=23 I. C. 980; *Abdullah v. Emperor*, 22 N. L. R. 97=95 I. C. 755=27 Cr. L. J. 835=1926 Nag. 448; *Dupeyn v. Driver*, 23 C. 495; *Farzand Ali v. Hanuman Prasad*, 19 A. 64; *Narain v. Hovrah Municipality*, 10 C. W. N. 441 at P. 444=3 Cr. L. J. 379.

brother, which creates much undesirable controversy in the district, it is to the advantage of every body that the hearing should be removed outside the district(1). Magistrates should not only preserve an outward appearance of impartiality, but should maintain the internal freedom from bias incumbent on Judicial Officers and if they allow their executive zeal to appear to outrun their Judicial discretion a transfer of the case is desirable not necessarily on the ground that the Judicial Officer is adjudged to be incapable of performing his duty, but simply to allay the reasonable apprehensions of an applicant for transfer(2). In transferring a case from one Magistrate to another, the High Court ought not to be guided by the impressions produced in its own mind as to the impartiality of the Magistrate, but must look to the effect likely to be produced in the minds of the parties and their witnesses by the selection of a Magistrate whose personal antecedents or circumstances have, however, unavoidably connected him with either one or the other(3).

Reasonableness of accused's apprehension.—The apprehension required to be established to justify a transfer under this section is not such apprehension as would appear reasonable to the applicant but such as would appear reasonable in the opinion of the court(4). The transfer of a criminal case should not necessarily be ordered simply because an accused person thinks that he would not get an impartial trial, but the real question

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against the accused(5). In order to make out a good case for the High Court to take action under this section, it is not sufficient for the accused to merely allege that he will not get a fair trial, but he must lay before the High Court the facts which give rise to this belief in his mind and if those facts are found such that they will reasonably give rise to this belief, a transfer ought to be made(6). Where the accused had a reasonable belief that they had by various acts of theirs incurred the displeasure of the District Magistrate and other local authorities and that they would not have a fair and impartial trial in that district and the belief was strengthened by the fact that the Superintendent of Police conferred with the District Magistrate with regard to their cases before the prosecutions were actually launched and there was the further circumstance that legal practitioners at the place evaded taking up the case of accused, it was held that the cases of the accused ought to be

(1) *Ganpat v. Koshalendra*, 19 O L J 644=3 O. W. N 215=27 Cr. L J. 498

(2) *Crown v. Muhammad Shah*, 9 Cr. L J 251=18 L R 8

(3) *In re Pandurang*, 25 B 179(163)

(4) *Wali Mohammad v. Crown*, 10 S L R 183=18 Cr. L J. 644=40 I. C. 202, *Emperor v. Jaggan*, 36 A. 239; *Narain v. Howrah Municipality*, 10 C. W. N 411=9 C. L J. 920=26 Cr. L J. 498

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Magistrate is actually prejudiced against them. All that is necessary for them to establish is that circumstances have arisen which have afforded a reasonable apprehension in their minds that they would not receive justice in his court; in other words, that the Magistrate has conducted himself in such a manner that there is a reasonable apprehension in their mind that he would not approach the case with an impartial mind. The apprehension must be such as a reasonable person placed in the situation in which the accused persons are placed would entertain(1). What has to be established to succeed in a transfer application is a belief in the mind of the accused person that his case will not be fairly tried(2). It is not sufficient for the accused to merely allege that he will not get a fair trial, but he must lay before the High Court the facts which give rise to this belief in his mind and if those facts are found such that they will reasonably give rise to this belief, a transfer ought to be made(3).

Instances of reasonable apprehension : *extra judicial functions*

—A Magistrate in the discharge of multifarious duties of his office, has to perform a very large number of extra judicial functions and in the discharge of his executive duties, he may be compelled to act in a way which would raise a suspicion in the mind of an accused person that he is not likely to get justice when the Magistrate came to inquire into a particular matter judicially. In such a case it is advisable that the judicial trial should be held by another Magistrate(4).

Undue familiarity with one of the parties.—All Judicial Officers should deal at arms length with persons engaged or interested in cases pending before them and should so conduct themselves as not to allow an impression to be created that they are on terms of undue familiarity with one of them(5). In this case the Magistrate gave his visiting card to accused to arrange an interview with the landlord of the complainant who was interested in the prosecution and it was held that the act of the Magistrate was calculated not only to lower his own prestige and dignity in the eyes of the litigants but also to create an apprehension in the minds of the accused that his relations with the

(1) *Sahib Ram v. Emperor*, 127 I.C. 150=31 Cr. L.J. 1172=A.I. R. 1930 Lah.

I. C. 38=27 Cr. L. J. 1062.

(3) *Sant Bakhsh v. Emperor*, 10 O. C. 165; *Amar Singh v. Sadhu Singh*, 1925 I. 361=6 Lah. 396=66 I. C. 709=26 Cr. L. J. 853; *Syed Raza v. Emperor*, 7 A. I. Cr. R. 149. Where the accused honestly entertains an apprehension, the case should be transferred. *Abdul Hakim v. Emperor*, 6 R. P. 187=34 Cr. L. J. 1025=A. I. B. 1933 Pat. 597=145 I. C. 524.

Kali, 28 O. 291; *Kali Churn v. Emperor*, 33 O. 1183; *In re Pandurang*, 25 B. 179; *Rang Bahadur v. Kariman*, 2 Pat. L. T. 297; *Amar Singh v. Sadhu Singh*, 6 Lah. 396; *Faqir Singh v. Crown*, 10 Lah. 223; *Sikandar Lal v. Crown*, 10 Lah. 778.

(2) *Mahraj Singh v. Emperor*, 97

(4) *Mohammad Yunis v. Gulab*, 74 I. C. 715=9 O. and A. L. R. 448=1923 O. 172=24 Cr. L. J. 811.

(5) *Muzaffar Khan v. Ahmed Khan*, A. I. R. 1934 Lah. 541=35 P. L. R. 478=1934 Cr. C. 820=152 I. C. 896=26 Cr. L. J. 193

as well as the accused's character and mental status(1). Where any doubt can be shown as regards the personal impartiality of the presiding Judge of the court, a transfer should immediately be granted; but where no such personal grounds can be shown a transfer should only be granted when the Magistrate has shown by his acts or orders that there is a possibility that he may be prejudiced against the accused or, at any rate, that the accused might have a reasonable apprehension that he is so prejudiced(2). The fact that he makes a decision against the accused is not sufficient to warrant any apprehension of impartiality, if the order is passed in good faith and the reasons for the order are duly stated(3). What is reasonable apprehension should be decided according to the incidents of the case and in reference to the special circumstances. It is difficult to lay down any hard and fast rule under which a transfer should be made, for the circumstances in one case might differ from those of the other(4). Although each of circumstances alleged may not be by itself sufficient to show that there was a bias on the part of the Magistrate, a transfer would nevertheless be justified, where having regard to all the circumstances taken together the accused might have

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in the mind of the accused by the remarks and conduct of the Magistrate that determines the question of transfer of a case(6). In a case for transfer the matter is not to be decided in the abstract whether a certain Magistrate would deal with a matter impartially or not. The question always would be whether through some error or unfortunate accident the Magistrate has behaved in a way to give legitimate ground for fear to one party or the other(7). It is not every kind of apprehension that will entitle an accused person to get a transfer of the case; the apprehension of the accused must be shown to be reasonable(8). The important point to be considered is the impression which is then created in the mind of the accused. If a reasonable apprehension is created in his mind regarding the fair and impartial trial, the application must be allowed(9).

What should be proved.—On an application for transfer of a case it is not necessary for the petitioners to establish that the

(1) *Emperor v. Bhabu Lal*, 30 Cr. L. J. 795.

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(6) *Sikandar Lal v. Emperor*, 30 Cr. L. J. 129=113 I. C. 321=10 Lah. 778=31 P. L. R. 67=1923 Lah. 975

(7) *Ghaisoo v. Emperor*, 123 I. C. 685=31 Cr. L. J. 555=23 A. L. J. 606=A. I. R. 1930 A. 737=Ind. Rul. (1930) A. 413.

(8) *Rekha v. Emperor*, 1 Pat. L. T. 494=56 I. C. 664; *Pulin Behari v. Asutosh*, 39 C. L. J. 330=25 Cr. L. J. 944=81 I. C. 560=A. I. R. 1924 C. 931;

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(4) *Kali Charan v. Emperor*, 33 C. L. J. 1183; *Benode Behari v. Emperor*, 5 Pat. L. T. 63=25 Cr. L. J. 590=81 I. C. 78; *Rajani Kanta v. Emperor*, 36 C. L. J. 904; *Rekha v. Emperor*, 1 Pat. L. T. 494=56 I. C. 664=21 Cr. L. J. 504.

(5) *Nityanind v. Emperor*, 2 Cr. L. J. 339=90 C. W. N. 619; *Titu v. Emperor*, 1 Pat. L. T. 652=57 I. C. 454=1940 Pat. 283=21 Cr. L. J. 600; *Din Dayal v. Emperor*, 1 Pat. L. T. 522=59 I. C.

Attitude favourable to one party.—Where a Magistrate during the course of the trial received a letter from the witness for the defence, which was calculated to create an apprehension in the mind of the petitioner that the witness was a friend of the Magistrate; where the witnesses for the petitioner were treated in a manner different from that in which the witnesses of the opposite party were treated; and where the Magistrate while complying with the prayer for postponement as the petitioner wanted to move for transfer to another court, passed an illegal order imposing condition when he had no discretion but to postpone, it was held that a strong ground was made out for transfer(1). Where a Magistrate or his officials allow the judicial record of a pending case to be removed from the court and handed over to a person, who is to be examined as a witness in the case, such course is highly improper and such as would raise a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial in that court(2).

Magistrate himself conducting examination of witnesses.—Where a Magistrate does not permit the complainant or his pleader to examine his witnesses but proceeds to examine them himself, the procedure adopted by him is one that is likely to raise a reasonable apprehension in the mind of the complainant that he will not obtain a fair trial in his court and constitutes a sufficient ground for transfer of the case to some other court(3). Where a Magistrate asked the Public Prosecutor to frame the questions and the latter gave to the Magistrate a typed paper containing the suggested questions and the Magistrate conducted the examination on those questions, it was held that the procedure adopted by the Magistrate was illegal and likely to raise a reasonable fear in the mind of the accused that he would not get a fair trial and there was sufficient ground for transferring the case(4).

Exhibiting haste in trial.—Where an accused person was served with a summons only three hours before the time fixed for his appearance, his application for adjournment on the ground that he had no sufficient time to get copies and that his leading counsel was absent was rejected, and an application for stay in view of an application for transfer was also rejected, the first prosecution witness who gave evidence against the prosecution was ordered to be prosecuted for perjury and the case was adjourned when the second prosecution witness did not give evidence in favour of the prosecution even though other prosecution witnesses were ready to be examined, it was held that the circumstances were such as to create in the mind of the accused a justifiable apprehension that he would not have an impartial trial and that the case should be transferred(5). Where a Magistrate exhibits haste

(1) *Dayawanti v. Dilanand*, 30 P. L. R. 657=30 Cr. L. J. 1048=119 I. C. 327=A I. R. 1929 Lah. 702=Ind. Rul. (1929) Lah. 871.

(2) *Brahmu Dutt v. Emperor*, A. I. R. 1932 Lah. 294=136 I. C. 9=33 Cr. L. J. 223=33 P. L. R. 439=1032 Cr. O. 442.

(3) *Janki v. Shoo Narain*, 82 I. C. 154=10 O. and A. L. R. 342=11 O. L. J. 333=25 Cr. L. J. 1226=1924 O. 371.

(4) *Faqir Singh v. Emperor*, 123 I. C. 570=A I. R. 1930 Lah. 166=Ind. Rul. 1930 Lah. 474=31 Cr. L. J. 560.

(5) *Charanji Lal v. Crown*, 9 Lah. 637=29 Cr. L. J. 615=111 I. C. 819=A. I. R. 1928 Lah. 1.

person whom they rightly or wrongly believed to be at the bottom of the prosecution were such that they could not have a fair and impartial trial. A Magistrate's accepting hospitality of the complainant's son is a circumstance which would naturally raise a reasonable apprehension in the mind of the accused that he would not have a fair trial though the Magistrate may have been quite ignorant of the fact that his host was the son of the complainant(1). See also notes above under the head "Impartiality of Judge".

Hostility of Magistrate towards party.—Where adjournments are repeatedly made by a trying court to bring pressure on the accused person to produce his absconding co-accused persons, the accused must be held to have had reasonable apprehensions in their mind that their case would not be tried in that calm and judicial atmosphere and with that detachment which every accused person is entitled to in a court of justice(2). Where further proceedings having been stayed by order of the High Court, one of the two complainants appeared before the Magistrate on the date fixed for hearing and apprised him of that order, but the Magistrate instead of staying the proceedings issued a warrant for the arrest of the complainant who had not appeared, it was held that there was no justification for the action of the Magistrate and that the Magistrate's attitude towards the complainants being clearly hostile there was good ground for transferring the case from his court to the court of some other Magistrate(3). Where a Magistrate did not adopt the directions given to him by the Sessions Judge as to how the trial should proceed, ignored an application made by the accused under this section for stay of proceedings and summarily expunged certain passages from the written statement of the accused, which could not and ought not to have been struck off, it was held that the incidents were sufficient to raise a reasonable apprehension in the mind of the accused that he would not have a fair trial and there was sufficient ground for transfer(4). Where the Magistrate while recording evidence does not mention the important fact in the accused's favour that the prosecution witness who identified the accused at first pointed out a different man, the omission is gravely reprehensible, which would give rise to a very reasonable apprehension in the mind of the accused that his trial would not be conducted fairly, and is a sufficient ground for transfer of the case from that Magistrate's court to another(5). Where the Magistrate refused to give facilities to the accused to prosecute his civil suit connected with the same facts on which the prosecution was based, and the record was necessarily sent for and detained by the Magistrate so as to delay the decision in the civil suit, this was held to be a good ground for apprehension that the accused would not get fair trial from the Magistrate(6).

(1) *Narain Singh v. Emperor*, 91 I. O. 133=27 Cr. L. J. 565=A. I. R. 1926 L. 847.

(2) *Fakir Muhammad v. Emperor*, A.I.R. 1930 Lah 553=1930 Cr. O. 1049=129 I. O. 485.

(3) *Fazal Ahmad v. Abdulla*, 27 Cr. L. J. 101=91 I. O. 536=7 Lah. L. J. 571=26 P. L. R. 701=A. I. R. 1926 Lah. 151.

(4) *Ram Piar v. Emperor*, 123 I. O. 543=A. I. R. 1930 Lah. 882=32 Cr. L. J. 146=1930 Cr. O. 978.

(5) *Rabindra Nath v. Emperor*, 81 I. O. 441=26 Cr. L. J. 297.

(6) *Faqir Singh v. Crown*, 10 Lah. 223=29 Cr. L. J. 769 (770)=110 I. O. 801=11 A. I. Cr. R. 1=A. I. R. 1929 Lah. 392=30 P. L. R. 385.

magistrate issued warrants in the first instance and then exacted heavy bail from the accused persons it was held that the accused were justified in apprehending that they would not have a fair trial before the Magistrate(1). Where the trying Magistrate at first granted bail but afterwards cancelled it under the order or influence of the District Magistrate, it was held that the action of both the Magistrates was wholly unjustified, and was certainly calculated to raise a reasonable apprehension in the mind of the accused(2). The same view was taken in another case where the trying Magistrate on hearing a bail application announced that personally he was inclined to grant bail but before passing orders he would like to consult the Magistrate, and then actually consulted the latter on the telephone and according to his advice rejected the application(3). Where after the application of the accused for adjournment of the case to enable them to move the High Court for transfer the Magistrate raised the amount of the bail of some of the accused from Rs. 100 to Rs. 250, and cancelled the bail bonds of others it was held that the action of the Magistrate might be absolutely *bona-fide*, but it was sufficient to create a reasonable apprehension in the minds of the accused that they would not have a fair trial before him(4). It was so also where the Magistrate refused bail to some of the accused persons after the High Court had granted bail to those who had applied for bail to that court(5). Where a Magistrate refused to accept bail and to feel reasonable

Pressing a party to compromise the case.—It is highly improper on the part of a Magistrate to send for a party to a case pending in his court to his house and then to press upon him the desirability of a compromise. Such a course is likely to raise a reasonable apprehension in the mind of the party concerned that the Magistrate is showing favour to the other side and constitutes a sufficient ground for transferring the case from his court(7). A communication by the pleader to the accused that the Magistrate had told him that he would convict the accused unless he compromised a certain civil suit with the complainant coupled with the circumstance that bailable warrants had been issued against him in the first instance even though it was a summons case is quite sufficient to deprive the accused of all confidence in the impartiality of the Magistrate and to entitle him to a transfer of the case(8).

(1) *Girish Chandra v. Chandra-moni*, 8 C. W. N. 589

(2) *Vellu Thevan v. Emperor*, 10 Rang. 180=1932 Rang. 90=197 I. O. 675=1932 Cr. C. 472=33 Cr. L. J. 550.

(3) *Cheranjee Lal v. Crown*, 9 Lah. 537=29 Cr. L. J. 815=111 I. O. 319=1928 Lah. 1.

(4) *Tittu v. Emperor*, 1 Pat. L. T. 652=21 Cr. L. J. 630=(1920) Pat. 283=57 I. C. 454; see also *Takaya Ram v. Crown*, 32 P. L. R. 96=1930 Cr. C. 1051 (1055); *Durga Das v. Emperor*, A. I. R. 1933 Lah. 914=145 I. O. 173=

34 Cr. L. J. 900=1933 Cr. Cas 1375.

(5) *Mohan Das v. Crown*, 27 Cr. L. J. 1333 (1935)=20 S. L. R. 171=28 I. O. 405=1927 Sind 98.

(6) *Natha Singh v. Emperor*, A. I. R. 1932 Lah. 440=33 P. L. R. 416=1932 Cr. Cas 519=34 Cr. L. J. 69=141 I. O. 43.

(7) *Rahim Baksh v. Dula*, 32 P. L. R. 358=1931 Cr. O. 96; *Gaya Charan v. Kunicar Bahadur*, 25 Cr. L. J. 570=A. I. R. 1925 O. 173=61 I. C. 58

(8) *Meqah Raj v. Baz Khan*, 105 I. O. 812=9 A. I. R. 129=28 Cr. L. J. 928=1 L. T. 40 Lah. 27=A. I. R.

in recording the statement of an accused person before all the evidence for the prosecution is concluded, this fact may create an apprehension in the mind of the accused that he will not get a fair trial, and entitles him to a transfer of the case(1).

Commencing trial on holiday.—It is highly objectionable on the part of the Magistrate to commence the trial on a gazetted public holiday and to examine all the prosecution witnesses on that very day. And when he does so in compliance with the request of a Police Officer, it is sufficient to create an impression in the mind of the accused that they will not have a fair trial at his hands and it is a fair ground for transfer(2).

Cross-examining witness and accused and stopping cross-examination.—Where a Magistrate cross-examines a prosecution witness at great length after he has been cross-examined by the defence, on the questions suggested by the Public Prosecutor, an apprehension in the mind of the accused that the Magistrate is taking the side of the prosecution is quite reasonable, and the case may be transferred from his court(3). An examination of the accused by the Magistrate under section 342 amounting practically to a lengthy cross examination by a series of searching questions is injudicious, and may raise an apprehension in the mind of the accused about the fairness of the trial and is a valid ground for transfer(4). Where the trying Magistrate stopped the cross examination of the complainant in a case because in his view the complainant had been fully cross examined for one hour, it was held that the Magistrate was guilty of an act of indiscretion which could reasonably lead the accused to believe that they would not get a fair trial at his hands(5).

Demanding excessive bail, increasing bail or cancelling bail bond.—Where a Magistrate in a proceeding under s. 107, Cr. P. C., demanded a very heavy amount of security for granting bail and the conduct of the Magistrate during the trial was characterised by vindictiveness and a desire to harass the accused and the only reason for the attitude of the Magistrate was that the accused was an active member of the Indian National Congress, it was held that there was a clear case for transferring the case to another Magistrate(6). Where during the police investigation a reasonable request of the accused to examine their papers which had been seized by the police was refused and the trying Magistrate demanded a very excessive bail, though the amounts involved were small, it was held that there was sufficient reason to create an apprehension in the mind of the accused that they would not get a fair trial and the case was a fit one for being transferred to another district(7). Where in a case of an alleged petty theft the

(1) *Abdul Rab v. Azmat Ali*, 18 A. L. J. 1145=59 I. C. 376=22 Cr. L. J. 69.

(2) *Ram Dyal v. Emperor*, A. I. R. 1928 Lah. 334=107 I. C. 779=10 A. I. Cr. R. 22=29 Cr. L. J. 291.

(3) *Hafizulla v. Emperor*, 121 I. C. 683=A. I. R. 1930 Lah. 173=31 Cr. L. J. 736=Ind. Rul. 1930 Lah 500=1930 Cr. C. 181.

(4) *Fagir Singh v. Crown*, 10 Lah. 223=29 Cr. L. J. 769(770)=110 I. C. 801=

11 A. I. Cr. R. 1=A. I. R. 1929 Lah. 382.

(5) *Yusuf v. Buni Lal*, 20 Cr. L. J. 559=51 I. C. 817; see *Abdul Aziz v. Ganesh Prasad*, A. I. R. 1925 O. 52=82 I. C. 49=25 Cr. L. J. 1185.

(6) *Chetanand v. Gurbaksh Singh*, 125 I. C. 615=A. I. R. 1930 Lah. 663=31 Cr. L. J. 980.

(7) *Dina Nath v. Emperor*, 122 I. C. 631=A. I. R. 1929 Lah. 873=31 Cr. L. J. 532=Ind. Rul. (1930) Lah. 451.

district, then the accused are entitled to have a transfer of their case to another district(1). The fact that an accused person is unable, owing to the influence of persons interested in the prosecution, to secure the services of a competent member of the local bar for his defence is a sufficient ground for transfer of the case to some other district(2). A preventive proceeding like one under s. 107 or s. 110, Cr. P. C., should not be transferred from one district to another except in extremely exceptional cases(3), as where it is instituted on the information of the District Magistrate who is more or less convinced of the accused's guilt and who is taking keen personal interest in the matter(4).

Conduct unfair to accused.—Where the Magistrate's conduct though not biased on behalf of the prosecution, has nevertheless been at times unfair to the accused for the ends of justice, a transfer of the case is expedient(5). Where the procedure adopted is such as to justify a reasonable apprehension in the mind of the accused persons that they would not have a fair and impartial trial and is calculated to indicate that both parties are not being treated with equal fairness, there is a sufficient ground for transferring the case(6). The fact that a complaint is sent to a particular Magistrate for trial at the request of the complainant is sufficient to raise an apprehension in the mind of the accused that he will not get a fair trial in that Magistrate's court and to justify the transfer of the case to some other court(7). Where the Magistrate refused to grant a copy under s. 162, Cr. P. Code, on the ground that no contradiction has been established and sent the papers to the police again so as to deprive the accused of his right under s. 191, Cr. P. Code, it was held that there was sufficient ground for transferring the case(8). Use of strong language by a court is never calculated to satisfy the litigant public before it(9). Where the Magistrate makes inordinate delay in examining the complainant or awaits the consideration of the evidence in another case with which the accused had no concern, in order to decide whether any action should be taken upon the complaint, these may give rise to a reasonable apprehension that a fair trial cannot be had, and the case should be transferred(10).

(1) *Roshan Lal v. Crown*, 31 P. L. R. 694=A. I. R. 1930 Lah. 951=129 I. O. 684=1930 Cr. O. 1050; *Kishan Singh v. Crown*, 30 P. R. 1917 Cr.=18 Cr. L. J. 881=41 I. O. 993=44 P. W. R. 1917 Cr.; *Gurdit Singh v. Crown*, 28 P. L. R. 211=1927 Lah. 271.

(2) *Talwar v. Zaildar*, 30 P. L. R. 1917 Cr. O. 1050; *Singh*, 16 A. 9; *Emperor v. Mahindra Singh*, 30 A. 47; *In re Gudar Singh*, 19 A. 291; *Chandi Prashad v. Emperor*, 17 C. W. N. 538.

(4) *Wahid Ali v. Emperor*, 6 I. C. 874=11 Cr. L. J. 412=7 A. L. J. 813.

(6) *Krishna v. Emperor*, A. I. R.

1933 Nag. 269=16 N. L. J. 158=1933 Cr. C. 1003=146 I. C. 149=34 Cr. L. J. 1172.

(6) *Hari Chand v. Emperor*, A. I. R. 1931 Lah. 59=129 I. C. 193=32 Cr. L. J. 258=1931 Cr. C. 129.

(7) *Gharsi Mal v. Debi Sahai*, 81 I. C. 637=25 Cr. L. J. 999.

(8) *Nek Ram v. Emperor*, 32 Cr. L. J. 370=129 I. C. 267=131 Cr. C. 337=A. I. R. 1931 A. 273; see also *Ghulam Nabi v. Emperor*, A. I. R. 1929 Lah. 429=117 I. C. 377=30 Cr. L. J. 760.

Issuing warrant against pardanashin lady.—A transfer of the case is desirable where the Magistrate issues a warrant in the first instance against a *pardanashin* lady(1) and refuses to dispense with the personal attendance of a *pardanashin* lady belonging to a respectable family and insists on her appearance in court(2).

Existence in the district of an atmosphere prejudicial to the accused.—Where it was alleged on behalf of the accused that there existed an atmosphere prejudicial to the accused in the district and on that account he could not expect a fair and impartial trial and it appeared that those allegations were not unfounded, the High Court transferred the case to another district(3). This decision is based on two earlier cases(4) of the same court in which the cases were transferred from one district to another under somewhat similar circumstances. Where the District Magistrate refused to grant an interview to and cancelled the arms license of a person who was under trial for various offences before the joint Magistrate, it was held these were sufficient reasons for transferring the cases against him out of the district, there being also grounds for granting a transfer from the court of the joint Magistrate(5). A transfer to an other district was considered expedient where the complainant made a verbal statement in chambers before the District Magistrate who at once arrested the accused before making any inquiry, and there was a likelihood of the Magistrates of the district figuring as witnesses in the case(6); as also where a complaint of murder had been preferred against the accused before the Sub Divisional Magistrate, and during the pendency of the complaint, the District Magistrate made an observation in the presence of all the Magistrates including the Sub-Divisional Magistrate that the accused was innocent and that baseless charges had been imputed from malicious motives(7); as also where the District Magistrate in making over a case for disposal to another Magistrate made the remark that the case was quite clear and that the defence was ridiculous(8). A case should be tried in a calm and quiet atmosphere, where all proper and legitimate facilities can be provided, both to the prosecution and the defence. If certain events have taken place which raise a reasonable apprehension in the minds of the accused that they are not likely to have a fair and impartial trial in a certain

1928 Lah. 75.

(1) *Hari Kishen v. Polo Ram*, 27 P. L. R. 604=28 Cr. L. J. 225=99 I. C. 1025=A. I. R. 1927 Lah. 16.

(2) *Raj Rajeshwari v. Emperor*, 17 O. W. N. 1248=15 Cr. L. J. 281=23 I. C. 489.

(3) *Amrit Lal v. Emperor*, 134 I. C. 519=32 Cr. L. J. 1188=1931 Cr. C. 780=32 P. L. R. 471=A. I. R. 1931 Lah. 540. To the same effect, see *Anant v. Emperor*, 1924 Nag. 243=7 N. L. J. 155=26 Cr. L. J. 163=83 I. C. 723.

(4) *Sardari Lal v. Crown*, 3 Lah. 413=71 I. C. 1006=A. I. R. 1923 Lah. 264=24 Cr. L. J. 286; *Jai Parkash v. Emperor*, Criminal Miscellaneous No. 202 of 1930, decided on 28th November,

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(5) *Emperor v. Rani Kishan*, 35 A. 5=17 I. C. 567=10 A. L. J. 357=13 Cr. L. J. 823.

(6) *Din Dagal v. Emperor*, 1 Pat. L. T. 522=21 Cr. L. J. 795=58 I. C. 523. See also *Bhola Nath v. Mrs. Vasheshwar Nath*, 106 I. C. 99=A. I. R. 1927 A. 708=28 Cr. L. J. 1011: Where a number of officials in the district were personally concerned in the case, whether as witnesses or otherwise.

(7) *Rup Narain v. Abdul Hamid*, 11 O. L. J. 657=25 Cr. L. J. 1374=81 I. C. 766.

(8) *Muhammad Yakub v. Emperor*, 90 I. C. 809=26 Cr. L. J. 1525=2 O. W. N. 688=A. I. R. 1925 O. 690.

evidence of a witness for the prosecution, the Magistrate made a note to the effect that the witness faltered and it appeared from his demeanour that he had not told the truth and the complainant moved the High Court for a transfer of the case, it was thought desirable that the case should be transferred to some other Magistrate(1). Where in framing charges against the accused the Magistrate uses the expression, "*Jurm sabit hai*" (the offence is established), it is sufficient to entitle the accused to get the case transferred to some other Magistrate(2). It is so also where a Magistrate, in recording the examination of the accused under section 364, adds a note which amounts to an expression of opinion that he has already made up his mind as to the value of the defence(3). Expression of an adverse opinion by a Magistrate after the entire evidence has been recorded and the case argued by the parties, does not entitle a party to a transfer of the case(4). Where a Magistrate refused to admit to bail a person against whom proceedings were pending under section 110 of the Code on the ground that "the accused is said to be dangerous and violent man, who might use this liberty for the purpose of intimidating witnesses," the High Court declined to direct a transfer of the proceedings(5).

Case remanded by appellate court for retrial need not necessarily be transferred to another Magistrate.—It is not a general rule that when a case is remanded by the appellate court for retrial it should always be sent to a different Magistrate to the one who held the trial originally merely on the ground that the former Magistrate having already expressed an opinion against the accused when convicting him the latter has a reasonable apprehension that he will not have a fair trial in the court of that Magistrate(6), though there is authority to the contrary also(7).

Expression of opinion by Magistrate in another case.—The fact that a Magistrate has expressed in another criminal case a distinct opinion about the guilt of the accused is a reasonable ground for the apprehension that he may not have a fair and impartial trial before the Magistrate and is, therefore, a good ground for transferring the case from his file(8). But the mere fact that a Magistrate has in a previous case, expressed an opinion adverse to the accused is not *ipso facto* a sufficient ground for transfer(9). The fact that a court before which there are pending two cross-cases of riot has on the trial of the first

(1) *Golam Bari v. Yar Ali*, 29 C. W. N. 316=86 I. C. 708=A. I. R. (1925) C. 460=26 Cr. L. J. 852.

(2) *Siri Kishen v. Gokal Chand*, 65 I. C. 632=23 Cr. L. J. 168.

(3) *Faqir Singh v. Crown*, 10 Lah. 223=29 Cr. L. J. 769=110 I. C. 801=11 A. I. Cr. R. 1=A. I. R. 1929 Lah. 382=30 P. L. R. 385.

(4) *Tel. Chand v. Emperor*, 108 I. C. 608=10 A. I. Cr. R. 144=29 Cr. L. J. 429.

(5) *In re Muthu Khan*, 27 A. 172.

(6) *Mohammad Saifi v. Emperor*, 28 Cr. L. J. 617=103 I. C. 103=A. I. R.

1927 Lah. 546.

(7) *Bali Ram v. Sitaram*, 30 C. W. N. 1002=97 I. C. 918=27 Cr. L. J. 1188=A. I. R. 1926 C. 1173.

(8) *Wishuanath v. Emperor*, 27 Cr. L. J. 210=1926 Nag. 98=92 I. C. 162=5 A. I. Cr. R. 615.

(9) *Daya Ram v. Emperor*, 109 I. C. 605=A. I. R. 1928 Nag. 217; *Asimaddi v. Govinda Baiyya*, 1 C. W. N. 426; *Emperor v. Hargobind*, 33 A. 583=12 I. C. 652=12 Cr. L. J. 664; *Rajani Kanta v. Emperor*, 36 C. 904; *Jang Bahadur v. Emperor*, 11 O. L. J. 54=25 Cr. L. J. 433.

Where in a proceeding under section 107, the persons against whom the proceeding was taken were appointed special constables, it might raise a reasonable apprehension that they would not have a fair and impartial trial, and a transfer ought to be allowed(1).

Expression of opinion or remarks.—A Magistrate who has formed an opinion about a case and has expressed his opinion before hearing the evidence in the case ought not to be allowed to try it(2). An expression of opinion by the trying Magistrate on the merits of the case prejudicial to the accused even in his executive capacity is a good ground for transfer(3). But the mere fact that a Magistrate, in whose court a case is pending trial, is in his executive capacity subordinate to the District Magistrate who has taken a strong view with regard to the merits of the case, is by itself not a sufficient ground for transferring the case under this section, to some other Magistrate outside the District(4). It is different, however, where a case is sent to a Magistrate for disposal with a remark by the District Magistrate that it is quite a clear case and the defence is ridiculous(5). But the mere fact that a District Magistrate has come to the conclusion that there is a *prima facie* case against an accused person which ought to be inquired into by a criminal court is no ground for transfer of the case from the district unless it is shown that the District Magistrate is attempting to influence the result of the case directly, or indirectly(6). The parties are entitled to claim that the Magistrate shall not pre-judge their cases or form an opinion about the respective merits of their cases or about the depositions of their witnesses till they have been fully and finally presented to the Magistrate by Counsel, if any, in their concluding arguments and after the entire evidence has been recorded. Any opinion formed and expressed by the Magistrate at an early stage of the case is bound to be prejudicial to the party concerned(7). Where the trying Magistrate made adverse and unfavourable remarks during the examination of the prosecution witnesses, it was held that there was sufficient ground for transfer of the case(8). Where in recording the

(1) *Kulsum v Umatul*, 4 Cr L. J. 456=11 C. W. N. 121; *Gopi Nath v. Empress*, 10 C. W. N. 82=3 Cr. L. J. 169.

=27 Cr. L. J. 802=95 I. C. 466=1926 Sind 253; *Sita Nath v. Emperor*, 8 C. W. N. 641, *Badan Singh v. Crown*, 5 Lah. L. J. 520=1924 Lah. 257.

(2) *M. v. D. M. v. D. M.*

(643), *Sartaj Singh v. Emperor*, 22 A. L. J. 430=83 I. C. 699=A. I. R. 1924 All. 533=16 Cr. L. J. 159, *Grish Chander v. Empress*, 20 C. 857, *In re Wilson*, 18 C. 247, *Alexander v. Cen-nor*, 20 C. W. N. 698=17 Cr. L. J. 193=34 I. C. 305; *Rang Bahadur v. Kar-man*, 2 Pat. L. T. 297=63 I. C. 868, *In re Virji*, 6 Bom. L. R. 856, *Rehman v. Crown*, 78 P. L. R. 1916, *Motumal v. Muhammad Ramean*, 19 S. L. R. 117

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(7) *Sikandar Lal v. Emperor*, 30 Cr. L. J. 129=113 I. C. 321=A. I. R. 1928 Lah. 975=Ind. Rul. (1929) Lah. 163=10 Lah. 778=31 P. L. R. 87.
(8) *Sheedhori v. Jhingur*, 7 Pat. L. T. 49=88 I. C. 194=26 Cr. L. J. 1242=A. I. R. 1925 Pat. 818.

side to say anything to him which might prejudice his mind one way or the other(1). But where a Magistrate makes a personal inquiry in a case out of court without notice to the parties and as a result summons certain witnesses, his action is improper and not in accordance with law, and disqualifies him from trying the case(2). Where a trying Magistrate goes for inquiry to the spot, where the alleged criminal offence is alleged to have taken place, without informing the accused or their pleaders, and makes the inquiry in the absence of the accused or their pleaders, the case ought to be transferred to some other Magistrate(3). Where the prosecution of the applicant was ordered by the Cantonment Magistrate after inspection of the building alleged to be constructed in contravention of the Cantonment Rules in his capacity as Secretary to the Cantonment Committee, it would be more advisable if the case were tried by another court(4).

Plea that applicant wishes to summon the trying Magistrate as a witness.—In an application for the transfer to another court of a criminal case pending against them the applicants alleged that the evidence of the trying Magistrate would be required by the accused touching certain matters connected with the case and the Magistrate swore an affidavit that he was not competent to give any evidence on any relevant or material fact, yet the application for transfer was allowed(5). But in some cases it has been held that in applying for the transfer of a case on the ground that the Magistrate before whom it is pending is a witness for the defence, the accused must satisfy the High Court that the Magistrate will be a necessary and essential witness for the defence(6). The fact that the District Magistrate is cited as a witness for the prosecution in a trial before another Magistrate in the district is no ground for supposing that the accused will be prejudiced in his trial, so as to justify the transfer of the case (7).

Magistrate having outside knowledge of proceedings.—A Judge or Magistrate having outside knowledge in respect of matters which form the subject-matter of the proceedings before him and having such knowledge from outside the court before the actual hearing of these proceedings commences is in a position of embarrassment in dealing with the case, and it would not be right to allow the case to remain in his file(8). A Magistrate who initiates proceedings under s. 110, and has proceeded in some measure, if not mainly on his own knowledge of the character of the accused is not the proper person to proceed with the trial and inquire into the truth of the information upon which the action has been taken(9). But in one case it has been held

(1) *In re Lalji*, 19 A. 302=(1897) A. W. N. 52.

(2) *Pakir Muhammad v. Emperor*, 97 I. C. 60=27 Cr. L. J. 1034=4 Rang. 196=1926 R. 180.

(3) *Faqirey Lal v. Emperor*, 60 L. J. 680=21 Cr. L. J. 166=24 I. C. 771; *Aliar Rai v. Emperor*, 39 C. 475; *Karban Ullah v. Azmat Mahai*, 12 C. W. N. 748=7 Cr. L. J. 510.

(4) *Hira Lal v. Emperor*, A. I. R. (1922) A. 528=71 C. 256=20 A. L. J. 911

(5) *Emperor v. Abdul Latif*, 26 A. 536=(1904) A. W. N. 94=1 Cr. L. J. 338.

(6) *Srilal v. Emperor*, 45 I. C. 680=19 Cr. L. J. 632; *Nabibux v. Crown*, 8 S. L. B. 170.

(7) *Ishwar Das v. Emperor*, 92 I. C. 856=27 Cr. L. J. 344=A. I. R. 1926 Oudh. 290.

(8) *Satinrda Nath v. Emperor*, A. I. R. 1929 C. 809=1929 Cr. C. 597.

(9) *Alimuddin v. Emperor*, 29 C. 392=6 C. W. N. 595; *Lohit Mohan v.*

case, expressed opinions to some extent unfavourable to the accused in the second case, is no good ground for holding that the court is incompetent to try the second case(1). It is not a sufficient ground for the transfer of a criminal case that the Judge, in a former proceeding arising out of a counter-case, expressed certain views upon the evidence as to which of two versions was correct. Judges must be presumed to be upright men, who will approach a case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case(2). Where, however, the Magistrate has, in a counter-case brought by the accused on the same facts, prejudged the guilt of the accused, the High Court will, in the interest of justice, transfer the case against the accused to some other court(3). The fact that a Magistrate has discharged one case is not *per se* a sufficient ground for transferring from his court a cross-case between the same parties; but the matter stands on a different footing if he has heard the evidence in both cases and discharged one case on the evidence that he heard in both(4). A transfer should, however, be directed when the Magistrate before whom the trial is being held has in another case expressed himself in rather strong language against the accused(5). But the observations alleged to be made by the Magistrate in another case, which are derogatory of the complainant, cannot be held to indicate that the complainant will not have a perfectly fair trial in deciding, first, a matter of accounts only, and, secondly, a question as to the criminal liability not of the complainant but of the accused in the case(6).

Inspection by Magistrate.—A personal inspection by a Magistrate of the locality to attest the correctness of the evidence and plans which may have been filed in a case which he is trying does not disqualify him from hearing and deciding it(7). It is not only not objectionable, but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of the occurrence in order to understand fully the bearing of the evidence given in court. But if he does so he should be careful not to allow any one or either

(1) *Emperor v. Hargobind*, 33 A 583, *Maula Khan v. Emperor*, 9 O W. N. 963=140 I. C 685=34 Cr L J 46=A. I. R. 1933 O 21, *Ramyad v. Emperor*, 124 I C 846=11 Pat. L. T. 248=A I R. 1930 Pat 337; *Dalsher v. Emperor*, 74 I C 511=24 Cr L J. 600=9 O. and A. L. R. 517, *Ghulamali v. Emperor*, A I R. 1935 S 72, *Asimuddi v. Gobind Baidya*, 33 A 583, *Jaharuddin v. Emperor* 31 C 715

(2) *Amrit Mondal v. Emperor*, 18 Cr. L. J. 95=37 I C 159=1 Pat. L. J. 399=(1217) Pat 20=3 Pat. L. W. 70, *Mahadeb v. Kishunlal*, 3 Pat. L. T. 347=72 I. C 339=24 Cr L J. 339=1922 Pat 60

(3) *Rangasami v. Emperor*, 30 M 213=5 Cr L J. 290=2 M. L. T. 89,

(4) *Emperor v. Hargobind*, 33 A 583=1

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(5) *Zahiruddin v. Emperor*, 83 I. C. 718=10 O and A. L. R. 675=11 O L J. 556=1924 O. 433=26 Cr L J. 158, *Rehmani v. Crown*, 78 P. L. R. 1916; *Veshwanath v. Emperor*, 37 Cr L J. 210, *Baqirides v. Emperor*, 125 I C. 92=A I. R. 1930 A 495=31 Cr L J. 764

(6) *In re Shamdasani*, A I. R. 1920 B. 477=34 Bom L. R. 1123=54 B 553

(7) *Crown v. Haras Singh*, 13 P. R. 1901 Cr =89 P. L. R. 1901, *Bom makka v. Ramakka*, 9 Cr L. J. 855.

the arrest of the judgment-debtor can try persons for having rescued the judgment-debtor from the lawful custody and for having assaulted the peon who was deputed to execute the warrant(1). But the trial by a Judge of a person whose prosecution he has ordered is inexpedient(2). Where a Magistrate has been taking steps as an executive officer to put down picketing of the shops it is desirable that such a Magistrate should not, as far as possible, hear cases arising out of picketing, in his judicial capacity(3). But in one case it has been held otherwise(4). Where a Magistrate has interested himself in a case pending before him in the way of obtaining a settlement by the parties, it is to the interest of both the parties and only fair to the Magistrate himself that he should not bear the case(5). The mere fact that the District Magistrate is, in his capacity as Collector, concerned in the management of an estate under the Court of Wards is no ground for the transfer of a case brought against the tenants of the estate, to another district from the file of a subordinate Magistrate before whom the case was pending(6). In another case in which the transfer was sought by the prosecution on the allegation that the Bettiah Raj which was under the Court of Wards had an interest in the case, and the District Magistrate who was one of the chief executive authorities connected with the Court of Wards ought not to try it, it was held that there were sufficient grounds for granting a transfer(7).

Trial of cases in which Magistrate's friends or relations are interested.—A Magistrate who is in close business or friendly relationship with a person should not take part in hearing a case in which the interests of such a person are gravely affected(8). But an application for transfer cannot be allowed merely on the ground that the trying Magistrate, fifteen years before, had rubbed shoulders with somebody who was either a complainant or respondent or an advocate in the case(9). The Magistrate's being member of the brotherhood of a person interested in a party is not itself a reason for the transfer of the case pending in his court on the application of the opposite party(10). Where, however, it is alleged that a certain prosecution witness is very friendly both with the Magistrate and the complainant and the Magistrate gives only a prevaricatory explanation the case should be transferred to some other Magistrate(11). The mere fact that the Magistrate is the master

(1) *Salimaddin v. Emperor*, A. I. R. 1926 O. 605=49 C. L. J. 234=93 I. C. 1049=27 Cr. L. J. 553.

(2) *Empress v. Ganga Din*, (1887) A. W. N. 139; *Ananta v. Altab*, 20 I. C. 409=14 Cr. L. J. 425=17 C. W. N. 795.

(3) *Man Lal v. Emperor*, 22 Cr. L. J. 100.

(4) *Nogendra Chandra v. Rehan Ali*, 23 Cr. L. J. 88=65 I. C. 440.

(5) *Muzaffar Husain v. Muhammad Yaqub*, 47 A. 411=86 I. C. 805=23 A. L. J. 191=A. I. R. (1925) A. 289=26

Cr. L. J. 869.

(6) *Baktu Singh v. Kali Prasad*, 28 C. 297.

(7) *Kishore Gir v. Ram Narayan*, 8 C. W. N. 77 (78).

(8) *In re Mukhtar Madhepura*, 116 I. C. 762=1929 Pat. 151=8 Pat. 575=10 P. L. T. 711 F. B.

(9) *Gokal Prasad v. Emperor*, 1929 A. L. J. 616=30 Cr. L. J. 622=116 I. C. 641=Ind. Rul. (1929) A. 417=A. I. R. 1930 A. 262.

(10) *Man Lal v. Emperor*, 22 Cr. L. J. 100.

otherwise(1). When a Magistrate was present at a search made by the police during investigation and in all probability he came to know of some facts in connection with the case, it is expedient that the case should be tried by some other Magistrate(2). A Magistrate, who has dealt with a dispute in an informal manner as a private arbitrator, ought not to deal subsequently with the same dispute between the same parties in his capacity of Magistrate: To do so, must necessarily be very inconvenient and embarrassing(3). But the circumstances that a Sub-Divisional Officer has knowledge of a village feud or that a statement of apprehension that a false case will be brought against a man was made to him does not debar him from deciding the case and is no ground for a transfer(4).

Magistrate interested in public capacity—A direct personal pecuniary interest, however small, in the result of a case disqualifies a Judge, Magistrate or Justice from trying a case. Where, however, the interest is not pecuniary, the disqualifying interest should have substantially the same effect so as to create a reasonable suspicion of bias; a mere possibility of a bias is not enough(5). Where the only interest in the result of a case tried by a Magistrate is that he is concerned in it in his public capacity it may fairly be presumed that his interest is not so substantial as to warrant the inference that he is likely to have a real bias in the matter. It would be otherwise, if in addition to his being so interested, there are other circumstances to suggest the real likelihood of a bias(6). The mere fact that the Magistrate has made the order consenting to the initiation of proceedings under s. 196-A, cl. (2) is no ground for transfer of a case from his court(7). But a Magistrate who as a member of the District Board presided at a meeting which adopted the Commissioner's proposal that the petitioners (accused) should be proceeded against, is debarred from trying the case and the case should be transferred from his court(8). A public servant who or a court which makes a complaint under s. 195 of the Code can on no account be allowed to take part in holding the trial of the case which is started on the basis of such a complaint(9). A Magistrate who has taken more than a formal part in the police investigation of a case is disqualified from trying the case and if he proceeds to try it the case ought to be transferred from his court to the court of some other Magistrate(10). But the court which issues the warrant for

Surja Kanta, 28 C. 703.

(1) *Milhu Khan In re*, 27 A 172

(2) *Gya Singh v. Mahomed Soliman*, 5 C. W. N. 864.

(3) *Gobinda Chandra v. Gopal Chandra*, 18 C. L. J. 150=14 Cr. L. J. 602=21 I. C. 474.

(4) *Harihar Balhsh v. Emperor*, 3 O. W. N. 944=1927 O 31=99 I. C. 97=29 Cr. L. J. 65=7 A I Cr. R. 179.

(5) *Mohandas v. Emperor*, 98 I C 405=27 Cr. L. J. 1333=1927 S 98=20 B L R 171.

(6) *Ibid.*

(7) *Hiralal v. Emperor*, A I R 1934 C. 891=38 O W N. 581=1934 Cr.

C 532=35 Cr. L. J. 714=148 I. C. 58.

(8) *Hem Ray v. Crown*, 29 F. L. R. 282=9 Lah. L. J. 583=108 I. C. 271=1 Cr. O Law. 5=A. I. R. 1928 Lah 114; See also *Nur Nishan v. Municipal Committee*, 23 Cr. L. J. 704=69 I. C. 384=1922 Lah. 72

(9) *Hiralal v. Emperor*, A. I. B. 1934 C 391=39 O W N. 581; *Sai v. Crown*, 8 Lah. 496=A I. R. 1927 Lah. 671=28 P. I. R. 683=106 I. C. 342=29 Cr. L. J. 6

(10) *Nga Po Tha v. Emperor*, 89 I. C. 261=A. I. R. (1925) R 219=4 Bur. L. J. 65=26 Cr. L. J. 1317.

intend to discharge the accused(1); as also where from the number of witnesses on both sides the case could not be finished in one day but the Judge insisted on finishing the case in one day and was unwilling to grant an adjournment to another date(2); as also where one party alleging that the Magistrate had been bribed by the opposite party prayed for a transfer of the case and the Magistrate reported denying the charge(3); as also where the accused's pleader, whether rightly or wrongly communicated to the accused that the Magistrate had asked him not to defend him (accused)(4); as also where the Magistrate sent the record after inexplicable delay and where the Magistrate had charged accused's father with an offence owing to enmity(5); as also where the court took the witnesses into its own hands and proceeded with their examination and they were not permitted to be examined by the complainant or his pleader(6); as also where the District Magistrate asked the Magistrate to withdraw certain parwanas and he refused to do so(7); as also where the Magistrate threatened the accused that he would be dealt with severely and sent to jail unless he admitted his guilt and furnished security under s. 110(8); as also where proceedings were instituted by a Magistrate from personal feelings of enmity derived from a long past dispute between one of his subordinates and the accused and he was consciously straining the law to injure the latter(9); as also where in a case of rioting and murder committed to the Sessions Court, which had apparently aroused considerable local interest, it appeared that the Civil Surgeon had been discussing the case at the local club with the officers of the station including the Sessions Judge(10); as also where the Magistrate received a letter from the witness for defence treated the witnesses of the petitioner in a manner different from that in which witnesses of the opposite party were treated and imposed a condition while complying with the prayer for postponement(11); as also where in a criminal case a certain witness was being examined and at the conclusion of his evidence the Magistrate ordered his prosecution under s. 193, I. P. C. and at the conclusion of the hearing of the case on that date he did formally order his prosecution(12). The examination of witnesses for the complainant after 9 o'clock at night in contravention of the directions of the High Court, as contained in its circular letter, is a sufficient ground for the transfer of the case(13).

(1) *P. v. ...*

I. R. 1935 A. 59.

(2) *Ram Sarup v Emperor*, 17 A. L. J. 48=20 Cr. L. J. 127=49 I. O. 111.

(3) (1926) M. W. N. 50 (Jour).

(4) *Dhera Singh v. Ram Singh*, 8 Lah. L. J. 529.

(5) *Kirpa Ram v Duta Singh*, A. I. R. 1923 Lah. 282.

(6) *Janki v Sheo Narain*, 11 O. L. J. 833=1924 O. 871=27 O. O. 246=82 I.O. 154=25 Cr. L.J. 1226=10 O. & A.L.

R. 342

(7) *Mahadeo Singh v Emperor*, A. I. R. (1921) Pat. 494.

(8) *In re Gudar Singh*, 19 A. 291 (292)

(9) *Rash Behary v. Emperor*, 35 O. 1076.

(10) *Muhammad Daraz v Emperor*, 19 A. L. J. 946=23 Cr. L. J. 126.

(11) *Daya Wanti v Buta Nand*, 119 I. O. 827=1929 Lah. 702=30 Cr. L. J. 1048=Ind Rul. (1929) Lah. 871=30 P. L. R. 657.

(12) *Gopal Singh v Emperor*, A. I. R. ...

(13) ...

of the complainant, who was complaining on his own account merely does not deprive him of his jurisdiction, although in such a case, it would generally be expedient for him to refer the complainant to another Magistrate(1). The fact that a Magistrate is a friend of a remote relative of the complainant is not *per se* a ground for transferring a case to another court(2). Nor is the fact that both the complainant and the accused are acquainted with the Magistrate who sometimes gets medical help from each(3) or that the Magistrate is a relation of the Sub-Inspector of Police(4).

Engagement of near relation of Magistrate as counsel.—There is no rule against a Pleader appearing in the court of his father, and the mere fact that the son of a Magistrate appears as a Pleader in a case before him, cannot be a ground for transfer of the case from his court(5). Where the case is a Crown case and the prosecution is being conducted by the Court Inspector, engagement of a counsel who is a brother of the Magistrate by the complainant to simply watch the proceedings is no ground for transfer of the case. But the case would be otherwise if such counsel took any active part in the conduct of the prosecution(6). It is not very seemly or suitable that a practising lawyer should pursue his practice in the court of a near relative(7). Where one of the lawyers engaged in a case is a near relation of the Presiding Magistrate the case should be transferred from his court(8).

Other cases.—Where on account of the weakness of a Magistrate it was apprehended that a case under section 110, Cr. P. C., would take a very long time if it were allowed to remain in that Magistrate's court the High Court transferred the case to another Magistrate(9); as also where a Magistrate made an order during the trial of a case that he would examine only one witness a day and thus protracted the proceedings inordinately(10); as also where a Magistrate declined to give the accused an opportunity to recall and cross-examine the witnesses for the prosecution and proceeded to judgment in the case against the accused(11); as also where the Magistrate without discharging the accused passed an order under section s. 250 calling upon the complainant to show cause why he should not give compensation to the accused persons which was clearly wrong, and it was clear that he did not

318=8 Lab. L. J. 257=27 Cr. L. J. 782=1926 Lab. 410, *Abbas v. Emperor*, 13 O. W. N. 50 (note); *Nihal Singh v. Emperor*, 89 I. C. 912=1 Lab. Cas. 302=26 Cr. L. J. 1440=A. I. R. (1925). Lab. 615.

(1) *In re Basapa*, 9 B. 172.

(2) *Sita Ram v. Gobind Sahai*, 15 I. C. 814=4 P. W. R. 1912 Cr.=66 P. L. R. 1912=13 Cr. L. J. 474, *Damodar Bapuji v. Emperor*, 33 Bom. L. R. 311=1931 Cr. C. 350.

(3) *Alliqullah v. Emperor*, 13 P. W. R. 1917 Cr.=18 Cr. L. J. 719=40 I. C. 719.

(4) *Baktu Singh v. Kali Prasad*, 28 O. 297.

(5) *Pearay Lal v. Pullan*, 85 I. C. 66=10 O. & A. L. R. 784=26 Cr. L. J. 440=

A. I. R. (1925) O. 348.

(6) *Duarika Singh v. Emperor*, 95 I. C. 764=27 Cr. L. J. 844=A. I. R. 1926 Pat. 464=7 Pat. L. T. 770=1926 P. H. O. C. 383.

(7) See the case cited in the last note and *Nityaranjan v. Emperor*, 29 C. W. N. 648=88 I. C. 607=26 Cr. L. J. 1183=A. I. R. 1925 C. 806.

(8) *Nityaranjan v. Emperor*, 29 C. W. N. 648=88 I. C. 607=26 Cr. L. J. 1183=A. I. R. 1925 C. 806.

(9) *Govind Sahai v. Emperor*, 23 I. C. 731=12 A. L. J. 262=15 Cr. L. J. 263.

(10) *Narain Dass v. Emperor*, 89 I. C. 451=1 Lab. Cas. 525=26 Cr. L. J. 1363.

(11) *Gopal v. Emperor*, 7 Cr. L. J. 313=7 C. L. J. 210.

expenses for summoning a person as witness(1) is no ground for transferring a case. An application for transfer cannot be allowed at an advanced stage of the case merely on the ground that the accused have not been allowed to properly cross examine the complainant(2). An accused who has exhausted his power of summoning witnesses by filing his first list cannot summon any other witness otherwise than by moving the court to act under s. 540 and it is no ground for transfer that the court has refused to summon some of the witnesses(3).

Granting or refusing to grant bail.—Mere granting of bail in a non-bailable offence in the exercise of a discretion vested in the Magistrate is no ground for transferring the case(4). A refusal to grant bail in a non-bailable offence not punishable with death or transportation for life is no ground for transfer, as the granting of the bail in such a case is a matter of discretion with the court(5).

Grounds flimsy and frivolous.—The practice of putting transfer application on frivolous ground without any specific and substantial charges on the trial courts is condemned(6). Application for transfer cannot be granted lightly on fanciful and sentimental grounds(7). A criminal case should not be transferred where the apprehension of not having a fair and impartial trial is created by the accused himself by casting in his application for transfer grave aspersions on the character of the trying Magistrate(8). The mere fact that a police officer, who was in court addressed the Magistrate during the proceeding is not a ground for suspecting that the Magistrate would be prejudiced in the trial and that the accused would not receive a fair trial(9). The High Court will not transfer a case outside a sub-division merely on the ground that the Sub Divisional Magistrate is on inimical terms with the accused and that the trying Magistrate who is subordinate to him is likely to be influenced by this alleged enmity of the Sub-Divisional Magistrate(10). A case cannot be transferred on the sole ground that it is apprehended that in the ultimate judgment which the Magistrate would deliver in the case he would not give effect to certain legal objections which might be taken at the trial(11). Mere granting of unnecessary adjournments to enable the complainants to appear is no ground for transferring the case(12). The method adopted by a counsel

(1) *Nand Kishore v. Kalka*, 5 Pat. L. T. 487=25 Cr. L. J. 458=77 I. C. 810=1924 Pat. 695.

(2) *Sujan Singh v. Jia Lal*, 29 P. W. R. 1917=18 Cr. L. J. 690=40 I. C. 690.

(3) *Emperor v. Mangal*, 36 A. 13.

(4) *Naujamma v. Govt of Mysore*, 7 Mys L. J. 428; *Sadashiv v. Emperor*, 22 Bom. 549.

(5) *Jumo v. Emperor*, 95 I. C. 939=27 Cr. L. J. 859=20 S. L. R. 136=A. I. R. 1926 (Sind) 257.

(6) *In re Achuthan*, 1 Mad. Cr. Cas. 110.

(7) *Mashar Khan v. Emperor*, A. I. R. 1928 Lah. 276=29 Cr. L. J. 220=

107 I. C. 108=9 A. I. Cr. R. 514.

(8) *Lachmi v. Emperor*, 96 I. C. 395=8 Lah. L. J. 303=2 Lah. C. 297=1926 Lah. 470=27 Cr. L. J. 939=27 P. L. R. 491 and 570.

(9) *Tab Shah v. Emperor*, 1927 O. 294=1 Luck. Cas 186=28 Cr. L. J. 902=105 I. C. 230.

(10) *Motomal v. Mahomed Ramzan*, 27 Cr. L. J. 801=95 I. C. 466=19 S. L. R. 117=A. I. R. 1926 S. 253.

(11) *Muhammad Azim v. Niaz Muhammad*, 107 I. C. 773=10 A. I. Cr. R. 8=A. I. R. 1928 Lah. 317=29 Cr. L. J. 289.

(12) *Maula Baksh v. Marshall*, 96 I. C. 878=27 Cr. L. J. 1022=1926 Lah. 628.

What are not sufficient grounds for transfer.—The criterion for transfer under cl. (a) is that the court must be of opinion that the applicant will not receive a fair and impartial trial in the court of the trying Magistrate. The mere fact that the applicant entertains an absolutely unreasonable belief that he will not have a fair trial is insufficient to order a transfer(1). A Magistrate should not cross-examine frequently the prosecution witnesses, nor should he disallow as irrelevant the questions which the complainant may wish to put to defence witnesses with a view to show their partiality. However, even if he acts in such a manner it cannot be held that his conduct gives rise to a reasonable apprehension in the mind of the complainant that his case will not receive a fair trial at the hands of the Magistrate(2).

Mistaken view of law.—The mere fact that a Magistrate during the hearing of a case took a particular view of the law or of the facts and charged the accused with a minor offence when they could have been charged with a graver offence is no ground for transfer under this section(3). In a case under s. 380, Penal Code, the Magistrate should at once give the accused an opportunity to cross-examine the prosecution witnesses if they should so desire, even though the charge may not be framed. But a refusal to give such opportunity is not, when the Magistrate acts *bona fide* from a mistaken view of the law, a good ground for transferring the case(4). The mere fact that certain orders passed by the trying Magistrate are erroneous or illegal is by itself insufficient to justify transfer of the case from his court(5).

Errors of judgment.—A *bona fide* error of judgment can be no ground for a transfer(6). Mere errors of judgment, as refusing to summon a prosecution witness for cross-examination and insisting on his being summoned as a witness for the defence, or disallowing objections as to the fitness of a person to serve as an Assessor, or permitting the prosecution to examine a witness in chief on the substantive case of the prosecution after the defence has disclosed its case in the cross examination of the witness,—are insufficient, in the absence of prejudice in the Judge, to direct a transfer of the case for trial by some other court(7). The mere fact that a trial court has committed an error of judgment in admitting an evidence(8) or in refusing to admit a document or asking a party to deposit the probable

Amin, 14 Lah 201=A 1 R 1933 Lah 95=33 P. L. R 1032=34 Cr L J 383=142 I. C. 696.

(1) *Pandurang v. Emperor*, 10 N L J. 184, *Raza Hussain v. Emperor*, 1927 All 181=99 I C. 105=L. R. 8 A 17 Cr.=28 Cr. L. J. 75.

(2) *Abdul Aziz v. Ganesh Prasad*, 82 I C 49=25 Cr. L. J 1185=(1925) A. I R (Oudh) 52.

(3) *Emperor v. Bhul Chand*, 5 A. I Cr. R. 803; *Nand Kichore v. Kalika*, 1924 Pat. 695=5 Pat L. T 487=25 Cr. L. J. 458=17 I C. 810.

Cr. P. C.—119

(4) *Ashirbad v. Maju*, 8 O. W. N. 838

(5) *Hari Chand v. Emperor*, A. I. R. 1931 Lah 59=129 I C 193=37 Cr. L. J. 253=1931 Cr. C. 139; *Fasiuddin v. Emperor*, 30 Cr. L. J 728 (731)=117 I C. 213=A 1 R 1929 Nag 172=1nd Rul (1929) Nag 197.

(6) *Muniyappa v. Govt of Mysore*, 3 Mys L. J. 111

(7) *Shivadhin v. Emperor*, 21 Cr. L. J 262=60 I C 661=3 Pat L. T. 32=A I R (1923) Pat. 116.

(8) *Bashir Ali v. Emperor*, 20 Cr. L. J 609=52 I C. 273.

conspiracy to commit the offence of criminal breach of trust and on proof of that charge they were liable to be punished in the same manner as if they had abetted the offence of criminal breach of trust, and this feature of the case made the trial complicated in its nature and was bound to attract difficult questions of law for decision by the court seized of the case: it was deemed proper and just that the accused should have a trial by a Court of Session with the aid of a Jury and that the case should be transferred to a Court of Session(1). If a criminal case is difficult or intricate, it is desirable that it should be tried by a stipendiary Magistrate rather than by an Honorary Magistrate(2).

Clause (d) : Convenience of parties.—For purposes of transfer it is the convenience of the accused rather than that of the complainant that has to be considered(3). A transfer may be granted from one court to another where the accused are residents within the jurisdiction of the latter court, and all the witnesses belong to the same place, so that it will be conducive to the convenience of the parties if the case is inquired into in the latter place(4). It is only fair that the accused person should stand his trial at the place where he resides(5), though there are authorities to the contrary also(6). Where an accused made an application for transfer of a trial on the ground mentioned in this clause, the High Court holding that the convenience of the numerous witnesses for the defence outweighed that of the prosecution witnesses who were few in number transferred the case to itself(7). In transferring a case, no consideration should be had to the fact that by a transfer to a particular district, the accused will have the benefit of a trial by Jury, where previously he had none. The real question is that of convenience of parties(8). With reference to a case which stood committed to the Court of Session at Thana, the Government of Bombay by means of a notification under s. 9 (2) and s. 193 (2), Cr. P. Code, directed that the case should be tried at Alibag by Mr. G., Additional Sessions Judge of Thana. The accused applied to the High Court to have the case transferred to Thana on the ground of convenience of parties and their witnesses and also on the ground that the accused would have the benefit of a trial by Jury at Thana instead of a trial with Assessors at Alibag. It was held by Madgavkar and Patkar, JJ. (Murphy, J., dissenting) that the case should be transferred to the Court of Session sitting at Thana in the interests of justice and convenience of parties; the powers of transfer vested in the High Court under this section were in no way affected by the notification of the Local

(1) *Botting v. Emperor*, 35 Cr. L. J. 928=149 I. C. 235=11 O. W. N. 780=1934 O. L. R. 481=A. I. R. 1934 O. 349.

(2) *Pandurang v. Emperor*, 28 Cr. L. J. 898=105 I. C. 226=10 N. L. J. 184=A. I. R. 1928 Nag. 21=9 A. I. Cr. R. 49.

(3) *Sohan Lal v. Gopal Singh*, 94 I. C. 131=27 Cr. L. J. 563=A. I. B. 1916 Lah. 493.

(4) *Dansi v. Lakshmi*, 45 A. 700 (701)=25 Cr. L. J. 72=75 I. C. 984.

(5) *Metcalf v. Watson*, 1924 Pat.

708=25 Cr. L. J. 81=76 I. C. 17; *Hari*
Pat. 1924 Pat. 1924 Pat. 1924 Pat.

(7) *Empress v. Kashi Nath*, Rat. Un. Cr. C. 927.

(8) *Durga Charan v. Emperor*, 8 Cr. L. J. 121=8 O. L. J. 59.

of attempting to provoke a Magistrate trying the case into some unguarded expression, and then applying for a transfer, is a method which is neither in the interest of his client nor in the interest of justice(1). The fact that a Magistrate is trying or has tried one case against an accused person is no reason why he should not try any subsequent case against the same person specially when no allegation of prejudice or unfair treatment has been made(2). Timidity of a witness, if genuine, should not be a ground for transferring cases to other courts(3). Where there is nothing to indicate that the inquiry has not been fair and impartial, except that the proceedings against the petitioners were hurried and the petitioners remain unrepresented through no fault of the Magistrate(4), or that the Magistrate accepted the complaint at a late hour in the evening and issued warrant forthwith(5), or that the court awarded costs of adjournment(6), or that the District Magistrate refused to produce the paper called for by the defence(7), an application for transfer of case under this section cannot be allowed. The fact that a Magistrate trying a case proposes to examine the complainant, who is a very old man, at his residence, giving the accused every opportunity of being represented does not call for a transfer of the case(8).

Onus of proof.—To move a case from one Magistrate to another on grounds personal to such Magistrate is tantamount to a severe censure on such officer, and the very clearest grounds must exist before the court will interfere(9). Unless some cause is shown for believing that a Magistrate is likely to be prejudiced or influenced by any improper motive in the decision of a case, the High Court will support such Magistrate. It is highly improper, by transfer of a case from his court to throw a gratuitous slight on the Magistrate(10). Before a criminal case can be transferred to another district against the wish of the accused, it must be proved by the very best evidence that a fair trial cannot be had in the district(11).

Clause (b)—A stronger case must be made out to justify a transfer under this clause(12). Where the case against the accused though *ex facie* was one triable both by a first class Magistrate and the Court of Session, it was likely to embrace within its charges for offences which are exclusively triable by a Court of Session and the accused were being tried under s. 120-B of the Penal Code also, that is, for criminal

(1) *Tara Chand v. Emperor*, A I R. 1933 A. 949=19 A I Cr R 106=14 L R A Cr 25=1933 Cr C. 1569

(2) *Sadasheo v. Emperor*, A I R. 1933 Nag 201=1933 Cr C 797=145 I. C 445=29 N L R 328=34 Cr L J 1035

(3) *In re Srinivasachariar*, 3 Mad Cr C 89.

(4) *Jagir Singh v. Emperor*, 125 I. C. 322=A I R. 1930 Lah. 529=Ind. Rul. (1930) Lah. 594=31 Cr. L J 812

(5) *Aliquillah v. Crown*, 13 P W. R. 1917 Cr.=18 Cr L J 719=40 I. C. 719.

(6) *Hajhunandan v. Ramadin*, 2

Pat L W 218=19 Cr. L J 6=42 I. C. 918

(7) *Bashir Ali v. Emperor*, 20 Cr. L J 609=52 I C 273.

(8) *Ishwar Das v. Emperor*, 92 I. C 856=27 Cr L J 344=A I R 1926 O 290

(9) *In re Shanker Abaji*, 6 Bom H. C. R. 69

(10) *In re Vishnu*, Rat Un Cr C 323; *Ganga Din v. Empress*, (1887) A. W. N 139.

(11) *Empress v. Nobogopal*, 6 C. 491.

(12) *In re Ameer Khan*, 15 W. R. Cr. 69.

Communal cases.—In earlier Lahore cases it was held that where a Hindu-Muhammadan question is involved in a criminal case it is desirable that the case should be heard by a European Magistrate(1). In later Lahore cases it has been held that it is no ground for the transfer of a case from the court of a Hindu or Muhammedan Magistrate to that of a European Magistrate merely because the parties belong to different religions or the dispute is of a communal or *quasi-communal* nature(2). The Nagpur Court holds that the accused in the case of a communal or *quasi-communal* nature is not entitled to a transfer of the case from the file of a Hindu Magistrate merely because he is a Muhammadan or *vice versa*(3). The Allahabad Court holds that in cases of transfer where communal interests are involved, a transfer should be granted with considerable hesitation. The matter should not be decided in the abstract whether a certain Magistrate would deal with a matter impartially or not, but the question always should be whether through some error or unfortunate accident the Magistrate has behaved in a way to give legitimate ground for fear to one party or the other(4). The High Court will not encourage the public belief that the judicial and Magistrate benches can be dragged into the arena of political and personal strife by means of applications, the foundation of which is a deliberate attempt to involve members of the Local Bench who have a public duty to perform, in local and personal controversies(5).

Dismissal for default—Where a case has been dismissed in default by a particular Magistrate, a fresh complaint based on the same facts should be transferred to the same Magistrate for trial(6).

Clause (ii): Criminal case pending in another province.—The High Court has no jurisdiction to transfer criminal cases which are in the course of hearing in another Province(7). Apparently Calcutta thought otherwise in the case of *Charu Chandra v. Emperor*(8). But the Madras High Court did not agree(9). Section 185 of the Code does not empower a High Court to transfer to a court subordinate to its own jurisdiction a case pending in a court subordinate to the jurisdiction of another High Court, nor does it empower a High Court to decide by which court such a case shall be tried(10).

Bangalore.—The District Magistrate and the Civil and Sessions

(1) *Mangat v. Emperor*, 26 Cr. L. J. 1056=87 I. C. 976=26 P. L. R. 267 =A. I. R. 1925 Lah. 626; *Hardwari Lal v. Crown*, 26 P. L. R. 842; *Hari Kishan v. Allah Bukhsh*, 8 A. I. Cr. R. 260=1927 Lah. 520=28 Cr. L. J. 588=102 I. C. 556.

(2) *Mangat v. Emperor*, 26 Cr. L. J. 1056=87 I. C. 976=26 P. L. R. 267.

(3) *Pandurang v. Emperor*, 105 I. C. 226=28 Cr. L. J. 898=10 N. L. J. 184=A. I. R. 1928 Nag. 21=9 A. I. Cr. R. 49.

(4) *Ghavo v. Emperor*, 28 A. L. J. 606=123 I. C. 685=Ind. Rul. (1930) A. 419=31 Cr. L. J. 555=A. I. R. 1930 A.

737.

(5) *Raza Hussain v. Emperor*, 99 I. C. 105=28 Cr. L. J. 73=L. R. 8 A. 17 Cr.=A. I. R. 1927 A. 184.

(6) *Dhari Mal v. Emperor*, 91 I. C. 911=27 Cr. L. J. 719.

(7) *Radhika Natha v. Jotish Chandra*, 24 Cr. L. J. 635=73 I. C. 523=1924 A. 71.

(8) 44 C. 595=37 I. C. 145=21 C. W. N. 320=18 Cr. L. J. 81 F. B.=25 C. L. J. 165.

(9) *Rahma Sahib v. Vellabji*, 40 M. 835=18 Cr. L. J. 148=37 I. C. 516.

(10) See the case cited in the last note and *Radhika Natha v. Jotish Chandra*, 24 Cr. L. J. 635=73 I. C. 523=1924 A. 71.

Government(1). Where the offences with which the accused was charged were committed in Bombay but the complainant chose to go to Ratnagiri District and the accused wished to be tried there, the High Court ordered the trial to proceed before the Sessions Judge of Ratnagiri(2). Where a case has given rise to communal feeling to such an extent that one of the parties finds it difficult to persuade its witnesses to appear in court to give evidence in its favour owing to the fear that they might render themselves liable to injury at the hands of the members of the opposite community, and the Magistrate demands heavy bail, it is desirable that the case should be transferred to some other locality where it may be tried in a calm atmosphere(3). The importance of having a fair and impartial trial ranks very much higher than the convenience of parties and witnesses(4).

Clause (c): "*Expedient for the ends of justice.*"—When two such officers, as the District Magistrate and the Sessions Judge, emphatically express their belief that it will be next to impossible to obtain a fair and impartial trial if the case be heard before a Jury chosen from a particular district, the bare expression of such belief, quite apart from the foundations thereof, must, it was said, shake the confidence of the parties interested and of the public in the fairness and impartiality of the particular Jury to try the case. And an order for transfer in such cases was expedient for the ends of justice under this clause(5). Where in a case there was a good deal of evidence (both oral and documentary) in English and the Magistrate in whose court the case was pending did not know English, it was decided to transfer the case to some Magistrate who did know that language(6). But a transfer cannot be granted merely because the Magistrate before whom the case is pending does not possess the amount of scholarship in Telugu and Sanskrit which is necessary to understand and interpret correctly without the aid of translation the books in respect of which the charge is lodged, and others to which it may be necessary to refer for comparison(7). This clause is no authority for the transfer of a case from one court to another when the ground alleged is that the transfer would be in the interests of justice if the trial were held by a court which knew nothing about either party(8). Nor does this clause apply to a case where an appeal from a conviction passed in the High Court Session the appellate Judge sets aside the conviction and orders a retrial, but further orders that the trial should be held not by the High Court but by some other court of competent jurisdiction subordinate to the appellate court. The order passed is one under s. 423 (b). It is quite proper and there is no lack of jurisdiction or irregularity in procedure(9).

(1) *Emperor v. Lakshman*, 32 Cr. L. J. 1147=131 I. C. 347=33 Bom. L. R. 675=A. I. R. 1931 B. 319=(1931) Cr. Cas. 569=Ind. Rul. (1931) Bom. 459=55 B. 576 F. B.

(2) *Empress v. Alma Ram*, 2 Bom. L. R. 394.

(3) *Halim v. Emperor*, 8 Pat. L. T. 153=27 Cr. L. J. 1891=98 I. C. 607=1927 Pat. 86.

(4) *Leg. Rem v. Bhairab Chandra*,

25 C. 727=2 C. W. N. 65.

(5) *Ibid*.

(6) *Mohammad v. Ali Razi*, 16 Cr. L. J. 73=26 I. C. 665.

(7) *In re Venkateswara*, 55 M. 739 (142).

(8) *Mewa Ram v. Narain*, 16 A. L. J. 490=19 Cr. L. J. 704=46 I. C. 158.

(9) *Hari v. Emperor*, A. I. R. 1935 P. C. 122.

Magistrate with instructions to transfer them to some other Magistrate subordinate to him, competent to try them, it was held that the District Magistrate had no power to transfer such proceedings to a Magistrate of the second class(1).

Case sufficiently important and serious to be tried by Sessions or more experienced Magistrate.—A case under s. 211 of the Indian Penal Code, with respect to offences falling within sections 409 and 420 of the same Code is of a nature serious enough to be tried either in a Court of Sessions or by an experienced Magistrate and should not be transferred to the court of an Honorary Magistrate having first class powers(2).

Sub-section (3): "A party interested."—A complainant even in a cognizable case is entitled to apply for transfer under this section, but his rights are subordinate to those of the Crown, and in the case of conflict between the two the right of the latter must prevail(3). Where the conduct of a case is in the hands of Public Prosecutor and where there is a conflict between the Public Prosecutor and the party interested the right of the former must prevail, as it is the Public Prosecutor and not the informant, who is primarily responsible for the conduct of the case(4). A person alleging himself to be the complainant but who in fact is not the complainant and from whose hands the prosecution has been taken away by the order of the Magistrate, is not a party interested within the meaning of this section(5). The person on whose motion a complaint is made by a court under s. 476, is not an interested party within the meaning of this sub section, and has no *locus standi* to make an application for transfer of the case(6).

Sub section (4): Application for transfer how to be made.—An application for transfer of a criminal case from one subordinate court to another ought to be made to the High Court in its judicial capacity supported by affidavit and not by a letter to the English Department of the High Court(7). Every application to the High Court for the transfer of criminal proceedings pending in a court subordinate to it must be supported by affidavit; the mere written statement of the counsel who appeared in the lower court is not sufficient for the court to act upon(8). Every person whether accused or not except the Advocate-General who makes an application under this section must support his application by an affidavit(9). An affidavit supporting

(1) *Emperor v. Golind Sahai*, 37 A. 20; see *Emperor v. Munna*, 24 A. 151.

(2) *Magan Lal v. Ganesh*, 16 A. L. J. 294=45 I. C. 515=19 Cr. L. J. 611.

(3) *Jamuna v. Rudra Kumar*, 4 Pat. L. J. 656=20 Cr. L. J. 648=52 I. C. 424;

Rajagopal v. Narayana, 57 M. L. J. 547=30 L. W. 640=120 I. C. 80=A. I. R. 1929 Mad. 814=30 Cr. L. J. 1163.

(4) *Rajagopal v. Narayana*, 57 M. L. J. 547=30 L. W. 640=120 I. C. 83=

3 Cr. Law. Mad. 17=30 Cr. L. J. 1163=A. I. R. 1929 Mad. 814.

(5) *In re Gannon*, 5 Bom. L. R. 869.

(6) *Ram Sarup v. Dil Khan*, 127 I. C. 152=31 P. L. R. 840=A. I. R. 1930 Lah. 873=1930 Cr. C. 917.

(7) *Empress v. Zahir ud-din*, 1 C. 219; *Empress v. Ahmad Bahsh*, (1894) A. W. N. 154; *Gowardhan v. Abbas Ali*, A. I. R. 1930 Lah. 168=121 I. C. 374=31 Cr. L. J. 257.

(8) *Amrita Lal v. Lachman Das*, (1891) A. W. N. 87.

(9) *Sada Sheo v. Emperor*, A. I. R. 1933 Nag. 201=145 I. C. 445=34 Cr. L. J. 1035.

Judge of the civil and military station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of this section(1).

Sonthal pergunnahs.—The court of a Magistrate in the Sonthal Pergunnahs is, as regards the trial of an European British subject, subordinate to the High Court, and the High Court has power under this section to direct the transfer of a case in which such subject is concerned(2).

Perim.—The High Court at Bombay can transfer a case pending before the Perim Sessions Court or the Cantonment Magistrate's Court at Secunderabad to any other criminal court of equal or superior jurisdiction, or to itself(3).

Village Magistrates.—The provisions of the Code relating to transfers of criminal cases and the right of accused to obtain an adjournment of the case pending an application to a superior court for transfer of the case against him do not apply to proceedings before Village Magistrates(4).

Village Panchayats.—In an earlier Allahabad case it was held by Stuart, J., (Kambaiya Lal, J. dissenting) that village Panchayats are in no way subordinate to the authority of the High Court and the High Court has no jurisdiction to direct the transfer of a case from a Panchayat constituted under the provisions of the U. P. Village Panchayat Act(5). In a later Allahabad case it has been held that the High Court has power to transfer a criminal case pending before a Panchayat constituted under Local Act No. VI of 1920(6).

Transfer from the file of one Presidency Magistrate to that of another.—In *In re Murugesu Mudaliar*(7), Bhashyam Ayyangar, J., expressed a doubt as to whether the High Court could transfer a case from the file of one Presidency Magistrate to that of another on the ground they were Magistrates presiding over the same court. But the learned Judge expressed no definite opinion on the point and *Emperor v. Harischandra*(8) is a direct authority to the contrary. In a later Madras case it has been held that the Court of the Chief Presidency Magistrate and those of the other Presidency Magistrates are "courts of equal jurisdiction" within the meaning of this clause and the High Court has power to transfer a case from the file of the Chief Presidency Magistrate to that of any other Presidency Magistrate(9).

Transfer to a court not competent to try the case.—Where proceedings under section 110 of the Code initiated before a Magistrate of the first class were transferred by the High Court to the District

(1) *Scott v. Ricketts*, 9 M. 356=2 West 677.

(2) *In re Wilson*, 18 C. 247, cf. *Siten dra Nath v. Emperor*, 108 I. C. 419=7 Pat. 337=23 Cr. L. J. 427=A. I. R. 1928 Pat. 241=9 P. L. T. 458.

(3) *Empress v. Mangal Tekchand*, 10 B. 274.

(4) *In re Thota Narayadu*, 11 I. C. 591=21 M. L. J. 755=12 Cr. L. J. 407.

(5) *Sat Narain v. Sarju*, 46 A. 167

=83 I. C. 350=21 A. L. J. 925=10 O. and A. L. R. 318=1931 A. 265=25 Cr. L. J. 1330.

(6) *Basdeo v. Badal*, 49 A. 183=1917 A. 193=25 A. L. J. 157=99 I. C. 125=L. R. 8 A. 33 Cr. =23 (r. L. J. 94).

(7) 13 M. L. J. 69.

(8) 10 Bom. L. R. 201.

(9) *In re Venkateswara*, 35 M. 739=11 I. C. 795=19 M. L. T. 378=22 M. L. J. 114=12 Cr. L. J. 451.

Sub-section (5).—This sub-section, as it originally stood, ran as follows:—"When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor." By the Amending Act 1923, the words "convicted, pay the costs of the prosecutor" were substituted by the words "so ordered, pay any amount which the High Court has power under this section to award by way of costs to the person opposing the application"(1). The word "costs" was substituted by the word "compensation" by the Amending Act XXI of 1932 and the following note was added, "Applications in the High Court are opposed usually by or on behalf of the Legal Remembrancer who is paid by salary and not by fees, which makes it difficult to assess his reasonable expenses incurred in opposing the application (see the judgment of Lord Williams, J. in *Neamat Sha v. Emperor*, 59 Cal. 481). The amendments made in sub sections (5) and (6-A) are aimed at meeting this criticism"(2).

Scope.—The scope of this sub section has been considerably enlarged by the amendment, and the substitution of the words "person opposing the application" in place of the words "the prosecutor" clearly indicates that it was intended to extend the benefit of the sub-section to persons opposing the application who need not necessarily be the prosecutor(3). In *Grish Chandra v. Chandra Mom*(4) the accused (applicants) were directed to pay all the complainant's costs incurred before the Magistrate from whose file the transfer was ordered. In *Khetu v. Mohim Nath*(5) the High Court in making the order of transfer considered the convenience of the other side and directed the Crown to pay the expenses of his witnesses.

Costs of adjournment.—The High Court has power in an appropriate case to direct the applicant to lodge a certain sum in court as security for the costs occasioned to his opponent by repeated adjournments and the applications in respect of them(6).

Sub-section (6).—As a general rule, notice should be given of an application for transfer but failure to give notice does not render the order of transfer illegal. Under special circumstances, such order can be made without notice(7).

Sub-section (6-A).—This sub section was placed upon the statute book under the Amending Act, XVIII of 1923, to avoid the abuse of the sections. Where the application for transfer has been made without any justification and is not supported by any good or cogent reason, but

(1) *Emperor v. Kantcer Sen*, 52 A. 263 (268-269)=123 I. O. 330-31 Cr. L. J. 485=1930 A. L. J. 209.

(2) Statements of Objects and Reasons (*Gazette of India*, 1932, Part V, p. 193).

(3) *Emperor v. Kanwar Sen*, 52 A. 263 (269)=123 I. O. 330-28 A. L. J. 209 =A. I. B. 1930 A. 206=11 L. R. A. 78-3 Cr. Law All. 167.

(4) 8 O. W. N. 589 (592).

(5) 8 O. W. N. 75.

(6) *Parash Ram v. Sir Hugh*, 54 B. 553=A. I. R. 1930 Bom. 477-32 Bom. L. R. 1123; cf. (1926) M. W. N. cii.

(7) *In re Masha Sahjee*, 71 C. 856 =8 M. L. T. 222-11 Cr. L. J. 533; *Kali Charan v. Emperor*, A. I. R. 1935 Pat. 120. A court should before passing an order of transfer, give an opportunity to the accused to show cause why the transfer should not be made: *In re Ramalunga*, 55 M. L. J. 217.

an application for transfer under this section must be sworn before the High Court, or the Clerk of the Crown or any Commissioner, or other person appointed by the High Court for that purpose. An affidavit sworn before an officer of the District Judge's Court is not sufficient for the purposes of this sub section(1). An application for transfer on the ground that the applicant wishes to call the Magistrate as a witness must be supported by an affidavit showing that his evidence is relevant and material(2).

Affidavit by accused and prosecution for perjury.—In earlier Allahabad and Madras cases it was held that when an accused person applies for the transfer of a case pending against him, supporting his application by an affidavit, he cannot, or at least ought not to, be prosecuted under section 193, Indian Penal Code, in respect of statements made therein(3). According to the present practice of the Allahabad High Court an accused person can legally tender his own affidavit in support of an application for transfer, whether the affidavit is tendered and the application made in subordinate courts or in the High Court, and he can be prosecuted in regard to any false statement made in the affidavit(4). This is also the view of the other High Courts(5).

Affidavit by Counsel.—According to the well recognized practice which prevails wherever members of the English Bar practise, a Counsel should never file an affidavit in a case in which he is appearing professionally. It not only hampers his freedom of action as an Advocate but he thereby gives up his dignified position of detachment as an Advocate and lowers himself to the level of either a *parokar* or a witness who has to support the case of a particular party by giving evidence on his behalf(6).

Counter-affidavit by District Magistrate.—On an application for the transfer of a case based chiefly on the ground of partiality of the District Magistrate to make an

for transfer is made in good faith, under this section, the mere fact that it subsequently turns out to be not well founded cannot lead to a necessary inference that the application was reckless involving professional misconduct(8). A case in which the statement is found to be totally unfounded and untrue stands on a different footing(9).

(1) *Mahim Chandra v Anjad Ali*, 33 Cr. L. 61=1931 Cr. C. 990=134 I. C. 1278=A. I. R. 1931 O. 710

(2) *Nizam Ahmad v Empress*, (1886) A. W. N. 257

(3) *Emperor v Bindeshri Singh*, 28 A. 331, *In re Barkat*, 19 A. 200, *Empress v Subbayya*, 12 M. 451, *Re Ramaswami*, 1 Weir. 176, *Emperor v. Matan*, 33 A. 163.

(4) *Baddu Khan v Emperor*, 108 I. C. 124=9 A. I. Cr. R. 91=A. I. R. 1918 A. 181=9 L. R. A. Cr. S.=29 Cr. L. J. 336.

(5) *Ghulam Muhammad v Crown*, 3 Lah. 46=67 I. C. 351=23 Cr. L. J. 899=4 U. P. L. R. (L) 71; *Allah Wasai v*

Emperor, 69 I. C. 457=1 Lah. Cas. 522=26 Cr. L. J. 1869, *Allah Ditta v. Crown*, 1 Lah. Cas. 522, *Sanwal v. Emperor*, 1927 S. 113=99 I. C. 841=28 Cr. L. J. 133, *Crown v Qadir Bakhsh*, 1 Lah. Cas. 475, *Prag Datt v Emperor*, 123 I. C. 851=A. I. R. 1930 O. 62=31 Cr. L. J. 600

(6) *Mashar Khan v Emperor*, 107 I. C. 108=29 Cr. L. J. 220=A. I. R. (1929) Lah. 276=9 A. I. Cr. R. 514

(7) *In re Pandurang*, 25 B. 179 (189)

(8) *In re Three Vakils*, 26 A. L. J. 1250=110 I. C. 686=A. I. R. 1929 A. 396=29 Cr. L. J. 750

(9) *In re a Mukhtar*, A. I. R. 1929 Pat. 151=10 Pat. L. T. 95=116 I. C. 762=8 Pat. 575.

embodies a statutory mandate which the courts below ought to respect and obey, and therefore where an application under the section is presented it is the duty of the court to stay all proceedings(1). Where the Magistrate does not grant an adjournment as provided in this sub-section all the subsequent proceedings are illegal and, except as regards any emergent order that may be found necessary in the interest of justice, without jurisdiction(2). But the proceedings of the Magistrate cannot be set aside as invalid if the notification of intention to move for transfer was given *mala fide* for the purpose of delay and defeat the ends of justice. A refusal to adjourn in such a case is a mere irregularity which can be cured by applying s. 537(3). In some of the earlier decisions it was held that there was no obligation to grant an adjournment in every case but only at the time when the application for adjournment was made, such an adjournment was necessary to afford the party a reasonable time to apply to the High Court and obtain an order before the commencement of the trial(4). But this view was not universally accepted(5). A Magistrate who adjourns a case under the provisions of this sub-section does not become *functus officio* and is not incompetent to grant pardon to an accused after such adjournment(6). A court is competent pending the disposal of an application for transfer to require the accused in proper case to execute a bond under section 117 (3) of the Code(7). The jurisdiction of the court does not cease in the sense that the court cannot pass an emergent order which the law authorises it to pass(8).

699=22 A. L. J. 430=1924 A. 533=26
C. L. J. 190. *Jalisco Emperor* C. L. J.

Crown v. Shewa, 3 S. L. R. 155;
Crown v. Naro, 9 Cr. L. J. 274; 1 S.
L. R. 35; *Devi Chand v. Emperor*,
22 Cr. L. J. 717=23 I. C. 877; *Sarat
Lal v. Emperor*, 6 C. W. N. 251;
Dhone Kristo v. Emperor, 6 C. W. N.
717. The Magistrate is bound to ad-
journ the case, and while granting the
adjournment has no power to impose any
condition: *Daya Wanti v. Bita
Nand*, 30 P. L. R. 657=30 Cr. L. J.
1048=119 I. C. 327=A. I. R. 1929 Lah.
702=Ind. Rul. (1929) Lah. 871.

(1) *Lutter v. Emperor*, 124 I. C.
17=A. I. R. 1930 A. 263=11 L. R. A. 70=
28 A. L. J. 547=Ind. Rul. (1930) All.
449=31 Cr. L. J. 590; *Ghulam Rasool
v. Emperor*, 109 I. C. 360=29 Cr. L. J.
536=A. I. R. 1928 Lah. 550, *Chir nji
Lal v. Emperor*, 111 I. C. 319=A. I. R.
1928 Lah. 1.

(2) *Pandurang v. Emperor*, 32 Cr.
L. J. 1161=131 I. C. 861=33 Bom. L. R.
668=A. I. R. 1931 Bom. 411=1931 Cr.
C. 726; *In re Nathan*, 53 M. 165=124
I. C. 501=57 M. L. J. 763=30 L. W. 583

=A. I. R. 1930 M. 187=31 Cr. L. J.
715=(1930) M. W. N. 78=(1930) Cr.
Cas. 187; *Empress v. Gayitre
Prosunno*, 15 C. 455; *Haji Bagridi
v. Emperor*, 103 I. C. 569=A. I. R.
1928 A. 268=L. R. 9 A. 77 Cr.=A. I.
Cr. R. 269=26 A. L. J. 318=29 Cr. L. J.
448; *Lutter v. Emperor*, 124 I. C.
17=A. I. R. 1930 A. 263=31 Cr. L. J.
590=28 A. L. J. 547=(1930) Cr. C. 375
=L. R. 11 A. 70 Cr.

(3) *Niyamat Sha v. Hanuman
Buksha*, 59 C. 478=23 Cr. L. J. 31=

376=18 A. L. J. 145.

(5) *Surat Lal v. Emperor*, 29 C.
211=6 C. W. N. 251; *Kishori Gir v.
Ram Narayan*, 8 C. W. N. 77; *Kali
Charan v. Rajjab Ali*, 3 Cr. L. J. 477=
10 C. W. N. 793=3 C. L. J. 637.

(6) *Bal Chand v. Emperor*, 98 I. C.
439=27 Cr. L. J. 1369=1927 All. 99.

(7) *Sahib Dino v. Emperor*, 93 I. C.
603=28 Cr. L. J. 173=1927 S. 148

(8) *Haji Bagridi v. Emperor*, 26 A.
L. J. 398.

on the other hand it is vexatious and made with the view of causing delay or otherwise hindering the course of justice, an order under this sub-section should be passed(1). The word "person" in this sub-section includes "the Local Government". Where, therefore, an application for transfer of a case is made to the High Court and is thrown out on the ground that it is frivolous or vexatious, the Local Government opposing the application is entitled to recover its costs from the applicants(2).

Sub section (8).—This sub-section, as amended in 1923, ran as follows: "If in the course of an inquiry or trial or before the commencement of the hearing of any appeal, the Public Prosecutor, the complainant or the accused notifies to the court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal the court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon." By the Amending Act, XXI of 1923, this sub-section has been re-drafted, and the explanation to sub-section (9), as well as sub-section (10) has been newly added. In the report of the Select Committee, the necessity for introducing the changes has been thus explained: "We recognise the necessity of greater safeguards against the abuse of the section than those now existing. We think that provision should be made for a compulsory adjournment if a party notifies his intention to move for a transfer at any time before the arguments begin, that is to say, at any time before the defence closes its case. We recognise that the power at present enjoyed of paralysing the action of the court by repeatedly notifying an intention to make an application sometimes without any intention of following up the notification with an application, must be checked. We have accordingly provided that when once a party has secured an adjournment, the court shall not be bound to adjourn on any subsequent intimation of an intention to apply for a transfer made by that same party, and that where there are more than one accused, it shall not be possible for different accused by a series of successive intimations to secure a series of adjournments." The amendments made by Act XXI of 1932 are aimed at meeting the criticisms of Lord Williams, J., in the case of *Neamat Sha v. Hanuman Baksha*(3).

Magistrate is bound to adjourn the case.—The provisions of this sub-section, as they stand, are absolutely imperative in terms. The Magistrate is bound to adjourn the case, on the application by the accused, when the accused are within their rights, till such period as would afford a reasonable time for an application to be made to the High Court and an order obtained thereon(4). This sub-section

(1) *Sadasheo v. Emperor*, A. I. R. 1933 Nag 201=1933 Cr. Cas 797=145 I. O 445=29 N. L. R. 338=34 Cr. L. J. 1035; *Parash Ram v. Sir Hugh*, 51 B. 553=A. I. R. 1930 Bom 477.
(2) *Emperor v. Kanwar Sen*, 52 A. 263=123 I. C. 320=28 A. L. J. 209=A. I. R. 1930 A. 206=11 L. R. A. 78=3 Cr. Law All 47=Ind. Rul 1930 A. 378=31 Cr. L. J. 485.

(3) 59 C 478=33 Cr. L. J. 31=35 C. L. J. 34=134 I. C. 1057=1931 Cr. C. 810=35 C. W. N. 1112=A. I. R. 1931 C. 626.
(4) *Pandurang v. Emperor*, A. I. R. 1931 B 411=33 Bom. L. R. 688=1931 Cr. C. 726=32 Cr. L. J. 1181=134 I. C. 261, *Lutter v. Emperor*, 29 A. L. J. 547=11 L. R. A. Cr. 70=A. I. R. 1930 A. 263=31 Cr. L. J. 590=124 I. C. 17.
Sartaj Singh v. Emperor, 83 I. C.

Accused's right to more than one adjournment.—An accused is entitled as of right to have his case adjourned if he desires to move the High Court under this section for its transfer but no such right exists where the accused's intention is to apply to the District Magistrate under s. 528. Once a case has been adjourned under s. 525 and the accused has failed to take advantage of the adjournment to move the High Court, he is not entitled to another adjournment to give him another opportunity to move the High Court(1). Where there are several accused all the accused are not one by one entitled to have an adjournment to apply for transfer in the absence of fresh grounds or incidents(2). This is now made clear by the proviso.

"Inquiry or trial."—The words "inquiry or trial" in this sub-section do not apply to a transfer application pending before the District Magistrate but are only intended to apply to inquiries or trials which are specially referred to in the earlier portion of the Code(3).

Proceedings under Chaps. VIII and XII.—The wording of sub-section (8) as amended in 1923 was not made suitable to proceedings under Chapters VIII and XII and it was held that the sub-section did not apply to proceedings under s. 145(4). It has now been made applicable to all such proceedings.

Effect of refusal to grant adjournment.—The refusal of a Magistrate to grant an adjournment to a suspect to enable him to apply for a transfer of the proceedings is a good ground for transfer of the proceedings(5). The hearing of case must be transferred from the court of a Magistrate who appears to disobey a statutory mandate(6).

Costs of adjournments.—See notes to sub-section (5). The applicant may be required to execute a bond.

Stay of proceedings pending rule issued by the High Court.—When a rule is issued by the High Court and proceedings stayed, Magistrates on receiving reliable information thereof, should stay their hand then and there. So where it was brought to the notice of the Magistrate by the Mukhtear for the accused who had received telegrams from counsel and vakil, informing him of the issue of the rule directing stay of proceedings by the High Court, and the Magistrate refused to look at the telegrams and to stay proceedings, but on the other hand proceeded with the inquiry, it was held that the Magistrate had acted improperly, that he should not have proceeded with the inquiry, and in

4 Bur. L. T. 213=12 Cr. L. J. 474; *Emperor v. Ali Raza*, 24 P. L. R. 1901; *Kishori Gir v. Ram Narayan*, 8 C. W. N. 77; *Imperator v. Azizdin*, 48 L. R. 42; *Surat Lal v. Emperor*, 29 C. 211; *Ashiq v. Emperor*, 15 Cr. L. J. 536=24 I. C. 818.

(1) *Kishori Rai v. Emperor*, 111 I. C. 855=10 A. I. Cr. R. 485=A. I. R. 1928 A. 753=9 L. R. A. Cr. 145=29 Cr. L. J. 935.

(2) *Peshori Lal v. Crown*, 12 Lah. 603=A. I. R. 1931 Lah. 274=1931 Cr. C. 530=32 Cr. L. J. 1229=134 I. C. 770=32 P. L. R. 941=Ind. Rul. (1931) Lah. 978 (2).

(3) *Muhammad Sharif v. Hari Prasad*, 5 Pat. 229=97 I. C. 974=27 Cr. L. J. 1214=8 Pat. L. T. 66.

(4) *Jamir v. Murari Mohan*, 57 C. 869=124 I. C. 522=50 C. L. J. 331=A. I. R. 1929 C. 778=31 C. W. N. 59; *Loka v. Kali Singh*, 8 Pat. L. T. 716=6 Pat. 553=1927 Pat. 351=9 A. I. Cr. R. 164=28 Cr. L. J. 1035=105 I. C. 219.

(5) *Jatoi v. Emperor*, 96 I. C. 391=27 Cr. L. 935; *Nenumal v. Fida Ali*, A. I. R. 1933 S. 307=146 I. C. 20=34 Cr. L. J. 1144.

(6) *Walidad v. Emperor*, 26 A. L. J. 1321=110 I. C. 223=A. I. R. 1928 A. 660=9 L. R. A. Cr. 127=10 A. I. Cr. R. 352.

Magistrate to give accused reasonable time.—Under this subsection, where an accused notifies to the court before which the case is pending his intention to make an application under this section, the court is bound to adjourn the case for such a period as will afford a reasonable time for an application to be made to the High Court, and an order obtained thereon(1). He need not extend time if the period allotted is reasonable(2).

Sufficiency or insufficiency of reasons by whom to be decided.—It is the bounden duty of the Magistrate, irrespective of the sufficiency or insufficiency of the grounds set forth for transfer, to allow a fair and reasonable opportunity to the accused to apply for a transfer. It is for the High Court and not for a Magistrate to decide, whether the grounds set forth for a transfer are good or not(3). An inquiry by the Magistrate, on a party's applying to him for postponement of the case to enable him to apply for transfer, into the grounds of transfer himself, is highly improper and would naturally cause apprehension in the mind of the petitioner that the Tribunal trying the case is not likely to give him an impartial and unbiased hearing(4).

Intention to move for transfer when to be intimated.—The section as amended in 1923 laid down that in case of an inquiry or trial the application may be made at any time during its course. It was accordingly held by the Calcutta High Court that the refusal by a Magistrate to grant an adjournment upon a notification being given under sub sec. (8), after the close of the cases of both sides but before the arguments are heard and the judgment is delivered, on the ground that the trial is at an end, is erroneous(5). But in a Madras case where an application for adjournment was made under this section just when the judgment was about to be pronounced and the application was dismissed, it was held that the dismissal of the application was proper and that the provisions of sub section (8) were not contravened(6). Now in the case of an inquiry or trial the application must be made before the defence closes its case. Prior to amendment in 1923 the words were "If in any criminal case or appeal, before the commencement of the hearing" The earlier cases are, therefore, no longer tenable and it is unnecessary to refer them at any length(7).

(1) *Luther v. Emperor*, 121 I. C. 17 = A. I. R. 1930 A. 263 = Ind. Rul. (1930) All. 449 = 31 Cr. L. J. 590 = (1930) A. L. J. 547, *Baggu Mal v. Emperor*, 1 P. R. 1913 Cr. A. postponement for too short

Weir 686.

(2) *Tirumeni Serrai v. Emperor*, (1929) M. W. N. 503

(3) *Prasad v. Emperor*, 121 I. C. 912

(4) *Prasad v. Emperor*, 121 I. C. 912

(5) *Prasad v. Emperor*, 121 I. C. 912

(6) *Prasad v. Emperor*, 121 I. C. 912

(7) *Prasad v. Emperor*, 121 I. C. 912

Emperor, A. I. R. 1935 S. 27

(4) *Mughees ud din v. Emperor*, 92 I. C. 694 = 27 Cr. L. J. 382 = 1926 Lah. 236 = 27 P. L. R. 67.

(5) *Niyamat Sha v. Emperor*, 59 C. 478 = 33 Cr. L. J. 31 = 35 C. L. J. 31 = 134 I. C. 1057 = (1931) Cal. 626 = 1931 Cr. C. 810

(6) *Pub Pros v. Chockalinga*, 52 M. 255 = A. I. R. 1929 M. 201 = 56 M. L. J. 216 = 29 M. L. W. 109 (1929) M. W. N. 60 = 2 Mad. Cr. C. 1 = 118 I. C. 274 = 30 Cr. L. J. 903, See *In re Nathan*, 53 M. 165

(7) *In re Mudaly*, 35 M. 701 = 10 I. C. 280 = (1911) 2 M. W. N. 311 = 12 Cr. L. J. 271; *Eslenes v. Emperor*, 121 I. C. 81 =

526-A. (1) Where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (A) to section 41 of the Army Act, the

High Court to transfer for trial to itself in certain cases.

Advocate-General shall, if so instructed by the competent authority, apply to the High Court, for the committal or transfer of the case to that High Court, and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by Jury.

(2) The Governor-General in Council may, by notification in the Gazette of India, declare any officer to be the competent authority for the purpose of issuing instructions under sub-section (1) in regard to any class of cases specified in the Notification.

This section is new and has been added by the Criminal Law Amendment Act, XII of 1923. It empowers the High Court to transfer to itself certain cases on the application of the Advocate-General.

527. (1) The Governor-General in Council may, by notification in the Gazette of India, direct the transfer of any particular * * case or appeal from one High Court to another High Court, or from any criminal court subordinate to one High Court, to any other criminal court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses.

Power of Governor-General in Council to transfer cases and appeals.

(2) The court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such court.

Amendment.—The word "criminal" which occurred before the word "case" has been deleted by s. 146 of Act XVIII of 1923.

Power of Governor General in Council to transfer cases.—This section empowers the Governor-General in Council to transfer cases from the jurisdiction of one High Court to another. It is a power given to the Government in addition to the power given to the High Courts under section 185(1). The two sections (185 and 527) have entirely different scopes. In the first place, the order under section 527 is an executive order which may be made without opportunity afforded to the accused to be heard. In the second place, section 527

case he entertained any doubt as to authenticity of the telegrams, the proper course for him was to send a telegram to the Registrar of the High Court to ascertain the truth(1). A similar view was taken in *Wahed v. Basaraddi*(2) and *Hem Chandra v. Mathur*(3). In the case last cited it was held that the Magistrate acted injudiciously in going on with the case, that the conduct of the Magistrate indicated clearly the bent of his mind and his bias against the accused, and that the case ought to be transferred to another court. When, however, a Magistrate after having been shown a telegram that the High Court has transferred the case, waited for a few days so that the order of the High Court may reach him, and, on the order not reaching him within the time fixed proceeded with the case and convicted the accused, it was held that the Magistrate's action, though indiscreet, was not illegal(4). The sending of a telegram does not in any way absolve the obligation of the party to appear before the court on the date fixed and if a warrant is issued against a party who fails to appear it will afford no ground for transfer of the case(5). It is different, however, where one of the two complainants appears before the Magistrate on the date fixed for a hearing and apprises him of that order, but the Magistrate instead of staying further proceedings issues a warrant for the arrest of the complainant who has not appeared(6).

Sub-section (9).—A discretion is given to the Sessions Judge by this sub-section to refuse to adjourn when he is of opinion that the applicant has had a reasonable opportunity of making an application and has failed without sufficient cause to take advantage of it.

Sub-section (10).—An application for an adjournment of an appeal must be made before the argument for its admission begins. A separate application for transfer of an appeal jointly filed by two or more accused is not absolutely necessary, though a joint appeal had been filed(7). The fact that a Sessions Judge has tried the appeals of some of several persons convicted of dacoity, is no bar to his trying the appeals of the remaining persons convicted of the same dacoity who were arrested subsequently, nor is it a good ground for transferring such appeals for trial by another Sessions Judge(8). Where, however, it appeared that the only officers in the district of P, otherwise competent to hear an appeal from a conviction for theft of property alleged to have belonged to the Road Cess Committee of the district, were, by reason of their connection with that committee, interested in the result of the appeal, the High Court directed that the petition of appeal, together with all papers connected therewith, should be forwarded to the Sessions Judge of the 24 Pergunnabs to be dealt with as an appeal presented in his own court(9).

(1) *Dattaram v. Prasad & Emperor*

(2) *Wahed v. Basaraddi*

(3) *Hem Chandra v. Mathur*

(4) 12 C W N 1031=13 Cr L J 766=17 I C 78.

(5) *Vinayek v. Reg. Rat. Un Cr. C.* 46.

(6) *Chande Prasad v. Emperor*, 17

C. W N. 536=14 Cr. L J 382=20 I C. 142

(7) *Fazal Ahmad v. Abdulla*, 7 Lab. I. J. 571=26 P. L R 701=27 Cr. L J. 104=91 I C 536

(8) *Maharaj Singh v. Emperor*, 1927 Nag 48=67 I C 38

(9) *Jagrup v. Emperor*, 61 I C. 656=22 Cr. L J. 416

(9) *In re Durakanath*, CCL R 279.

section shall record in writing his reasons for making the same.

(6) The head of a village under the Madras Village-Police Regulation, 1816, or the Madras Village-Police Regulation, 1821, is a Magistrate for the purposes of this section.

Amendment.—This section has been amended by section 147 of Act XVIII, of 1923. The actual changes brought about by this amendment are the addition of sub-sections (1) and (4) and inclusion of Regulation 1916 in sub-section (6).

Sub section (1).—The reasons for the insertion of this sub-section are thus stated : "In order to facilitate arrangements for the disposal of the Session's business, it is proposed to empower Sessions Judges to withdraw or recall cases from the file of Assistant Sessions Judges. This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges"(1).

There is nothing in the Code which gives jurisdiction to a Sessions Judge himself to transfer an appeal from the file of an Additional Sessions Judge to his own file, and even supposing a Sessions Judge has such jurisdiction, there is no provision in the Code by which an Additional Sessions Judge can issue such an order to another Judge of equal jurisdiction to himself. Section 17 (4) cannot confer any such jurisdiction on an Additional Sessions Judge(2). Powers of transfer of the Sessions Judge are expressly set out in sub-section (1), it is impossible to allow any further "inherent" powers of transfer(3).

Sub-section (2) : District Magistrate and Sub-Divisional Magistrate.—The provisions of sub-section (2) provide that the District Magistrate and the Sub-Divisional Magistrate shall have equal authority in withdrawing cases from a subordinate Magistrate. The District Magistrate, therefore, cannot exercise powers of an appellate court as regards orders passed by the Sub-Divisional Magistrate(4). In other words, a District Magistrate cannot set aside an order of transfer passed by a Sub-Divisional Magistrate(5). This view is supported by a ruling of a single Judge of the Madras High Court in *Raghunath Pandaram v. Emperor*(6). We find, however, another case in *Santhappa Sethuram v. Govindaswamy Kandiyar* (7) in which that case has been dissented from. It is pointed out there that a District Magistrate is not precluded from exercising his power of transfer of a case under this section, on the application of a party, by reason of the fact that the Sub-Divisional Magistrate had previously refused to transfer the case at the request of the same party. There is an earlier ruling of the same

(1) Statement of Objects and Reasons (1921).

(2) *Daulat Ram v. Emperor*, 83 Cr. L. J. 158=135 I. C. 252=12 L. B. A. Cr. 113=16 A. I. Cr. R. 123=1931 Cr. C. 707=29 A. L. J. 591=A. I. R. 1931 A. 435.

(3) *Ibid.*

(4) *Kishori Lal v. Emperor*, 20 Cr. L. J. 654=116 I. C. 751=L. R. 9 A. 85 Cr.=10 A. I. Cr. R. 1=1928 A. 516.

(5) *Iltaf Husain v. Emperor*, 17 I. C. 414=13 Cr. L. J. 782.

(6) 26 M. 130.

(7) 40 M. 791=18 Cr. L. J. 335=39 I. C. 447=5 L. W. 501=21 M. L. T. 281,

contemplates an order for transfer, and recourse may possibly be had thereto if an order made by one High Court under section 185 is disregarded by another(1). The Governor-General alone can under s. 527 pass orders binding on different High Courts(2). It is in the power of the Governor-General of India, if he thinks that in the state of public feeling a fair trial cannot be obtained in the place where an offence would ordinarily be tried, to order that the trial be held elsewhere(3). It is under this extraordinary power of the Governor General in Council that the *De la Hey murder case* against the *Kadambar Ward* was transferred from the Madras High Court Sessions to the Bombay High Court Sessions. So also a case was transferred to the Presidency Magistrate, Madras, from Behar within the jurisdiction of the Patna High Court. But the Governor-General in Council refused to transfer the *Bawla murder case* from the Bombay High Court Sessions(4). Where the Governor-General refuses to make such an order, the refusal cannot be held to amount to a violation of the principles of natural justice so as to enable their Lordships of the Privy Council to interfere with the result of the trial(5).

528. (1) Any Sessions Judge may withdraw any

Sessions Judge may withdraw cases from Assistant Sessions Judge.

case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him.

(2) Any Chief Presidency Magistrate, District

District or Sub-Divisional Magistrate may withdraw or refer cases.

Magistrate or Sub Divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and

may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(3) The Local Government may authorize the District

Power to authorize District Magistrate to withdraw classes of cases

Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

(4) Any Magistrate may recall any case made over by him under section 192, sub-section (2) to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under this

(1) Per Mookerjee, J. in *Charu Chandra v. Emperor*, 44 C 595=21 C. W. N. 320=18 Cr. L. J. 81=37 I. C. 145=21 C. I. J. 165.

(2) *Mahomed Ghouse v. Nathu Vallabhy*, 40 M 835=18 Cr. L. J. 148=37 I. C. 516=5 L. W. 349.

(3) *Shafi Ahmed v. Emperor*, 92 I. C. 212=A. I. R. 1925 P. C. 305=49 M. L. Cr. P. O.—120

J. 834=23 L. W. 1=(1926) M. W. N. 62=43 C. L. J. 67=3 O. W. N. 165=23 Bom. L. R. 158=27 Cr. L. J. 223=30 C. W. N. 557 P. C.

(4) *Ranganadhaier's*, Cr. P. C. 3rd Ed., p. 698

(5) *Shafi Ahmed v. Emperor*, 92 I. C. 212=1925 P. C. 305=28 Bom. L. R. 158=27 Cr. L. J. 228.

Magistrate can apply direct to the High Court for a transfer of the case under s. 526, and is not obliged to go first to the Chief Presidency Magistrate under this section(1).

May withdraw : Necessity of application for transfer.—There is nothing in this section which disables the Magistrate from taking action unless he is set in motion by the petition of one of the parties. It is not the intention of the legislature to make an application from either of the parties a necessary preliminary(2). But though a District Magistrate can transfer a case *suo motu*, yet when action is taken at the instance of a party, a proper application should, as a rule, be insisted upon, specially when allegations are made against the Magistrate(3). The Crown is as much a party before the Sessions Judge as an accused person. Any motion that has to be made before the Sessions Judge on behalf of the Crown should, therefore, be through the Government Pleader and not by an official or semi-official letter from the District Magistrate as representing the Crown(4).

Stage at which case may be withdrawn or transferred.—A case may be transferred as soon as the complaint has been received by the Magistrate who takes cognizance of the offence complained of. A District Magistrate has therefore power, upon application by the accused person, to withdraw a complaint from one Subordinate Magistrate and to refer it to another such Magistrate even before a decision to issue process against the accused has been reached(5). The District Magistrate has authority to call up to his own court any criminal case without limitation as to the stage of proceeding at which it may be called(6). But where a District Magistrate withdrew a case from the file of a Deputy Magistrate to his own file when the Deputy Magistrate was about to frame a charge, it was held that the transfer was bad(7). Again in another case in which, after hearing the evidence for the prosecution, the Subordinate Magistrate expressed an opinion that it was not sufficient to support the charge, and the District Magistrate thereupon removed the case to the file of another Magistrate, the High Court set aside that order and directed the first Magistrate to conclude the trial(8). A case cannot be transferred at a very late stage of a trial when the prosecution evidence has been taken and that remains to be done is to pass an order of commitment or discharge(9). A case which has been disposed of by a competent authority cannot be withdrawn by the District Magistrate to his file under this section(10). But where several

(1) *In re Shindasani*, 32 Bom. L. R. 1128.

(2) *Udhomal v. Majinlai*, 144 I. C. 881=A. I. R. 1933 S. 205.

(3) *Gowardhan Das v. Abbas Ali*, 121 I. C. 374=1930 L. 168=31 Cr. L. J. 257. (A transfer application should be supported by an affidavit testifying to the correctness of the allegation made therein).

(4) *Bhagwan Das v. Emperor*, 84 I. C. 719=22 A. L. J. 1103=26 Cr. L. J. 367.

(5) *Asaram v. Bhagirath*, 7 N. L. R.

97=11 I. C. 621=12 Cr. L. J. 437. The Magistrate who has withdrawn a case to his own file under this section may make a complaint under s. 476: *Amanat Ali v. Emperor*, A. I. R. 1929 C. 721=33 C. W. N. 1058.

(6) *Valaetee Khanum v. Mehr Ali*, 24 W. R. Cr. 4.

(7) *Gopinath v. Narain Das*, 30 C. 693.

(8) *Nobo Coomdar v. Queen*, 14 W. R. Cr. 12.

(9) *Re Pakiria*, 2 Weir. 691.

(10) *Siddik v. Chakauri*, 17 C. W. N. 451=14 Cr. L. J. 123=18 I. C. 683.

court which takes the same view(1). It has, however, been held that where a District Magistrate acts on his own initiative in transferring a criminal case, his order is not vitiated by the fact that another Magistrate of co-ordinate authority has refused to make the transfer(2). But where a Magistrate examines the reasons given by the co-ordinate authority and finds that that authority is wrong his interference must be deemed to be by way of appeal which he has no jurisdiction to entertain and the order of transfer must be set aside(3).

Sub Divisional Magistrate taking the case on to his own file case transferred by District Magistrate.—Where the District Magistrate has transferred a case to a Magistrate subordinate to himself, but also subordinate to the Sub Divisional Magistrate it is no longer competent to the latter Magistrate to take the case on to his own file(4).

Procedure in cases where whole case is transferred.—Where the whole case is made over to the subordinate Magistrate he has full seisin of it and it is not open to the Sub Divisional Magistrate unless he proceeds under this section to pass any order with regard to the case especially to call for a charge-sheet against some more accused persons(5). When a case has once been made over for trial to a subordinate Magistrate, the District or Sub-Divisional Magistrate's jurisdiction (as the case may be) to do any thing more in the matter ceases, so long as the transfer to the subordinate Magistrate is in existence and the case is not formally withdrawn(6). He cannot dismiss the complaint, much less prosecute the complainant (7). He can make no order in the case except such order as may be made by him by way of revision(8).

Chief Presidency Magistrate.—The subordination of the Presidency Magistrates to the Chief Presidency Magistrate should be deemed to be of the same kind and extent as the subordination of Magistrates and Benches to the District Magistrate under section 17 (1). The Chief Presidency Magistrate, therefore, has, under this section, the power to withdraw any case from any one of them and refer it for inquiry or trial to any other such Magistrate(9). The Additional Chief Presidency Magistrate is subordinate to the Chief Presidency Magistrate and the latter has power under this section to withdraw a case from the file of a Presidency Magistrate to whom it had been made over for disposal by the Additional Chief Presidency Magistrate and to transfer it to his own file(10). A party to a criminal case pending before a Presidency

(1) *Thaman Chetty v. Alagiri Chetty*, 14 M 399.

(2) *Narayanadasamy v. Kuppusamy*, 5 L W 372=18 Cr L J. 57 (58)=37 I C 41.

(3) *Ibid*.

(4) *Emperor v. Muhammad Akbar*, 47 A. 288=85 I. C 378=23 A L J. 183 =L R. 6 A 57 Cr.=26 Cr L. J. 539=A. I R. (1925) A 283.

(5) *Deonarasim v. Emperor*, 12 Pat 311=A I R. 1933 Pat. 244=14 Pat L T 176.

(6) *Shanto Teornji v. Emperor*, 3 B. L R App. 161; *Girish Chandra v*

Empress, 7 B L R 513; *Ajab Lal v. Emperor*, 32 C 783.

(7) *Kutab Ali v. Empress*, 3 C W. N 490.

(8) *Radhabullabh v. Benode*, 30 C. 449. He cannot even issue process for the apprehension of the absconding accused *Gelapdi v. Emperor*, 27 C. 979.

(9) *In re Nageshwar*, 1 Bom. L. R. 347.

(10) *Mohini Mohan v. Punam Chand*, 83 L. C. 681=39 C L J 595=51 C. 620=1924 C 911=25 Cr. L. J 101 =23 C. W. N 903.

witness(1). Where a Magistrate tried and convicted an accused in a case and expressed an opinion that the evidence of the accused was not believable it was held that the expressed opinion in itself was no ground for a transfer of another case against the same accused by a different complainant under a different set of facts(2). It is desirable that cross complaints should ordinarily be disposed of by the same Magistrate. The mere fact that the complaint of one party is dismissed and that he is apprehensive of a conviction is by itself no ground for a transfer(3). The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient reason for directing a transfer of the case from his court(4). Delay in disposing of the case cannot be a ground for taking action under this section. If the District Magistrate thinks there is delay he should ask the Subordinate Magistrate to expedite the trial(5). Courts should not be influenced by general allegations regarding the so-called communal feelings and cases should not be transferred on basis of such allegations for an intolerable position would arise if it were open to an accused person in a case of a communal or quasi communal nature to obtain a transfer of a case from the court of a Hindu Magistrate merely because he, the accused, was Mohammadan or vice versa(6). But in some cases it has been held that it is desirable that a case relating to a mosque or graveyard between Hindus and Mohammadans should be tried by the District Magistrate or some other European Magistrate(7). Where the grounds of an application for transfer are personal to the trying Magistrate, the District Magistrate should require strict proof of the allegations(8), and should give an opportunity to the trying Magistrate of answering the allegations made against him by the applicant(9). A District Magistrate ought not to withdraw a case from the court of a subordinate Magistrate to his own court, merely out of a desire to inform his own mind as to the nature of the dispute which led to the criminal proceedings(10).

Notice to parties.—Although this section does not provide for the giving of a notice to the opposite party, still on general principles notice should be given to the party to be affected before an order for transfer is made(11). In many cases it would be improper to take action under

(1) *Muneshwar v. Raghubir*, 21 I. C. 155=11 A. L. J. 741=14 Cr. L. J. 655.

(2) *Hayat Khan v. Emperor*, 4 Pat. L. W. 21=19 Cr. L. J. 121=43 I. C. 409.

(3) *Walidad v. Nizam-ud Din*, A. I. R. 1929 Lah. 48=111 I. C. 854.

(4) 20 Cr. 119=

(5)

(6) *Gowardhan v. Abbas*, 121 I. C. 874=A. I. R. 1930 Lah. 168; *Pandurang v. Emperor*, 28 Cr. L. J. 898=A. I. R. 1929 Nag. 51; see also *Gharso v. Emperor*, 18 A. L. J. 606=31 Cr. L. J. 155; *Bhagwan v. Emperor*, 22 A. L. J. 1103.

(7) *Kader Baksh v. Sunder Lal*, 127 P. L. R. 1912=10 Cr. L. J. 118;

Mangat v. Crown, 26 P. L. R. 267=26 Cr. L. J. 1056; *Harikishen v. Allah Buksh*, 28 Cr. L. J. 588.

(8) *In re Mahadu*, Est. Un. Cr. C. 599; *Shankar Abaji v. Empress*, 6 Bom. H. C. R. 69.

(9) *Yedu Bapu v. Bhagwandas*, 5 Bom. I. R. 28.

(10) *Amrit Majni v. Emperor*, 46 C. 854=28 C. W. N. 623.

(11) *Karnachandra v. Emperor*, 101 I. C. 218=1917 Nag. 244=8 A. I. Cr. R. 186=28 Cr. L. J. 517; *In re Kamatchi Ammal*, 119 I. C. 385=(1919) M. W. N. 265=1919 M. 511=2 Mad. Cr. C. 93=20 L. W. 401; *Jageshar v. Emperor*, 28 A. L. J. 118; *Teacotta v. Ameer Hojee*, 8 C. 593; *Ajchhaya v. Prayag*, 7 C. W. N. 114; *Bakshi v. Talhu*

persons are charged with the offence of rioting, and only one of them is sent by the police for trial and is convicted, the District Magistrate has ample jurisdiction, on the refusal of the Magistrate to summon the others on the application of the complainant, to transfer the case to his own file under this section(1). Where with regard to an offence which has been the subject of police report and has not been finally disposed of by a Magistrate a District Magistrate thinks it necessary to continue proceedings against the accused it is more regular for him to withdraw the pending case to his own file under this section, rather than to begin separate proceedings by taking cognizance of the same offence under section 190 (1) (c)(2). Where a case is forwarded by a Taluk Magistrate to a Head Assistant Magistrate for enhancement of sentence, it is competent to a District Magistrate to transfer the case at that stage to a joint Magistrate(3).

Grounds for transfer of case.—The powers given by this section are very extensive but the wide discretion that the Magistrate is clothed with should be sparingly exercised(4). He should exercise the powers with due discretion and for really good reasons(5). The general principle is that if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he will not receive fair dealing at his trial, the case should be transferred to a calmer atmosphere(6). A transfer is desirable where a Magistrate deals with a dispute between two parties in an informal manner as a private arbitrator(7), or where during the pendency of a case against the accused, the Magistrate goes to the scene of the occurrence accompanied by a partisan of the complainant and holds a local inquiry into a matter(8), or where a Magistrate in the course of an investigation holds a prolonged inquiry during which he makes a number of notes, and collects a large amount of information which by reason of the way in which it is acquired he cannot properly and legally consider in arriving at a judicial determination, and the notes made by the Magistrate are of such a nature that he ought to be examined as a witness in respect thereto(9). Applications for transfer giving good reasons, if the allegations be correct, why a case should not be transferred require to be seriously dealt with and should not be casually brushed aside as *faul*(10). Where, however, a case is triable by the Court of Session, it is no ground for transfer of a case that the Magistrate inquiring into the offence had expressed certain strong views against a party or that he was going to be called as a

(1) *Ayen Mahamad v. Emperor*, 5 O. W. N. 488

(2) *Ghana v. Emperor*, A. I. R. 1929 Pat. 710=123 I. O. 78=3 Cr. Law. Pat. 13=31 Cr. L. J. 472.

(3) *Re Chandra Sekaram*, 2 Weir. 600.

(4) *Jageshar v. Emperor*, L. R. 11 A. 48=1929 Cr. C. 660=1929 A. 932

(5) *Ghansham v. Waryam*, 13 F. R. 1639 Cr., *Ghulam Mohiuddin v. Emperor*, 20 Cr. L. J. 402, *Shantaram v. Kanai Lal*, A. I. R. 1934 C. 137=58 C. L. J. 214

(6) *Binode Behari v. Emperor*, 81

I. C. 78=25 Cr. L. J. 590=2 Pat. L. R. Cr. C. 9=A. I. R. 1925 Pat. 115, *Marhal v. Mathu*, 21 I. C. 950=15 Cr. L. J. 196, *Sergeant v. Dale*, 2 Q. B. D. 558=46 L. J. Q. B. 781=37 L. T. 15

(7) *Gobinda Chandra v. Gopal*, 18 C. L. J. 150=14 Cr. L. J. 602=21 I. C. 474

(8) *Kartan Ullah v. Emperor*, 12 C. W. N. 718=7 Cr. L. J. 510 see *Gopal Singh v. Emperor*, 115 F. 1 b. 1901

(9) *Hari Kishore v. Abdul*, 21 C. 920

(10) *Badan Singh v. Crown*, 51 Cr. L. J. 520

case under this section to record the reasons for doing so is only an irregularity and is not sufficient ground for setting aside the order of transfer unless it is shown to have prejudiced a party to the proceedings(1). It does not vitiate the order; nor are subsequent proceedings necessarily invalidated thereby(2); because the superior court can call for reasons and the demand may be met(3).

Sub section (6).—The original sub-section superseded *Madhavara-yachar v. Subba Row*(4) in which it was held that a village Munsiff was not a Magistrate under the corresponding section of the former Code and that a joint Magistrate had no power to withdraw a case from him and transfer it. The sub-section as it stands now supersedes *Sena-kolandai v. Ammayan*(5), which held that a District Magistrate was not competent to transfer a case from a village Headman appointed under regulation I of 1816.

Revision.—Although it is not the practice of the High Court to interfere with an order under this section made by a lower court in the exercise of its jurisdiction, still it will interfere when there are reasons for interfering with the order of transfer(6). But the High Court will not interfere in revision with an order of the District Magistrate dismissing an application under this section for the transfer of a case. The remedy of the applicant is to make an independent application for transfer under section 526 supported by affidavit and affirmation(7).

(1) *In re Susai Lazar*, 9 Cr. L. J. 310; *Prakas Chunder v. Emperor*, 34 O. 918; *Muhammad Sharif v. Hari Prasad*, 5 Pat 229=97 I. C. 974=27 Cr. L. J. 1214; *Shripad v. Emperor*, 52 B. 157=29 Cr. L. J. 317.

(2) *Asaram v. Bhagirathi*, 12 Cr. L. J. 437=11 I. C. 621.

(3) *Abdulla v. Emperor*, 3 P. R. 1910 Cr.=35 P. W. R. 1909 Cr.=11 Cr.

L. J. 150=164 P. & L. R. 1910.

(4) 15 M. 94.

(5) 26 M. 894.

(6) *Jagdamba Sahay v. Emperor*, 108 I. C. 329=29 Cr. L. J. 371=1928 P. 347=9 A. I. Cr. R. 537; See *In re Naba Kumar*, 5 B. L. R. 45 App.; *Sardar Khan v. Athanilla*, A. I. R. 1925 M. 174=47 M. L. J. 926=20 L. W. 847=85 I. C. 254=26 Cr. L. J. 510.

(7) *Ashu v. Moung Po*, 1 Radg. 631.

the section without issuing notice(1). Where a transfer is ordered, after all the witnesses for the prosecution have been examined, it is only right that notice should be given to the accused and he should be heard before passing the final order of transfer(2). When a complainant has obtained from a competent Magistrate an order of transfer of a case made after hearing both the parties a Magistrate of superior jurisdiction should not cancel the order and re-transfer the case to the original Magistrate without hearing the complainant in support of the order of transfer(3). A transfer under this section is not illegal for want of notice to the opposite party(4). The question of a notice is one of propriety rather than of legality to be decided on the facts of each particular case. District Magistrates have to be careful whenever they are called upon by one party only to a criminal case to exercise the power of transferring it and should not transfer it without notice to the other side, when the application has been made at a late stage of the case(5). The law is not, however, mandatory upon the point and the omission to issue notice is in itself not a reason for setting aside an order of transfer(6). An order for the transfer of a case, made at the request of the Magistrate on whose file the case stands and not on the application of a party, is an exception to the general rule that the order for transfer should not be made under this section without notice to the other side(7). No notice by the District Magistrate, to the accused is necessary, before passing his order of transfer to a subordinate Magistrate, where there is no application for transfer and the District Magistrate acts *suo motu*(8). An order of transfer made under this section was held not bad, though no notice was given to the accused to show cause against the making of the order, where the delay in the disposal of the case which was a simple one was extraordinary(9). Where a District Magistrate transfers a case from the file of a subordinate Magistrate to his own in obedience to an order of

Ram, 28 P. R. 1902 Cr.; *Sardara v. Emperor*, 24 Cr. L. J. 167=5 Lah. L.

L. 156; *In re Hawaji*, 21 Bom. L. R. 276; *In re Dukhi Kewat*, 28 A. 421, *Ct. Dwarha Das v. Emperor*, A. I. R. 1931 Lah. 29=180 I. C. 330=32 P. L. R. 356=32 Cr. L. J. 492=16 A. I. Cr. R. 120, *Bakhsha v. Tahla Ram*, 24 P. R. 1902 Cr., *In re Sakar Naik*, 2 Bom. L. R. 842 and see *Isham Ghani v. Fozal Elahi*, 1927 Lah. 80=99 I. C. 70=7 A. I. Cr. R. 199, *In re Virji*, 6 Bom. L. R. 856.

734=28 L. W. 303, *Asa Ram v. Bhagirathi*, 7 N. L. R. 97.

(5) *Karnachandra v. Emperor*, 102 I. C. 213=28 Cr. L. J. 517, *In re Hawaji*, 21 Bom. L. R. 276=50 I. C. 496=20 Cr. L. J. 320

(1) *Dur Mahomed v. Allahdino*, 18 I. C. 224=5 S. L. R. 190=13 Cr. L. J. 32.

(6) *Gobind Swami v. Emperor*, 83 I. C. 345=1923 Pat. 47=1 P. L. R. 109 Cr.=1923 Pat. 226=2 Pat. 333=26 Cr. L. J. 1885, *Hari Ram v. Allah Baksh*, A. I. R. 1933 Lah. 385

(2) *In re Lala Mian*, 9 Cr. L. J. 407=6 M. L. T. 14.

(7) *Empress v. Kupjammuthu*, 24 M. 317

(3) *In re Manikkam Pillai*, 22 Cr. L. J. 199=60 I. C. 55=12 L. W. 633 (1920) M. W. N. 767=39 M. L. J. 714

(8) *Abdulla v. Emperor*, 3 P. R. 1910 Cr.

(4) *Bagh Ali v. Muhammad Din*, 6 Lah. 541=6 A. I. Cr. R. 47=27 P. L. R. 80=27 Cr. L. J. 411=93 I. C. 75=1926

(9) *Re Masha Subjee*, 2 Weir. 692.

Sub-section (1) is applicable to all cases before all Magistrates either in presidency towns or in the mufassil, to which the special provisions of Chapter 33 do not apply. Sub-section (2) contemplates such cases only in which the Magistrate commits the claimant to trial to the Court of Session after rejection of the claim, in which cases the claimant, whose claim has been rejected by the Magistrate and who has thereafter been committed to the Court of Session, may repeat his claim there, and the said court, after such further inquiry, if any, as it thinks fit, decide the claim and shall deal with such person accordingly. Sub-section (3) applies to all courts in which trials (not inquiries) are held of the claimant after rejection of his claim, and it states that the decision on such claim shall form a ground of appeal from the sentence or order passed in such trial(1).

Claim as to status.—When an accused claims to be dealt with as an European British subject the Magistrate must decide that point going into the case(2). A mere statement by the accused that he is an European British subject cannot be acted upon(3). Before a person can be held to be an European British subject, he must prove that he comes within the terms of that definition; and to do this it is necessary that he should both make the claim and establish it. There can be no such status without a claim and a decision that it exists(4). A person claiming the privileges of an European British subject under this section must prove not only legitimate descent but also the nationality of his domicile(5). A statement in an affidavit by the accused's wife that she heard from their grand-parents while they were all living together that the accused's grand-father was born in England of English parents, though not controverted by the Crown by a counter-affidavit is hearsay evidence and is not sufficient to establish the status of the accused as a European British subject(6).

Opportunity to plead.—The Magistrate is bound to give the accused an opportunity of pleading that he is a European British subject(7).

Claim when to be made.—A claim to be dealt with as an European British subject under sections 29-A and 528-A must be made before the trial or inquiry has actually commenced, and if it is not then made, it cannot be made at any subsequent stage(8). In *Emperor v. Harendra Chandra*(9), however, Mukerji, J., observed that a claim under section 528-A. (1) may, in an inquiry under Chapter XVIII, be made at any time before the order of commitment.

528-B. If in any such case an European or Indian British subject or an European (other than an European British subject) or an

Failure to plead
status a waiver.

(1) *Emperor v. Harendra Chandra*, 51 C. 980 (9-7, 988)=29 C. W. N. 383=26 Cr. L. J. 385=84 I. C. 929=A I. R. 1925 P. 351

(2) *Empress v. Berrill*, 4 A. 141

(3) *Clark v. Beane*, 5 W. R. Cr. 53.

(4) *Tobin v. Empress*, 5 P. R. 1885 Cr.; *Emperor v. Shidoo*, A. I. R. 1929 S. 26=22 S. L. R. 472=29 Cr. L. J. 936=111 I. C. 856

(5) *Thomas*, 6 M. H. C. R. 7.

(6) *Thomas v. Emperor*, 98 I. C. 218 =53 C. 746=A. I. R. 1926 C. 1203=27 Cr. L. J. 1301.

(7) *Clark v. Beane*, 5 W. R. Cr. 53.

(8) *Carmen v. O'Brien*, 54 C. 1041 =107 I. C. 953=A. I. R. 1928 C. 97=1 Cr. L. J. 215.

(9) 51 C. 980.

CHAPTER XLIV-A.

SUPPLEMENTARY PROVISIONS RELATING TO
EUROPEAN AND INDIAN BRITISH SUBJECTS
AND OTHERS.

528-A (1) Where, in any case to which the provisions of Chapter XXXIII do not apply, any person claims to be dealt with as an European or Indian British subject, or where any person claims to be dealt with as an European (other than an European British subject) or an American, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall deal with him accordingly.

(2) When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session, and such person repeats the claim before such court, such court shall, after such further inquiry, if any, as it thinks fit, decide the claim, and shall deal with such person accordingly.

(3) When any court before which any person is tried rejects any such claim as aforesaid, the decision shall form a ground of appeal from the sentence or order passed in such trial.

This section reproduces with certain changes the old section 453.

Scope.—The claim to be tried as an European British subject, or an Indian British subject or an European not being an European British subject or an American is dealt with in this Chapter. Sub-section (1) of this section expressly takes cases, to which Chapter 33 applies, out of its scope. It provides that such a claim must be put forward by the claimant stating the grounds of such claim to the Magistrate before he is brought for the purposes of the inquiry or trial, and also lays down that such Magistrate should hold an inquiry and decide whether the claimant has established his status and shall deal with him accordingly.

and held that an application in revision was not a subsequent stage of the same case, but was a totally independent matter giving a right to apply to a superior court independently of any proceedings necessarily subsequent or consequent upon the hearing of the original case. This case has been followed in a recent Calcutta case(1). But the omission to make a claim under s. 528-A does not affect the question of appeal under s. 449 (1) (c) if the conditions in s. 443 (1) (a) and (b) exist and it is not necessary to show that a claim was made before and found by the Presidency Magistrate. Sections 528-A and 528-B have no application to s. 449(2).

Duty of Magistrate to inform accused of his rights.—When an accused person is found to be an European British subject his rights should be explained to him to enable him to choose whether he shall be tried as an European British subject or not(3). An omission to ask an accused person whether he is an European British subject is merely an irregularity and is not a sufficient ground for interference in revision(4). It has, however, been held in Calcutta that where the Magistrate fails to inform the accused of his rights under the Code, the conviction of the accused will be set aside(5). But in a later case a different view is expressed(6). This section does not impose any duty upon a Magistrate to ask an accused person categorically if he is an European British subject(7).

Revocability of waiver.—The claim under section 528-A can be revived after waiver(8). A waiver is not absolutely irrevocable and can be recalled provided it is promptly withdrawn in the same court and before any action has been taken on the abandonment(9).

528-C.—Where a person, not being an European British subject, is dealt with as an European British subject, or, not being an Indian British subject is dealt with as an Indian British subject, or, not being an European (other than an European British subject) or American, is dealt with as an European or American, and such person does not object, the inquiry, commitment, trial or sentence, as the case may be, shall not, by reason of such dealing, be invalid.

This section reproduces with certain changes the old s. 455.

(1) *Bolton v. Emperor*, A. I. R. 1933 C. 240=1933 Cr. C. 325=60 Cal. 676=143 I. O. 892=34 Cr. L. J. 671.

(2) *Martindale v. Emperor*, 52 C. 347.

(3) *Emperor v. ...*

(4) *Emperor v. ...*

(5) *Emperor v. ...*

(6) *Emperor v. ...*

(7) *Emperor v. ...*

(8) *Emperor v. ...*

(9) *Emperor v. ...*

Emperor, 37 C 467.

(6) *Carmen v. O'Brien* 51 C. 1011=29 Cr. L. J. 245=107 I. O. 353=A. I. R. 1929 Cal. 97=1 Cr. Law 10=9 A. L. Cr. R. 471.

(7) *Tobin v. Empress*, 5 P. R. 1885 Cr.

(8) *Emperor v. Sullivan*, 24 A. 511;

Makbool Ahmad v. Allen, 50 O. 689.

(9) *Emperor v. Sterling*, 1 P. R. 1908 Cr=4 P. W. R. 1908=2 Cr. L. J.

274=136 P. L. B. 1909; *Empress v.*

Keongh, 17 P. R. 1978 Cr.

American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall not assert it in any subsequent stage of the case.

This section reproduces with certain changes the old section 454.

Failure to plead status a waiver.—The privilege of an European British subject to be tried as such is one that can be waived(1). Failure to make a claim amounts to a relinquishment of the alleged right to be dealt with as an European or an European British subject(2). When an accused person relinquishes his privilege to be dealt with as an European British subject, he loses all the benefits of the special procedure laid down in this Code(3) and his case is determined under the ordinary law, and, even if the Magistrate is satisfied that he is a European British subject his jurisdiction is not ousted(4). Where the Magistrate explained to the accused his rights to be dealt with as an European British subject, and then asked him whether he claimed to be dealt with as such, and the latter stated that he did not claim the right, it was held that he had relinquished his right(5). This section relates to any case to which sub section (1) of section 528-A applies. Where, therefore, no claim is put forward before a Mofassil or Presidency Magistrate, this section bars its assertion thereafter(6).

Any subsequent stage of the case.—Where an accused person waives his right to be tried as an European British subject, the special privilege given to him as such including the right of appeal or revision to the High Court by virtue of section 4, clause (j), is lost, and he should be tried like any other ordinary person not only in the matter of the trial itself but in the matter of appeal and revision as well(7). But the Allahabad High Court did not follow this view in *Harris v. Peal*(8)

(1) *Barindra Kumar v. Emperor*, 37 C. 467=14 C. W. N. 1114=11 Cr. L. J. 453=7 I. C. 359; *Emperor v. Nulty*, 7 N. L. R. 93=11 I. C. 610=12 Cr. L. J. 436; *In re Quiros*, 6 I. C. 83; *Empress v. Grant*, 12 B. 561.

(2) *Alexander Ruffe v. Emperor*, 13 Cr. L. J. 193=14 I. C. 197=24 P. W. R. 1111.

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37 C. 467.

(6) *Emperor v. Harendra Chandra*, 51 C. 980=29 C. W. N. 384=26 Cr. L. J. 385=84 I. C. 929=A. I. R. 1925 C. 384,

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37 C. 467.

(7) *Jeremiah v. Johnson*, 25 Cr. L. J. 231=76 I. C. 695=45 M. L. J. 600=18 I. W. 895=33 M. L. T. 194=(1924) M. W. N. 60=A. I. R. 1924 M. 373; following *Empress v. Grant*, 12 B. 561; *Sterling v. Emperor*, 1 P. R. 1903 Cr.=4 P. W. R. 1903 Cr.=7 Cr. L. J. 274=136 P. L. R. 1903; see also *Emperor v. Sulleian*, 24 A. 511.

(8) 17 A. L. J. 696 (897)=21 Cr. L. J. 767=58 I. C. 351.

and held that an application in revision was not a subsequent stage of the same case, but was a totally independent matter giving a right to apply to a superior court independently of any proceedings necessarily subsequent or consequent upon the hearing of the original case. This case has been followed in a recent Calcutta case(1). But the omission to make a claim under s. 528-A does not affect the question of appeal under s. 449 (1) (c) if the conditions in s. 443 (1) (a) and (b) exist and it is not necessary to show that a claim was made before and found by the Presidency Magistrate. Sections 528-A and 528-B have no application to s. 449(2).

Duty of Magistrate to inform accused of his rights.—When an accused person is found to be an European British subject his rights should be explained to him to enable him to choose whether he shall be tried as an European British subject or not(3). An omission to ask an accused person whether he is an European British subject is merely an irregularity and is not a sufficient ground for interference in revision(4). It has, however, been held in Calcutta that where the Magistrate fails to inform the accused of his rights under the Code, the conviction of the accused will be set aside(5). But in a later case a different view is expressed(6). This section does not impose any duty upon a Magistrate to ask an accused person categorically if he is an European British subject(7).

Revocability of waiver.—The claim under section 528-A can be revived after waiver(8). A waiver is not absolutely irrevocable and can be recalled provided it is promptly withdrawn in the same court and before any action has been taken on the abandonment(9).

528-C.—Where a person, not being an European British subject, is dealt with as an European British subject, or, not being an Indian British subject is dealt with as an Indian British subject, or, not being an European (other than an European British subject) or American, is dealt with as an European or American, and such person does not object, the inquiry, commitment, trial or sentence, as the case may be, shall not, by reason of such dealing, be invalid.

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(2) *Martindale v. Emperor*, 52 C. 347.

(3) *Emperor v. Nulty*, 7 N. L. R. 93; *William v. Shanks*, L. B. R. (1872=1892) 403; *Baldev v. Clarke*, 18 C. W. N. 385; *In re Queeros*, 6 C. 83.

(4) *D'Souza, In re*, 16 Cr. L. J. 616=30 I. O. 440.

(5) *Baldev v. Clarke*, 18 C. W. N. 385; see also *Barindra Kumar v*

Emperor, 37 C. 467.

(6) *Carmen v. O'Brien* 54 C. 1041=29 Cr. L. J. 245=107 I. O. 353=A. I. R. 1929 Cal. 97=1 Cr. Law 10=9 A. L. Cr. R. 471.

(7) *Tobin v. Empress*, 5 P. R. 1885 Cr.

(8) *Emperor v. Sullivan*, 21 A. 511; *Makbool Ahmad v. Allen*, 60 C. 689.

(9) *Emperor v. Sterling*, 1 P. R. 1908 Cr.=4 P. W. R. 1908=2 Cr. L. J. 274=136 P. L. R. 1909; *Empress v. Keogh*, 17 P. R. 1678 Cr.

528-D. (1) Unless there is something repugnant in the context, all enactments made by the Governor-General in Council or the Indian Legislature which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects, although such persons are not expressly referred to therein.

(2) Nothing in this section shall be deemed to authorise any court to exceed the limits prescribed by this Code as to the amount of punishment which it may inflict on an European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects.

This section reproduces with certain changes the old s. 459.

Prosecution under Police Act.—In a prosecution under the Indian Police Act, V of 1861, the Magistrate is bound to take into consideration and determine a prisoner's plea that he is European British subject(1).

Powers of Sessions Courts in British Baluchistan.—Courts of Session in British Baluchistan have the same powers over European British subjects and other persons as are held by Courts of Session in British India. Therefore, a Court of Session in British Baluchistan can hear such appeals as the Code prescribes(2).

(1) *Queen v. Hearn*, 3 N. W. P. H. C. R. 128.

(2) *Bombardier v. Emperor*, 119 I. C. 489=1929 Lab. 187=80 Cr. L. J. 918—Ind. Rul. (1929) Lab. 774.

CHAPTER XLV

OF IRREGULAR PROCEEDINGS

529. If any Magistrate not empowered by law to do any of the following things, namely :—

Irregularities which do not vitiate proceedings.

- (a) To issue a search-warrant under section 98;
- (b) To order, under section 155, the police to investigate an offence;
- (c) To hold an inquest under section 176;
- (d) To issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;
- (e) To take cognizance of an offence under section 190, sub-section (i) clause (a) or clause (b);
- (f) To transfer a case under section 192;
- (g) To tender a pardon under section 337 or section 338;
- (h) To sell property under section 524 or section 525; or
- (i) To withdraw a case and try it himself under section 528;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

Clause (e).—If a Magistrate not empowered by law to take cognizance of an offence under s. 190, sub-s. (1), cl. (a) or cl. (b) erroneously and in good faith does take such cognizance, his proceedings shall not be set aside merely on the ground of his not being empowered unless prejudice has been caused to the accused(1). The proceedings of the Magistrate would be less open to objection if he is empowered to take cognizance of offences under clauses (a) and (b) of s. 190, but erroneously and in good faith, takes cognizance of a case under clause (b) instead of taking cognizance under clause (a)(2). If a police report does not contain a sufficiently specific statement of facts as required by clause (b) of s. 190, but only a certain number of facts,

(1) *Chuni Lal v. Emperor*, A. I. R. J. 107.

1933 A. 399=1933 Cr. C. 682=144 I. C. 380=34 Cr. L. J. 761; *Abdul Jamal v. Emperor*, 18 I. C. 667=13 P. W. R. 1913 Cr.=68 P. L. R. 1913=14 Cr. L.

(2) *Sicastrami v. Emperor*, 51 B. 493=28 Cr. L. J. 939 (941)=103 I. C. 459.

528-D. (1) Unless there is something repugnant in the context, all enactments made by the Governor-General in Council or the Indian Legislature which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects, although such persons are not expressly referred to therein.

(2) Nothing in this section shall be deemed to authorise any court to exceed the limits prescribed by this Code as to the amount of punishment which it may inflict on an European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects.

This section reproduces with certain changes the old s. 459.

Prosecution under Police Act.—In a prosecution under the Indian Police Act, V of 1861, the Magistrate is bound to take into consideration and determine a prisoner's plea that he is European British subject(1).

Powers of Sessions Courts in British Baluchistan.—Courts of Session in British Baluchistan have the same powers over European British subjects and other persons as are held by Courts of Session in British India. Therefore, a Court of Session in British Baluchistan can hear such appeals as the Code prescribes(2).

(1) *Queen v. Hearn*, 3 N. W. P. H. C. R. 128.

(2) *Bombardier v. Emperor*, 118 I C. 438=1929 Lah 187=30 Cr. L. J. 918 =Ind. Bul. (1929) Lah. 774.

the jurisdiction over the particular offence. Hence a Magistrate of one district cannot tender pardon to a person implicated in an offence committed in another district and inquired into in the latter district. The pardon so tendered is illegal and cannot be validated by the operation of this section(1).

Clause (i).—Where during the absence of the District Magistrate from the headquarters, the Magistrate in general charge, transferred a criminal file from another Magistrate to his own court and after the illegality was pointed out to him, continued the trial of the case, it was held that the proceedings were *ultra vires* and without jurisdiction and the illegality was not cured under this section(2).

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely :—

Irregularities
which vitiate pro-
ceedings.

- (a) Attaches and sells property under section 88;
- (b) Issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department;
- (c) Demands security to keep the peace;
- (d) Demands security for good behaviour;
- (e) Discharges a person lawfully bound to be of good behaviour;
- (f) Cancels a bond to keep the peace;
- (g) Makes an order under section 133 as to a local nuisance;
- (h) Prohibits, under section 143, the repetition or continuance of a public nuisance;
- (i) Issues an order under section 144;
- (j) Makes an order under Chapter XII;
- (k) Takes cognizance, under section 190, sub-section (1) Clause (c), of an offence;
- (l) Passes a sentence under section 349, on proceedings recorded by another Magistrate;
- (m) Calls, under section 435, for proceedings;
- (n) Makes an order for maintenance;
- (o) Revises, under section 515, an order passed under section 514;
- (p) Tries an offender;
- (q) Tries an offender summarily; or
- (r) Decides an appeal;

his proceedings shall be void.

(1) *Empress v Chidha*, (1897) A. W. N. 172-20 A. 40.

(2) *Punnu v. Emperor*, 150 P. L. R. 1903

still the Magistrate can take cognizance upon such report, the defect being cured by this section(1). The trial of an offence by a Magistrate who is otherwise competent to try the same is not invalid merely because the offence was not committed within the circle of the jurisdiction of the Magistrate. Such an irregularity is excused by the provisions of cl. (e)(2). This clause saves the proceedings before a Magistrate taken on a complaint of which cognizance is taken without authority; but this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so(3). It may be added, with reference to clause (e), section 530 (k), and section 531, that, unless it appears that the proceedings wrongly held have, in fact, occasioned a failure of justice, they cannot be set aside(4).

Clause (f).—Where a Magistrate of the first class to whom a case has been transferred by a Sub-Divisional Magistrate, in his turn, erroneously but *bona fide* believing that he has power to do so, transfers that case to a Magistrate of the third class, this clause applies and the trial of the case by such third class Magistrate is not invalidated(5). A transfer by a first class Magistrate of a case under s. 145 erroneously and in good faith, does not vitiate the proceedings by reason of the provisions of this clause(6). Section 192 cl. (1) is not restricted to cases of offences only, but is wide enough to include cases under Chapter VIII. Even if there is no power under the section to transfer such cases, the defect is cured by this clause(7). A *taluk* second class Magistrate has no power to transfer a case to a *sheristedar* second class Magistrate. But such a transfer does not vitiate subsequent proceedings(8). Where a District Magistrate transfers a case under section 456 of the I. P. C. to a bench of second class Honorary Magistrates not empowered to try it summarily and the bench proceeds with the case, the regularity of the proceedings is not affected(9). Where a Magistrate of the first class transfers a case to a Magistrate of the third class, who is not empowered to do so, is cured by this clause(10).

Clause (g).—This clause has no reference to a Magistrate empowered otherwise under the court to tender pardon, but not possessing

35 C. 243=7 Cr. L. J. 146=12 C. W. N. 299=7 C. L. J. 177

(8) *In re Sabbapathi Mudali*, 2 Weir. 152=2 Weir. 699.

(9) *Nga San Hini v. Emperor*, 11 I. C. 247=1 U. B. R. (1910) 70=12 Cr. L. J. 383, Cf. *In re Chunder Seekor*, 1 C. L. R. 434

(10) *Prasanna v. Emperor*, 11 C. W. N. 100

(5) *Hasanali v. Emperor*, 115 I. C. 399=30 Bom. L. R. 653=1923 B. 286=1 Cr. Law 100=30 Cr. L. J. 467.

(6) *Kishori Lal v. Srinath*, 86 C. 370=9 Cr. L. J. 399=13 C. W. N. 530=1 I. C. 817, *Akbar Ali v. Dams Lal*, 4 C. W. N. 621

(7) *Chintamon Singh v. Emperor*, 11 C. P. C.—121.

disregards the offence actually complained of, his proceedings are illegal and absolutely void under this section(1). But though it is improper on the part of the Magistrate to clutch jurisdiction by disregarding facts, which involve a more serious offence than he is competent to try, his proceedings are not, therefore, void(2). If a Magistrate is entitled to try the accused under the sections named in the complaint and he tries him accordingly, it cannot be said that, because another section could also be charged in the complaint, therefore the trial under the sections charged in the complaint is void(3). The meaning of this clause is that if a Magistrate tries an offender for an offence beyond his jurisdiction, his proceedings shall be void(4). Trial by a court not duly empowered is a nullity(5). When a case is submitted by a second class Magistrate to the Sub Divisional Magistrate, on the ground that the offence constituted by the evidence appears to be one which he is not competent to try, and the case is then referred by the Sub-Divisional Magistrate to a Magistrate competent to try the same, the latter cannot act on the evidence recorded by the second class Magistrate, and a conviction based partly on such evidence is bad in law(6). Where a trial is void under this section, s. 403 does not bar a retrial(7).

Clause (g).—A summary trial for an offence which is not triable summarily is illegal and void even though it has resulted in a conviction only for an offence triable summarily(8). An offence in respect of excisable article other than cocaine is not one which is triable summarily(9). An offence under s. 60 of the Excise Act, being punishable with imprisonment for one year, cannot be tried summarily, and if it is so tried the proceedings are void(10). Where, on the facts found by a Magistrate an offence is established which he cannot try summarily, he is not competent to convict for an offence made up of some only of those facts in order to give himself jurisdiction(11).

Clause (r).—An appeal from the conviction and sentence of five

(1) *Kailash Chunder v. Joynuddi*, 5 O. W. N. 250; *Emperor v. Nur Muhammad*, 32 Bom. L. R. 1279 (1281) = A. I. R. 1930 B. 595; *Katuva v. Suppan*, 28 Cr. L. J. 161=99 I. C. 596=25 L. W. 86; 2 Weir. 21; *Emperor v. Ayyan*, 24 M. 67=2 Weir. 699; see *Empress v. Gundaya*, 13 B 502.

(2) *Emperor v. Ayyan*, 24 M. 675; *Kuttuwa v. Suppan*, 25 L. W. 86=28 Cr. L. J. 164; *Dawson v. Emperor*, 2 Rang. 455=26 Cr. L. J. 1103; *Bhimakka v. Giddappa*, 3 Mys. L. J. 100.

(3) *Sripul Rai v. Emperor*, 28 A. L. J. 1423=A. I. R. 1931 A. 10=11 L. R. A. Cr. 187=1931 Cr. O. 10=129 I. C. 257=32 Cr. L. J. 360.

(4) *Emperor v. Ayyan*, 24 M. 675 (677.)

(5) *Hussain Gaihu v. Empress*, 8 B. 307; *Empress v. Itani*, Rat. Un. Cr. C. 921.

(6) *Budhu Talua v. Empress*, 55 O.

65=29 Cr. L. J. 464=47 C. L. J. 122=A. I. R. 1928 O 183=109 I. C. 175.

(7) *Hussain Gaihu v. Empress*, 8 B. 307; *Abdul Ghani v. Emperor*, 29 C. 412; *Ct. Darbari Lal v. Emperor*, 19 I. C. 839=8 A. L. J. 1120=12 Cr. L. J. 575.

(8) *Emperor v. Ram Narain*, 46 A. 446=L. R. 5 A. 69=81 I. C. 312=25 Cr. L. J. 506.

(9) *Emperor v. Ram Narain*, 46 A. 446=L. R. 5 A. 69=81 I. C. 312=25 Cr. L. J. 506.

(10) *Bhikka v. Emperor*, 86 I. C. 432=10 O. & A. L. R. 1196=26 Cr. L. J. 600=28 O. C. 123.

(11) *In re Chitender Shikur*, 1 C. L. R. 434; *Empress v. Abdul Karim*, 4 C. 18; *In re Abdul Kadir*, 3 C. L. R. 44; See *Empress v. Gundaya*, 13 B 502; *Kailash Chunder v. Joynuddi*, 5 C.W. N. 252.

Clause (a).—Where land is attached regarding which no warrant has been issued, the High Court may in view of the provisions of ss. 530 (a) and 439, release the property from attachment in exercise of its inherent powers, where it cannot do so under the strict provisions of s. 89(1).

Clause (i).—It is desirable that when a Magistrate takes action under section 144, the record should show, in clear and unmistakable terms, the authority under which a Magistrate professes to act(2).

Clause (j).—This section refers only to a case, where a Magistrate is not competent, by virtue of the position he holds or powers vested in him, to try a case of the character mentioned in s. 145. But where a Magistrate is competent to try a case under s. 145, the fact that he has not local jurisdiction over the matter will not make the case come within this clause(3).

Clause (k).—A Magistrate taking cognizance of an offence against a witness in a case which is pending before him upon the facts disclosed by the evidence of another witness does so under s. 190 (1), cl. (c), and not under s. 351(4). A Revenue Officer sent a Yadast to a 3rd class Magistrate, charging a certain person with having disobeyed a summons issued by the Revenue Officer. The 3rd class Magistrate thereupon tried and convicted the accused under s. 174 of the Penal Code. The District Magistrate referred the case on the ground that the conviction was bad under s. 530 (k). It was held that as the Yadast amounted to a complaint within the meaning of s. (4) although the complainant was not examined on oath as required by s. 200, the conviction was not illegal(5).

Clause (l).—Where a second class Magistrate transmitted a case under s. 349 to the District Magistrate on the ground that he was unable to inflict a sufficiently severe sentence who found that the offence committed by the accused was not under s. 406 but one under s. 409 of the Indian Penal Code and convicted him of the latter offence, it was held that the proceedings of the second class Magistrate were void under this section(6).

Clause (n).—An order for maintenance will not be invalid on the mere ground that proceedings were held in a wrong district(7).

Clause (p).—When a Magistrate convicts the accused of an offence triable by him though the facts disclosed also constitute a graver offence, not triable by him, his proceedings are not void under the provisions of this section(8). When, however, a Magistrate deliberately

(2) *P. C. v. P. C.*, 1907 C. 8.
 (3) *Raj Mohan v. Prosunno*, 5 C. W. N. 686.
 (4) *Khudiram v. Empress*, 1 C. W. N. 103.
 (5) *Empress v. Monu*, 11 M. 443.
 (6) *Empress v. Sitaram*, 1 Bom. L.

R 27
 (7) *Sitaram v. Sukhia*, 2 Cr. Law, 373=1929 C. 336=49 C. L. J. 205=30 Cr. L. J. 525=115 I. C. 602.

messur, 8 C. W. N. 49.

(8) *Raj Mohan v. Prosunno*, 5 C. W. N. 686.

(4) *Khudiram v. Empress*, 1 C. W. N. 103.

(5) *Empress v. Monu*, 11 M. 443.

(6) *Empress v. Sitaram*, 1 Bom. L.

(8) *Delalabad v. Empress*, 2 Cr. L. J. 373=1929 C. 336=49 C. L. J. 205=30 Cr. L. J. 525=115 I. C. 602.

it was held that a committal by a Magistrate not having local jurisdiction to commit was within section 531. *The Queen-Empress v. James Ingle*(1) is to the same effect. In the case of *Empress v. Alim Mundle*(2), however, a Magistrate, who had no jurisdiction, made a commitment, and the commitment was held to be void. But an order of a Magistrate committing a case to the Court of Session is an order of a criminal court within the meaning of this section. If such an order, contrary to the requirements of s. 177, *supra*, directs the commitment to be made to the Court of Session which has no territorial jurisdiction, it is not to be set aside, unless it appears that the error has occasioned a failure of justice(3).

Commitment to wrong Sessions.—If the Sessions Court to which a commitment is made has no local jurisdiction over the place where the offence took place such commitment should be quashed (though of course after the trial has taken place to its termination section 531 might cure the defect)(4). But where a commitment was made to the High Court Sessions in respect of two offences, one of which was committed within, and the other without, the original jurisdiction of the High Court, it was held that the High Court could, on the grounds of expediency and convenience, proceed with the trial, the irregularity being cured by section 530(5).

Order for maintenance.—An order under s. 483 passed by a Magistrate who is otherwise competent to pass such an order would not be vitiated by the mere fact that the proceedings were held in a wrong district(6).

Session's division, district, etc.—This section only refers to districts, divisions, sub-divisions and local areas governed by the Code(7), and not to the Tributary Mehals like Keonjhar(8), or Mohurbunji(9). This section operates wherever in British India any finding, sentence or order of any criminal court has been arrived at or passed "in a wrong Sessions division, district, sub-division or other local area" *ejusdem generis*, with a sub-division provided that in such area the Code runs(10). Trying a case in a district not within local jurisdiction is not a defect of jurisdiction but only of venue, and can be cured by this section(11).

Other local area.—The section meets the difficulty which was felt

(1) 16 B. 200.

(2) 11 C. L. R. 55

(3) *Empress v. Thalu*, 8 B. 312; *Empress v. Ingle*, 16 B. 200; See *Empress v. Abbi Reddi*, 17 M 402; *Bhagwati v. Emperor*, 3 Pat 417 (421)=26 Cr. L. J. 49; *Empress v. Atmaram*, 2 Bom. L. R. 394.

(4) *Asst. Sessions Judge v. Ramam-mal*, 36 M. 387; *Bhagwati v. Empe-ror*, 3 Pat. 417=26 Cr. L. J. 49; *Sheo Dayal v. Emperor*, 23 O. O. 87=57 L. J. 469=21 Cr. L. J. 635.

(5) *Chenopathi v. Rex* 2 M. 791=37 M. L. J. 80=20 Cr. L. J.

(6) *Nitaram v. Sul*.

1928 C. 806=32 C. W. N. 932=30 Cr. L. J. 525

(7) *Bichitranand v. Bhogbut*, 16 C. 667; see *Punardeo v. Ram Sarup*, 2 C W. N. 577.

(8) *Ibid*.

(9) *Empress v. Keshab*, 8 C 935.

(10) *Ali Muhammad v. Emperor*, 131 A. L. R. 1931

101, 600=32 Cr.

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J. v. Bhugbu

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years' rigorous imprisonment by a Magistrate specially empowered under s. 30 lies to the High Court and not to the Sessions Court. The Sessions Judge acts without jurisdiction in entertaining and dealing with the appeal and his proceedings are void under this clause (1).

531. No finding, sentence or order of any criminal

Proceedings in court shall be set aside merely on the wrong place.

ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong Sessions Division, District, Sub-Division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

Scope.—This section applies solely to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in the wrong local area(2) and refers to districts, divisions, sub-divisions and local areas governed by the Code(3). The manifest intention of this section is to provide against the contingency of a finding, sentence or order, regularly passed by a court in the case of an offence committed outside its local area, being set aside when no failure of justice has taken place. There is nothing in the language of this section to confine its operation to cases where offences committed within the jurisdiction of a court are tried by such court outside the limits of the local area of its jurisdiction(4). This section relates only to proceedings in a wrong place and cures defects as to local jurisdiction. It does not touch the case of an order passed by a court which it was not competent to make(5).

Trial in a wrong Sessions Division, etc.—The policy of the Code as shown by sections 531 to 538 is to uphold in most cases the orders passed by the Criminal Court which was lacking in local jurisdiction or which has committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities(6). *Queen v. Piran*(7) was a case under the Code of 1872. There it was assumed that a trial by a court of an offence over which it had no local jurisdiction and which was committed within the local jurisdiction of another court within the same province would be sustained under section 70 of that Code. *Bapu Daldi v. Queen*(8) proceeds upon the same presumption. In *Queen-Empress v. Abbi Reddi*(9) and *Ranyan Kutti v. Emperor*(10)

(1) *In re Abdulla*, 26 Cr. L. J. 293= 2 Rang. 386=81 L. C. 437=A. I. R. 1925 Rang. 29.

(2) *Empress v. James Ingle*, 16 B. 200 (201).

(3) *Bichitranund v. Bhugbut*, 16 C. 667 (668).

(4) *Emperor v. Dorairamya Mudali*, 30 M. 91 (95)=4 Cr. L. J. 500=1 M. L. T. 315.

(5) *In re Mer Husen*, 15 Cr. L. J. 293=23 L. C. 503=16 Bom. L. R. 81. A point of jurisdiction can be raised at any stage; *Bhagicalia v. Emperor*, 26 Cr.

L. J. 49=83 L. C. 577.

(6) *Ganapathy v. Rex*, 42 M. 791 (1907) 23 L. C. 111=1907 Rang. 217.

(7) 15 B. L. R. App. 4.

(8) 5 M. 23 at p. 25.

(9) 17 M. 402.

(10) 26 M. 610.

it was held that a committal by a Magistrate not having local jurisdiction to commit was within section 531. *The Queen-Empress v. James Ingle*(1) is to the same effect. In the case of *Empress v. Alm Mundle*(2), however, a Magistrate, who had no jurisdiction, made a commitment, and the commitment was held to be void. But an order of a Magistrate committing a case to the Court of Session is an order of a criminal court within the meaning of this section. If such an order, contrary to the requirements of s. 177, *supra*, directs the commitment to be made to the Court of Session which has no territorial jurisdiction, it is not to be set aside, unless it appears that the error has occasioned a failure of justice(3).

Commitment to wrong Sessions.—If the Sessions Court to which a commitment is made has no local jurisdiction over the place where the offence took place such commitment should be quashed (though of course after the trial has taken place to its termination section 531 might cure the defect)(4). But where a commitment was made to the High Court Sessions in respect of two offences, one of which was committed within, and the other without, the original jurisdiction of the High Court, it was held that the High Court could, on the grounds of expediency and convenience, proceed with the trial, the irregularity being cured by section 530(5).

Order for maintenance.—An order under s. 488 passed by a Magistrate who is otherwise competent to pass such an order would not be vitiated by the mere fact that the proceedings were held in a wrong district(6).

Session's division, district, etc.—This section only refers to districts, divisions, sub-divisions and local areas governed by the Code(7), and not to the Tributary Mehals like Keonjhar(8), or Moburbunj(9). This section operates wherever in British India any finding, sentence or order of any criminal court has been arrived at or passed "in a wrong Sessions division, district, sub-division or other local area" *ejusdem generis*, with a sub-division provided that in such area the Code runs(10). Trying a case in a district not within local jurisdiction is not a defect of jurisdiction but only of venue, and can be cured by this section(11).

Other local area.—The section meets the difficulty which was felt

(1) 16 B. 200.

(2) 11 C. L. R. 55.

(3) *Empress v. Thaku*, 8 B. 312, *Empress v. Ingle*, 16 B. 200; See *Empress v. Abbi Reddi*, 17 M. 402; *Bhagwati v. Emperor*, 3 Pat 417 (421)—26 Cr. L. J. 49; *Empress v. Atmaram*, 2 Bom. L. R. 394.

(4) *Ant. Sessions v. J. J. J.* 2 M. L. J. 60—20 Cr. L. J. 484.

(5) *Ganapathi v. Rex*, 42 M. 791—37 M. L. J. 60—20 Cr. L. J. 484.

(6) *Sitaram v. Sukia*, 115 I. C. 602—

1928 C. 806—32 C. W. N. 932—30 Cr. L. J. 525.

(7) *Bichitranand v. Bhogbut*, 16 C. 667; see *Punardeo v. Ram Sarup*, 2 C. W. N. 577.

(8) *Ibid.*

(9) *Empress v. Keshab*, 8 C. 985.

(10) *Ali Muhammad v. Emperor*, 131 I. C. 209—A. I. R. 1931 Rang. 164—1931 Cr. Cas. 600—32 Cr. L. J. 1120—Ind. Rul. (1931) Rang. 273; *Emperor v. Keshub*, 8 C. 985—11 C. L. R. 241; *Bichitranand v. Bhugbut*, 16 C. 676; *Kureemun v. Field*, 21 W. R. 66 Cr.—18 B. L. R. App. 4.

(11) *Uttam Chand v. Emperor*, 9 P. L. R. 1902.

in the case of *Quten v. Piran*(1), where it was held that s. 70 of Act X of 1872 did not apply where there was an error of jurisdiction from a case being tried in a wrong province.

Inquiry, trial or other proceeding.—A criminal appeal was presented to the Sessions Judge of the Bijnor-Budaun Division at Bijnor within the said Sessions division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. It was held that the trial of the appeal at Moradabad was an irregularity, but, no failure of justice being shown to have been occasioned thereby, the irregularity was covered by s. 531 and did not render the trial of the appeal a nullity(2).

Failure of justice.—Under this section no finding of a criminal court can be set aside solely on the ground that the Magistrate has no local jurisdiction to hear the case unless it appears that a failure of justice has in fact been occasioned(3). In the absence of prejudice, or of a failure of justice, the conviction of an accused person for an offence under section 408 of the Penal Code by a Magistrate outside whose territorial jurisdiction the offence was committed is a mere irregularity cured by this section(4). The mere objection by an accused person to the jurisdiction of a Magistrate is not conclusive proof that the accused was prejudiced(5). Where objection as to the jurisdiction of a court was not seriously taken and the petitioner failed to show that he had been in any way prejudiced, the High Court declined to interfere(6).

Order of acquittal.—This section cannot justify the High Court in declining to interfere with the order of acquittal, based on the ground that the court had no jurisdiction to try the case. Where a court finds that it has no jurisdiction to try a case, the proper order to pass is not one of acquittal but of discharge(7).

Autrefois acquit.—An accused person can plead *autrefois acquit* under s. 403, if the only defect in the jurisdiction of the court which passed the order is a want of territorial jurisdiction, unless any failure of justice has occurred by reason of the trial having been held in the wrong court(8).

(1) 13 B L R App 4.

(2) *Empress v. Fazal Arim*, 17 A. 86. As to appeals heard within the same Sessions Division, see *Birju v. Emperor*, 65 I. C. 491=19 A. L. J. 432=23 Cr. L. J. 107.

(3) *Palli Ram v. Emperor*, 134 I. C. 477=8 O W N 817=A I R 1931 O. 277=(1931) Cr. Cas. 337=32 Cr. L. J. 1117=Ind. Rul. (1931) O. 391; *Emperor v. Badlu Shah*, 46 A. 138=81 I. C. 40=21 A. L. J. 912=25 Cr. L. J. 552=1924 A. 454=L. R. 5 A. 49 Cr. a case under sec. 408 of P. C. M. L. J. 1080.

G A I Cr. R. 265.

L. J. 372

(5) *Ibid.*

(6) *Sanatun v. Gooroo Churn*, 21 W. R. (r. 84); *Habit Chandra v. Emperor*, 39 C. 119

(7) *Gokal Chand v. Phul Chand*, 5 I. C. 830=7 P. R. 1910 Cr.=11 Cr. L. J. 253

(8) *Rathnarelu v. K. S. Iyer*, A. I. R. 1933 M. 765=(1933) M. W. N. 713=1933 M. Cr. C. 251=65 M. L. J. 529=38 I. W. 562=145 I. C. 878=34 Cr. L. J. 1080.

532. (1) If any Magistrate or other authority

When irregular commitments may be validated.

When irregular commitments may be validated.

purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the court to which the commitment is made may, after perusal of proceedings accept the commitment if it considers that the accused has not been injured thereby, unless during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

(2) If such court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

Scope.—This section applies only to cases where the Magistrate or other authority who has assumed to commit has not been duly invested with the powers under which he assumes to make the commitment, *i.e.* when the defect is one personal to the committing officer and not a defect in his proceedings(1). It does not apply to a commitment by a Magistrate duly empowered to commit(2). This section has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence, which, upon a true construction of the Code, is not triable by a Court of Session or High Court(3). The section seems to refer to cases in which the Magistrate is competent to deal with the offence as having taken place within the local limits of his jurisdiction, but has no power to commit to the Sessions either because he is a second class Magistrate or for some reasons other than that of want of local jurisdiction(4). This is a curing or remedial section and it must be strictly interpreted in the interests of accused persons. The provisions of this section do not assume or imply that a High Court at a trial has no other authority to quash a commitment(5).

Quashing commitment for want of jurisdiction.—This section contemplates the contingency of a case which has been inquired into at the proper place, as indicated by s. 177, being committed to the proper Court of Session by a particular Magistrate not duly empowered by law to make such commitment; and not of a case which has been inquired into in a district in which it was not committed being committed to

44 CL-100-1 PL-100-1 16

16 N. 13=A. I. R. 1929 C. 756=50 C. L. J.
498=81 Cr. L. J. 506

16 (4) *Empress v. James Ingle*, 16 B.
200 (201, 202).

(3) *Emperor v. Girish Chandra*, 57 C. 1042 (1057) = 123 L. C. 433-34 C. W.

(5) *Emperor v. Girish Chandra*, 57 C. 1042 F. B.

in the case of *Quten v. Piran*(1), where it was held that s. 70 of Act X of 1872 did not apply where there was an error of jurisdiction from a case being tried in a wrong province.

Inquiry, trial or other proceeding.—A criminal appeal was presented to the Sessions Judge of the Bijoor-Budaun Division at Bijoor within the said Sessions division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. It was held that the trial of the appeal at Moradabad was an irregularity, but, no failure of justice being shown to have been occasioned thereby, the irregularity was covered by s. 531 and did not render the trial of the appeal a nullity(2).

Failure of justice.—Under this section no finding of a criminal court can be set aside solely on the ground that the Magistrate has no local jurisdiction to hear the case unless it appears that a failure of justice has in fact been occasioned(3). In the absence of prejudice, or of a failure of justice, the conviction of an accused person for an offence under section 408 of the Penal Code by a Magistrate outside whose territorial jurisdiction the offence was committed is a mere irregularity cured by this section(4). The mere objection by an accused person to the jurisdiction of a Magistrate is not conclusive proof that the accused was prejudiced(5). Where objection as to the jurisdiction of a court was not seriously taken and the petitioner failed to show that he had been in any way prejudiced, the High Court declined to interfere(6).

Order of acquittal.—This section cannot justify the High Court in declining to interfere with the order of acquittal, based on the ground that the court had no jurisdiction to try the case. Where a court finds that it has no jurisdiction to try a case, the proper order to pass is not one of acquittal but of discharge(7).

Autrefois acquit.—An accused person can plead *autrefois acquit* under s. 403, if the only defect in the jurisdiction of the court which passed the order is a want of territorial jurisdiction, unless any failure of justice has occurred by reason of the trial having been held in the wrong court(8).

(1) 13 B L R App 4.

(2) *Empress v. Fazal Azim*, 17 A. 86. As to appeals heard within the same Sessions Division, see *Birju v. Emperor*, 65 I C. 491=19 A L. J. 952=23 Cr. L. J. 107.

(3) *Palli Ram v. Emperor*, 134 I. C. 477=8 O. W N 827=A I R 1931 O. 277=(1931) Cr Cas 637=32 Cr. L. J. 1117=Ind Rul (1931) O. 331; *Emperor v. Badlu Shah*, 46 A. 138=81 I. C. 40=21 A L. J. 912=23 Cr. L. J. 552=1924 A. 454=L R. 5 A. 49 Cr. a case under s. 408 of the Penal Code.

G A I Cr. R. 365.

(5) *Ibid.*

(6) *Sanatun v. Gooroo Churn*, 21 W. R. (r 88); *Habit Chandra v. Emperor*, 39 C 119

(7) *Gokal Chand v. Phul Chand*, 5 I C. 830=7 P. R. 1910 Cr.=11 Cr. L. J. 253

(8) *Palli Ram v. Emperor*, 134 I. C. 477.

obtained was of no effect, but that this section applied and the Judge had power, in his discretion, to accept the commitment and to proceed with the trial(1). But the balance of authority is against the view taken in the last-cited Bombay case(2). It cannot by any means be said that where sanction is obtained after commitment either this section or section 537 cures the defect(3). But where there was no certificate of the Public Prosecutor at the time of the commitment of the approver to the Sessions, but the certificate was subsequently filed in the Court of the Sessions Judge after he noticed the absence of the certificate and before the trial proceeded, it was held that the provisions of s. 339 having been complied with before the trial commenced the trial was in order(4).

Objection to irregularity, etc.—An objection to the irregularity of a commitment must be taken at the earliest possible time or the High Court will not in revision quash the commitment(5). A conviction by the Court of Session cannot be set aside simply on the ground of a defect in the initiation of the proceedings in the commitment court or on the ground of some irregularity in the commitment proceedings more especially when that point was not raised in the lower court. This section would cure such a defect(6). The fact that an objection to the committal was taken before the commitment on the ground that the Magistrate had no territorial jurisdiction is no ground for the court to which the commitment is made for quashing it under this section(7).

Failure of justice or prejudice to accused.—Where a Magistrate, on perusal of the depositions committed a person charged with perjury in a trial without examining the witnesses for the prosecution, the commitment was held to be bad on the ground of prejudice to the accused(8). Where, however, a trial under a commitment by an erroneous order of Sessions Judge has been held and no actual failure of justice has been caused by such error, this section would be a bar to the reversal of the judgment(9).

533. (1) If any court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 361 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the

(1) *Empress v Morton*, 9 B. 288 F. R. To the same effect, see *Empress v. Bil Gangadhar Tilak*, 22 B 112.

(2) *Shamal Khan v Empress*, 16 P. R. 1890 Cr.; *In re Adul Qadir*, 5 M. L. T. 162; *Barindra Kumar v. Emperor*, 37 C. 467=7 I. C. 359=11 Cr. L. J. 453.

(3) See the cases cited in the last note.
(4) *Nga Wa Gyi v. Emperor*, 92 I. C. 430=1923 Rang 219=4 Bur. L. J. 23=3 Rang. 55=27 Cr. L. J. 254=5 A. I. Cr. R. 353

(5) *Hema Singh v Emperor*, 9 Pat. 155=1929 Cr. C. 372=A. L. R. 1929 Pat. 611.

(6) *Dila Singh v. Emperor*, 40 C. 369=17 I. C. 570=13 Cr. L. J. 846.

(7) *Empress v. Abbi Reddi*, 17 M. 402; see *Queen v. Jackson*, 13 B. L. R. 471.

(8) *Queen v. Chinna Vidagiri*, 4 M. 227.

(9) *Empress v Khamir*, 7 C. 662=10 C. L. R. 8; see *In re Sagambar*, 12 C. L. R. 120.

the proper Court of Session, as indicated by that section by a particular Magistrate duly empowered by law to make such a commitment(1). Consequently, where a Magistrate inquires into and commits for trial an offence which has not been committed in his district, and the Court of Session for that district accepts such commitment, because the prisoner has not been prejudiced thereby, and tries him for such, the proceedings are illegal *ab initio*(2). The High Court will not, however, quash a commitment on the ground of want of jurisdiction, unless a failure of justice would be caused by proceeding with the trial(3). Where, however, a commitment was made by a Sessions Judge under s. 472 of Act X of 1872, in a case in which he had no power to make such commitment, the High Court set it aside as made without jurisdiction(4). This section only validates commitments legal in themselves but made by a Magistrate not empowered to commit(5).

Quashing of commitment made by Magistrate personally interested.—This section does not apply to a commitment which is bad owing to the disqualification of the Magistrate by reason of having taken an active part in the preliminary investigation and it can be quashed under section 215, *supra*(6).

Commitment under s. 346.—Commitment made to the Sessions Judge by a Magistrate acting under the powers conferred by section 346, Cr. P. C., is not illegal simply because he has not examined *de novo* the witnesses who were examined by the Magistrate who submitted the case under the provisions of that section. To the case of an accused thus committed, this section has no sort of application(7).

Commitment of a case triable by Magistrate.—Where the "Magistrate who committed the case was competent to try it himself" the commitment was cancelled and he was directed to hold the trial(8).

Want of previous sanction.—It has been held by the High Court of Bombay(9), and following it by the High Court of Allahabad(10), that this section does not apply to a case where there is no question that the Magistrate who committed the accused for trial to the Court of Session had the power to do so, but the only defect is that there is no previous sanction. In an earlier Bombay case, however, where, after a Magisterial inquiry, an European British subject being a public servant was committed for trial to the High Court, without any previous sanction required by section 197, it was held that the proceedings were irregular and without jurisdiction, and that a sanction subsequently

(1) *Empress v. Jagan Nath*, 3 A 258.

(2) *Ibid.*

361=136 I. C. 779

(6) *Emperor v. Maung Lat*, 2 L. B. R 209=1 Cr. L. J. 477.

(7) *Kamini v. Fakir Chand*, 12 C. W. N. 136=6 Cr. L. J. 429.

(8) *In re Anunt Klyburt*, 17 W. R. 14 Cr.

(9) *Emperor v. Madhav Laxman*, 43 B. 147=20 Cr. L. J. 71=48 I. C. 871.

(10) *Emperor v. Muhammad Mahdi*, A. I. R. 1934 A. 963=4 A. W. R. 524 F. B. =1934 Cr. C. 1291=152 I. C. 667=36 Cr. L. J. 137.

provisions of sections 164 and 364, for although various defects can be cured, the value of the confession may be very much diminished by non-compliance with the strict letter of law(1). The true principles which should govern such cases are those which are laid down in *Empress v. Viran*(2), viz., that whenever no attempt has been made to comply with the provisions of the law, this section would not render a confession admissible. The evidence which is made admissible by this section is the confession itself and not the evidence of the Magistrate of its contents(3).

Unrecorded confession to Magistrate.—This section can only be invoked when there is some written record but that record is defective through some error in not strictly following the provisions of section 164 or 364, the object being to take such record out of the excluding provisions of section 91 of the Evidence Act(4). Where no record whatever has been made of a confession, such confession cannot be proved merely by oral evidence(5). But it is not obligatory on a Magistrate holding an investigation or preliminary inquiry under section 159 of the Code to record in writing a confession made to him by an accused person and such confession may be proved by the oral testimony of the Magistrate(6).

Confession not taken down by Magistrate himself.—A confession not actually taken down by a Magistrate himself, can be proved, by examining the Magistrate as a witness—such an irregularity is curable under this section(7).

Irregularity in recording statement—A statement irregularly recorded by a Magistrate may be cured by examining the Magistrate(8). Even if a statement be not recorded strictly in conformity with sec. 164, so long as the Magistrate purports to have recorded it under this section, and even after the statement has been received in evidence, this section can be resorted to and evidence taken, that an accused person duly made the statement recorded(9).

Empress v. Bastwanta, 25 B. 168;
Queen v. Thomson, (1893) 2 Q. B. 12;
Farid v. Crown, 2 Lah. 315; *Subrah-*
mania Ayyar v. Emperor, 25 M. 61;

(5) *Emperor v. Gulaba*, 35 A. 260 =
14 Cr. L. J. 24 = 19 I. C. 307 = 11 A. L.
J. 286; *Nga We v. Emperor*, 2 L. B.
R. 317

(6) *Pedda Obigadu v. Emperor*, 45
M. 230 = 69 I. C. 264 = 14 L. W. 542 =
(1921) M. W. N. 779 = 30 M. L. T. 107 =
42 M. L. J. 37 = 1922 M. 40 = 23 Cr. L. J.
680

(7) *Badan Singh v. Emperor*, 9 Cr.
L. J. 297 = 1 I. C. 444 = 2 P. R. 1909 Cr.

(8) *Rama Kariyappa v. Emperor*,
120 I. C. 350 = 31 Bom. L. R. 565 = 1919
B. 327 = 31 Cr. L. J. 97 = Ind. Rul. (1930),
Bom. 14; *Bayin v. Emperor*, 121 I. C.
782 = 7 Rang. 759; *Bala Udmi v. Em-*
peror, A. I. R. 1931 Lah. 18; *Ratti*
Ram v. Empress, 7 P. R. 1893 Cr.;
cf. *Nga San Ya v. Emperor*, 4 I. C.
769 = 1909 U. B. & L. Ex. P. 8 = 11 Cr. L.
J. 41; *Harphul v. Emperor*, 75 I. C.
762 = 1923 Lah. 429 = 25 Cr. L. J. 58.

(9) *Bayin v. Emperor*, 121 I. C. 782 =
7 Rang. 759 = 31 Cr. L. J. 297 = A. I. R.
(1930) Rang. 63.

Rang. 78, *Drummond v. Emperor*,
A. I. R. 1933 Lah. 311 (2) = 56 O. L. J.
528 = 144 I. C. 296 = 34 Cr. L. J. 712;
Salu Mangan v. Emperor, A. I. R. 1933
B. 166 = 144 I. C. 664 = 34 Cr. L. J. 808.

(1) *Rathi Ram v. Empress*, 7 P. R.
1893 Cr.

(2) 9 M. 221 = 2 Weir 126

(3) *Rama Kariyappa v. Emperor*,
120 I. C. 350 = 31 Bom. L. R. 565 = A. I.
R. (1929) Bom. 327 = 31 Cr. L. J. 97 =
Ind. Rul. (1930) Bom. 14.

(4) *Pub. Prox. v. Pallasi Pedda*, 23
Cr. L. J. 680 = 69 I. C. 264 = 45 Mad. 230
= A. I. R. 1921 (Mad) 40 = 80 M. L. T.
107.

statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, s. 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to courts of appeal, reference and revision

Scope and object.—Under this section when a confession or other statement of an accused person is duly made in accordance with the provisions of law, but in the recording of it those provisions have not been fully complied with, oral evidence is admissible to prove that the confession or other statement was duly made. The defect which the section is intended to cure is not one of substance but of form only(1). This section can only cure a defect which is more or less formal in character. A defect which is not merely one of form, but is one of substance, and which prejudicially affects the accused as to his defect on the merits, cannot be cured by the section(2). This section will not render a confession admissible when the provisions of the law have been totally disregarded(3). The object of this section is to prevent justice being frustrated by reason of the Magistrate not having fully complied with the provisions of section 164 or section 364(4). The same views have been expressed in two other cases by the Bombay High Court where it is said that the section applies to omissions to comply with the law as well as to infractions of the law(5)

Irregularities in recording confessions.—The provisions of sections 164 and 364 are imperative and mandatory and it is the duty of every Magistrate to follow these provisions strictly. But this section is intended to cover every case in which the Magistrate has failed to comply with any of the provisions of section 164 or 364. In all such cases the court before which the confession is tendered is bound to take evidence that the accused person had "duly made" the statement recorded. Before the confession can be admitted and the irregularity cured under this section, it is necessary that the confession must have been duly made; but it is not necessary that it should have been duly recorded. The defect in recording a statement which had been duly made can be cured by calling further evidence to prove that it had been duly made. But there is a safeguard in the section, and a statement which has not been recorded in accordance with law cannot be taken in evidence if the error has injured the accused as to his defence on the merits(5). Magistrate should in all cases be careful to observe all the

(1) *Empress v. Bhairab Chunder*, 2 C W N 702; *Empress v. Viram*, 9 M 221; *Jai Narayan v. Empress*, 17 C 650; *Khemani v. Crown*, 6 Lab 58

(2) *Davlat Ram v. Emperor*, 8 Luck 518; *Prag v. Emperor*, A I R 1930 O. 441—128 I C 215—7 O W. N. 009.

(3) *Empress v. Viram*, 9 M. 224

(4) *Empress v. Viram Babaji*, 21

B. 495; *Empress v. Anta*, (1891) A. W. N. 60, per Edge, C J.

(5) *Empress v. Raqhu*, 23 B. 221; *Emperor v. Rama Kariyappa*, 31 Bom L. R. 565—1929 B 327—120 I. C. 350—31 Cr. L. J. 97—Ind. Kul. (1920) Bom 14.

an irregularity which is cured by this section(1). But a confession does not become irrelevant merely because the memorandum required by law to be attached thereto by the Magistrate taking it has not been written in the exact form prescribed(2).

Language of confession—Under sec. 364 a confession may be recorded in the language in which the accused person is examined or, if that is not practicable, in the language of the court or in English, any defects in the mode of recording it being cured by this section(3). The following decisions(4) holding otherwise were under sec. 533 of the Code of 1882 which has been considerably altered and must be received with caution.

534. An omission to inform under s. 447 any person of his rights under Chapter XXXIII shall not affect the validity of any proceeding.

Omission to give information under section 447.

This section has been replaced by section 34 of the Criminal Law Amendment Act, XII of 1923.

Omission of Magistrate to inform accused of his rights under Ch. 3.—An omission by a Magistrate to inform an accused person of his rights under Ch. 33 as required by s. 447 is absolutely cured by the provisions of this section(5). If, however, a Magistrate having reason to believe that an accused is a European British subject, omits to ask him, whether he is such, and proceeds to try him as if he were not one, he might lay himself open to an action for trespass(6).

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the court of appeal or revision, a failure of justice has in fact been occasioned thereby.

(2) If the court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge

Effect of omission to prepare charge.—As required by s. 210 or

(1) *Emperor v. Muhammad Bux*, 85 I. C. 833=16 S. L. R. 143=26 Cr. L. J. 609; *Rehana v. Emperor*, 73 I. C. 506=1923 Ind. 315=21 Cr. L. J. 618.

(2) *Empress v. Bhairon Singh*, 3 A. 338.

(3) *Emperor v. Deodat*, 45 A. 166=20 A. L. J. 915=71 I. C. 51=1923 A. 90=21 Cr. L. J. 6; *Fool Chand v. Emperor*, 18 C. 549; *Empress v. Vissram Babaji*, 21 B. 495 (501); *Empress v. Raghu*, 23 B. 221; *Empress v. Anta*,

(1832) A. W. N. 60.

(4) *Jai Narayan v. Empress*, 17 C. 852; *Nilmadhub v. Empress*, 15 C. 595.

(5) *Zaqariya v. Emperor*, 3 Rang. 220=26 Cr. L. J. 1971=81 I. C. 459=4 Bux L. J. 41=A. I. R. (1915) R. 237; *Scott v. Emperor*, 13 Rang. 101.

(6) *Annadural Aiyar's Ct. P. C.* 1918 Ed. p. 1645; *Citing Calder v. Halkett* 2 Moors Ind. App. 293.

Omission to sign and take signature of accused.—A confession which bears neither the signature of the Magistrate nor of the accused is not in strict accordance with the provisions of section 364. But the fact that it has been duly made by the accused can be proved by further evidence under this section and except perhaps in cases which are not easily conceivable the accused is not likely to be injured in his defence on the merits on account of such an omission(1).

Failure to question the person as to his making a voluntary confession.—The omission to question an accused person before recording his confession as to whether he is making it voluntarily is a material omission which prejudices him and the defect is a fatal one not curable by this section(2).

Warning to accused.—It is important that the Magistrate should make it clear to the person making the statement and warn him that he is not bound to make it and his confession would be used in evidence against him. But the omission to record the fact that the accused was so warned would not make the confession inadmissible if the Magistrate who recorded the confession was afterwards examined under this section and deposed that he gave the required warning to the accused and the accused understood it(3). But if the warning had not in fact been given, the statement could not be held to have been 'duly made,' and this section would be inapplicable(4).

Defective certificate or memorandum.—A defect in the certificate or memorandum prepared under section 164 (3), and attached to a confession is cured if the Magistrate who records that confession goes into the witness-box and states that he complied with all the requirements of the said section(5). Thus if the memorandum omitted to state that the confession was voluntarily made the defect would be cured by this section if the Magistrate afterwards deposed that he believed that the confession was voluntarily made(6). But in some earlier cases a contrary view was taken(7). The failure to comply with the formalities as to verification at the end of the record of a confession is

7 Rang 759=121 I. C. 782=31 Cr L J. 297=A I B. (1930) Rang 53; *Khudiram v Emperor*, 9 C. L. J. 55; cf *Reg v. Bai Rahm*, 10 Bom. H. C. R. 106.

(2) *Farid v Emperor*, 65 I. C. 613=2 Labh 325=5 P. W. R. 1922 Cr.=23 Cr. L. J. 149=1922 Labh 237, *Ranbir Singh v Emperor*, A. I. R. 1932 Labh. 201=33 P. L. R. 241=196 I. C. 19; cf. *Inder Singh v. Crown*, 2 Patiala L. R. 71.

(3) *Ram Ho v Emperor*, 3 Pat 872 (877)=26 Cr. L. J. 314=31 I. C. 458, *Hawa Singh v Crown*, 7 Labh L. J. 750=26 P. L. R. 579=26 Cr. L. J. 1459=89 I. C. 1026; *Khemar v Crown*, 6 Labh 58=26 P. L. R. 346=26 Cr. L. J. 1074; *Nilmadhab v. Emperor*, 5 Pat. 171=27

Cr L. J. 957=96 I. C. 509.

(4) *Partap Singh v. Crown*, 6 Labh. 415=7 Labh. L. J. 482=27 Cr. L. J. 514=93 I. C. 978; *Rao v. Emperor*, 26 P. L. R. 173=26 Cr. L. J. 1175=88 I. C. 599=A. I. B. (1925) Labh 367; cf. *Bula v.*

24 Cr. L. J. 6; *Ramas Ho v. Emperor*, 3 Pat 872(877)=26 Cr. L. J. 314=31 I. C. 458, *Maksud v. Emperor*, 2 Pat. L. T. 773=22 Cr. L. J. 200=60 I. C. 26; *Ram Sanahi v. Emperor*, 9 I. C. 149=12 Cr. L. J. 15.

(7) *Re Kathuladi*, 2 Weir. 140; *Empress v. Bhairab Chunder*, 2 C. W. N. 701 (717).

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(2) *Empress v Bhairon Singh*, 3 A. 338

(3) *Emperor v Deodat*, 45 A. 166=20 A. L. J. 915=71 I. C. 51=1923 A. 90=24 Cr. L. J. 6; *Fool Chand v. Emperor*, 18 C. 549; *Empress v. Viream Babaji*, 21 B. 495 (561); *Empress v. Raghu*, 23 B. 221; *Empress v. Anta*,

(1892) A. W. N. 60.

(4) *Jai Narayan v. Empress*, 17 C. 852; *Nilmadhab v. Empress*, 15 C. 595.

(5) *Zagariya v. Emperor*, 3 Rang 220=26 Cr. L. J. 1371=81 I. C. 459=4 Bar L. J. 41=A. I. R. (1915) R 232; *Scott v. Emperor*, 13 Rang 101

(6) *Annadural Aiyar's Cr. P. C.* 1918 Ed. p. 1615; Citing *Calder v. Halkett* 2 Moors Ind. App 293.

s. 254. Under s. 254, a Magistrate is not bound to frame a charge unless he is of opinion that there is ground for presuming that the accused has committed an offence punishable with death, transportation or imprisonment for a term exceeding six months. In any case the omission to frame a charge is no ground for setting aside a conviction. Even if the omission appears to have occasioned a failure of justice the utmost that can be done is to order that a charge be framed and the trial be recommenced from the point immediately after the framing of the charge(1). The mere omission to frame a charge does not authorize the setting aside of the conviction and sentence unless there is a consequent failure of justice(2). Where it is perfectly clear to the accused from the evidence on the record and the examination-in-chief what case he has to meet, the omission to frame a charge will not justify a reversal of the order of the lower court(3). A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him, but gave him clearly to understand the nature of the charge, and it was held that such omission did not occasion a failure of justice, that it did not invalidate the order of acquittal and render such order equivalent to one of discharge, and that such order is a bar to the revival of the prosecution of such person for the same offence(4).

Conviction for an offence other than the one charged with.—

In an earlier Calcutta case it was held that sections 535 and 537 (a) do not apply to a case where the accused is charged with one offence and convicted of another—totally different to the one he was charged with(5). In a later Calcutta case it has been held that this section is not limited in its application to a trial where no charge at all has been framed, but it is also applicable to cases in which no charge has been framed of the offence of which an accused person has been convicted(6). Where an accused was charged of an offence under section 147, Indian Penal Code, but was convicted of an offence under section 352, Indian Penal Code, and where the whole of the defence evidence was let in in the court of first instance and was disbelieved and it was also disbelieved in the lower appellate court any irregularity in conviction was cured by this section(7).

Absence of specific mention of S. 34.—Where the accused is convicted by the application of s. 34, Penal Code, absence of the specific mention of s. 34, in the charge sheet does not make the conviction and sentence invalid, if no failure of justice has been

(1) *Ambika Prasad v. Emperor*, 31 Cr. L. J. 313 = 129 I. C. 269 = 28 A. L. J. 1314 = A. L. R. 1931 A. 7 = Ind. Rul. (1931) A. 145 = L. R. 12 A. 32 Cr. = 53 A. 206 = (1931) Cr. (as 7, *Ganga Prasad v. Emperor*, 1923 A. 476

I. C. 191 = A. L. R. 1926 Cal. 1203; see *In re Raja Parshan*, 3 C. L. R. 131.

(4) *Empress v. Gurdu*, 3 A. 129; see also *Orilal v. Kalu*, 18 Cr. L. J. 1006 = 42 I. C. 744.

(5) *Emperor v. ...* 40 C. 100

(6) *Emperor v. ...* 52 A. 1015

(9) *Madhab Chandra v. Emperor*, 3 C. 738 (744) = 27 Cr. L. J. 1295 = 93

Mad. 110.

occasioned by this omission. The omission is cured by this section(1).

Omission to set out previous conviction.—A mere omission to set out the previous conviction is no ground for interfering with the sentence unless it has caused failure of justice(2).

Omission to comply with ss. 360, 361.—The bare fact of an omission to comply strictly with this provisions of s. 360 or s. 361 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction which may be supported by the curative provisions of ss. 535 and 537(3).

Summons cases.—In summons cases, the intimation prescribed by s. 242 takes the place of a formal charge(4). An omission by a Magistrate to state the particulars of the offence to the accused as required by s. 242 is an irregularity curable under this section where there has been no failure of justice resulting from such omission (5).

Sanction obtained after framing of charge.—Where a Magistrate after framing a charge under s. 19, Arms Act, 1878, found that the District Magistrate's sanction was wanting, and applied to and got it from the said Magistrate, but proceeded with the case without framing a fresh charge, the omission was held cured under this section(6).

536. (1) If an offence triable with the aid of Assessors is tried by a Jury, the trial shall not on that ground only be invalid.

Trial by jury of offence triable with Assessors.

(2) If an offence triable by a Jury is tried with the aid of Assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the court records its finding.

Trial with Assessors of offence triable by Jury.

Sub section (1): Trial by Jury of offence triable with Assessors.—Where the accused charged with an offence triable with the aid of Assessors was tried by a Jury and was acquitted and the Sessions Judge who disagreed with the Jury treated the verdict of the Jury, on learning that the case was triable with the aid of Assessors, as the opinion of Assessors and recorded a judgment convicting the accused

(1) *Nura v Emperor*, A. I. R. 1934 Lch 227=1931 Cr. O. 458=151 I. C. 741=35 Cr. L. J. 1396

(2) *In re Abdul*, 5 I. C. 743=7 M. L. T. 77=11 Cr. L. J. 217; *Bisakhi v Crown*, 29 P. R 1917 Cr.=18 Cr. L. J. 875=41 I. C. 987=37 P. W. R. 1917 Cr.=29 P. R 1917 Cr.

(3) *Abdul Rahman v. Emperor*, 109 I. C. 227=A. I. R. 1927 P. C. 44=31 C. W. N. 271=25 A. L. J. 117=(1927) M. W. N. 103=38 M. L. T. 61=8 Pat. L. T. 155=4 O. W. N. 283=28 Cr. L. J. 259=6 Bur. L. J. 65=6 Rang. 53=52 M. L. J.

585=29 Bom. L. R. 813=45 C. L. J. 411 P. C.

(4) *Mauna v. Emperor*, 14 Cr. L. J. 230=19 I. C. 326=9 N. L. R. 42; see *Jagannath v. Emperor*, A. I. R. 1931 Nag. 253=1931 Cr. L. 1297=153 I. C. 427.

(5) *Dandoo v. Harba*, 101 I. C. 895=8 A. I. R. 175=28 Cr. L. J. 511=A. I. R. 1927 Nag. 210; *Zahani v. Khushal*, A. I. R. 1932 Nag. 127=23 N. L. R. 163

(6) *Kaka v. Emperor*, 4 L. B. R. 247=8 Cr. L. J. 65

s. 254. Under s. 254, a Magistrate is not bound to frame a charge unless he is of opinion that there is ground for presuming that the accused has committed an offence punishable with death, transportation or imprisonment for a term exceeding six months. In any case the omission to frame a charge is no ground for setting aside a conviction. Even if the omission appears to have occasioned a failure of justice the utmost that can be done is to order that a charge be framed and the trial be recommenced from the point immediately after the framing of the charge(1). The mere omission to frame a charge does not authorize the setting aside of the conviction and sentence unless there is a consequent failure of justice(2). Where it is perfectly clear to the accused from the evidence on the record and the examination-in-chief what case he has to meet, the omission to frame a charge will not justify a reversal of the order of the lower court(3). A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him, but gave him clearly to understand the nature of the charge, and it was held that such omission did not occasion a failure of justice, that it did not invalidate the order of acquittal and render such order equivalent to one of discharge, and that such order is a bar to the revival of the prosecution of such person for the same offence(4).

Conviction for an offence other than the one charged with.—

In an earlier Calcutta case it was held that sections 535 and 537 (a) do not apply to a case where the accused is charged with one offence and convicted of another—totally different to the one he was charged with(5). In a later Calcutta case it has been held that this section is not limited in its application to a trial where no charge at all has been framed, but it is also applicable to cases in which no charge has been framed of the offence of which an accused person has been convicted(6). Where an accused was charged of an offence under section 147, Indian Penal Code, but was convicted of an offence under section 352, Indian Penal Code, and where the whole of the defence evidence was let in in the court of first instance and was disbelieved and it was also disbelieved in the lower appellate court any irregularity in conviction was cured by this section(7).

Absence of specific mention of S. 34.—Where the accused is convicted by the application of s. 34, Penal Code, absence of the specific mention of s. 34, in the charge-sheet does not make the conviction and sentence invalid, if no failure of justice has been

(1) *Ambika Prasad v. Emperor*, 32 Cr. L. J. 313=129 I. C. 269=28 A. L. J. 1314=A. I. R. 1931 A. 7=Ind. Rul (1931) A. 145=L. R. 12 A. 32 Cr.=63 A. 206=(1931) Cr. (ns. 7; *Ganga Prasad v. Emperor*, 1923 A. 476

(2) *Emperor v. Shib Charan*, 63 A. 233=33 Cr. L. J. 1007=133 I. C. 140=A. I. R. 1931 A. 42=Ind. Rul. (1931) A. 589=(1931) Cr. Cas. 141=23 A. L. J. 1015

(3) *Madhab Chandra v. Emperor*, 3 C. 738 (744)=27 Cr. L. J. 1295=23

I. C. 191=A. I. R. 1926 Cal. 1202; see *In re Jaya Parshan*, 3 C. L. R. 131.

(4) *Empress v. Gurdu*, 3 A. 129; see also *Orlat v. Kalu*, 18 Cr. L. J. 1006=42 I. C. 734.

(5) *Sifa v. Emperor*, 40 C. 168.

(6) *Abdul Rahim v. Emperor*, 89 I. C. 1055=41 C. L. J. 474=A. I. R. (1915) C. 926=26 Cr. L. J. 1279.

(7) *Muthukanallu v. Emperor*, 23 Cr. L. J. 206=65 I. C. 862=15 L. W. 583=1932 M. W. N. 183=A. I. R. (1922) Mad. 110.

Joint trial for offences some triable by Jury and others triable with aid of Assessors.—Where in a joint trial for offences some of which are triable by a Jury and the others by the Sessions Judge with the aid of Assessors, the accused are acquitted of the former but convicted of the latter and on appeal the conviction is set aside and a re-trial is ordered, the re-trial for the latter set of offences alone is not illegal if the accused do not object to it(1).

Revision.—Under this section, where an offence triable with the aid of Assessors is tried by a Jury, no conviction or sentence passed in such a case can be set aside or interfered with in revision unless it is clear that the irregularity has led to some miscarriage of justice(2).

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

Finding or sentence when reversible by reason of error or omission in charge or proceedings.

- (a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or
- (b) omitted
- (c) of the omission to revise any list of Jurors or Assessors in accordance with section 324, or
- (d) of any misdirection in any charge to a Jury, unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

Changes.—(1). Cl. (b) of the old unamended s. 537 was omitted by s. 148, Act XVIII of 1923, cl. (b) of the unamended s. 537 laid down that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on account of the want of or any irregularity in any sanction required by s. 195 or any irregularity in procedure taken under s. 476, Cr. P. C.(3) When s. 195 was amended

(1) *Abdul Hamid v. Emperor*, 7 A. I. Cr. R. 104.

(2) *Asanuga v. Emperor*, 108 I. C. 214=(1927) M. W. N. 209—A. I. R. 1928

M 275=20 Cr. L. J. 351.

(3) *Kali Charan v. Emperor*, A. I. R. 1934 O 180 (p. 187, C. 1)—11 O. W. N. 473=1934 O. L. R. 257=148 I. C. 784=1934 Cr. C. 282=35 Cr. L. J. 789.

held, that the conviction was bad, as the trial by the Jury was not invalid and the trial was complete when the Jury returned their verdict. The Judge was bound to act either under s. 306 or under s. 307, that is, he was bound either to give judgment in accordance with the verdict, or to submit the case for orders of the High Court if he disagreed with the verdict, and was clearly of opinion that the reference was necessary for the ends of justice(1). The trial by Jury should be accepted as a legal one and the case should be held to be one that could be submitted under s. 307(2). Where a case triable with Assessors, is substantially tried with the aid of Assessors, but those Assessors are not chosen according to law, the trial must be held to have been illegal(3).

"Shall not on that ground only be invalid."—Where a case not triable by a Jury has in fact been tried by a Jury, under this section the trial is not vitiated thereby(4). Opinions have, however, been expressed in various High Courts that the words under comment mean that a verdict given by a Jury in a case which should have been tried with the aid of Assessors can be regarded as the opinion of Assessors, and the trial may stand not as a trial by a Jury but as a trial with the aid of Assessors. This view was held by one of two Judges in *Pattikadan Ummanu v. Emperor*(5), and a similar view seems to have been taken by the Calcutta High Court in the case of *Empress v. Mohim Chander*(6). But the Allahabad and Bombay High Courts have differed from this view and have held that the verdict of the Jury in such a case cannot be treated as being the opinion of Assessors, and by section 418 an appeal can lie on a matter of law only(7). In the Allahabad case, however, the verdict of the Jury was held to have been vitiated by misdirections and the appeal was heard on the facts.

Sub-section (2): Trial with Assessors of offence triable by Jury.—The law makes no distinction as to the procedure at the trial between a trial by a Jury and one with the aid of Assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the Assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of Assessors enforced, he cannot be heard to complain(8). Where a case triable by Jury is tried with Assessors, without any objection being taken at the trial, the mere fact that the Assessors have found the accused not guilty, and the Judge differing from their opinion convicted them, would not make the trial invalid(9).

(1) *Surja v. Empress*, 25 C. 555.

Karuppa Thevan, 3 Mad Cr. C. 325.

(6) 3 C. 765; see also *Queen v. Narlooo*, 18 W. R. 59 Cr and *Queen v. Durga Churn*, 24 W. R. Cr. 30.

(7) *Emperor v. Dakhani*, 55 A. 68; *Emperor v. Parbhu Shankar*, 25 B. 680.

(8) *Emperor v. Mansing*, 33 B 423 = 11 Bom. L. R. 350; *Karuppa v. Emperor*, (1930) M. W. N. 776.

(9) *Empress v. Ganapatti*, 23 M. 632.

L. J. 441

(5) 26 M. 243, See also *Empress v. Lakshmana*, 9 M 42 and see *In re*

ground for any such assumption, and the judicial committee itself, when it had occasion to refer to *Subrahmanya Iyer's* case in *Abdul-Rahman v. Emperor*(1) clearly indicated that the impugned procedure must be one that is not only prohibited by the Code but also works actual injustice to the accused. In the latter case the Code was clearly infringed, but the curative provision of this section was considered a sufficient remedy(2). After the decision of the Privy Council in *Abdul Rahman v. Emperor*(3), it has been held in several cases that in order that infringement of a mandatory provision of the Code may amount to an illegality sufficient to vitiate the proceedings, it is necessary that the impugned procedure must be one that is not prohibited by the Code, but also works actual injustice to the accused(4). The test to be applied in considering whether a particular infringement of the provisions of the Code does or does not fall within the purview of section 537 appears to be this. Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the court assumed an authority which it did not possess? Has it broken the vital rules of procedure? If the error is of such a nature then the proceedings are vitiated in their very inception and section 537 has no application; but the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceeding(5). A distinction should be made between a positive enactment by the Code that a certain trial shall not take place and a positive enactment that in the course of such a trial certain detailed procedure should be followed. Both are imperative provisions. But still the one is a different thing from the other. In the former case an infringement of the enactment amounts to an assumption of jurisdiction and vitiates the trial from the very beginning. In the latter case an infringement merely amounts to an error, omission or irregularity in the procedure adopted in the course of the trial. This section aims at curing infringements of the latter type(6).

Bhongi, 25 Cr. L. J. 52; *Lyme v. Crown*, 4 Lah. 382; *Marudav. Crown*, A. I. R. 1922 M. 512.

(1) 5 Rang. 53=100 I. C. 227=A. I. R. 1927 P. O. 44=81 C. W. N. 271=25 A. L. J. 117=(1927) M. W. N. 103=38 M. L. T. 64=8 Pat. L. T. 155=4 O. W. N. 283=28 Cr. L. J. 259=6 Bur. L. J. 65=52 M. L. J. 585=29 Bom. L. R. 813=45 O. L. J. 441=54 I. A. 95 P. C.; see also *Nga U. v. Emperor*, A. I. R. 1935 R. 98=18 Rang. 1

(2) *In re Ramaraju Texan*, 53 M. 937 (940)=127 I. C. 654=(1930) M. W. N. 377=A. I. R. 1930 M. 857=82 L. W. 894.

(3) 5 Rang. 53=100 I. C. 227=A. I. R. 1927 P. O. 44=81 C. W. N. 271=25 A. L. J. 117=(1927) M. W. N. 103=38 M. L. T. 64=8 Pat. L. T. 155=28 Cr. L. J. 259.

(4) *In re Ramaraju*, 53 M. 937=127 I. C. 654=(1930) M. W. N. 377=A. I. R. 1930 Mad. 857; *Kallu v.*

Bashiruddin, 53 A. 173=A. I. R. 1931 A. 3=32 Cr. L. J. 372=123 I. C. 269=1931 Cr. O. 8=11 L. R. A. Cr. 181=28 A. L. J. 1504; *Nga Bo Oa v. Emperor*, A. I. R. 1927 R. 249=6 Bar. L. J. 114; *Kapoor Chand v. Suraj Prasad*, 142 I. C. 537; *In re Tirumana*, 116 I. C. 365=2 Cr. Law. 500=1929 M. 544=(1929) M. W. N. 239; *Emperor v. Sukhi*, 50 A. 457=26 A. L. J. 176=80 Cr. L. J. 337; *Madat Khan v. Crown*, 8 Lah. 193=81 C. W. N. 393 P. O.; *Annai Erappa v. Emperor*, 91 L. W. 386=1930 Cr. C. 186=81 Cr. L. J. 87=125 I. C. 253.

(5) *Emperor v. Bechu*, 45 A. 124 (127)=20 A. L. J. 874=21 Cr. L. J. 67=71 I. C. 115=(1923) A. I. R. (All) 81; *Nur Mahomed v. Emperor*, 54 B. 934=32 Rom. L. R. 1279=1920 Cr. C. 1182 (1184).

(6) *Nga Hla U v. Emperor*, 3 Rang. 139=26 Cr. I. J. 1336=89 I. C. 917=A. I. R. 1925 (Rang) 258.

cl. (b) became unnecessary and was hence omitted(1). But the Oudh court holds that the irregularities in proceedings taken under section 476 are no longer condoned(2). The Lahore High Court has, however, taken the opposite view(3).

(2) In the old Code, an illustration was added to section 537 as follows:—"The Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceeding." But in the amended Code, this illustration is omitted. The repeal of this illustration in the amended Code clearly indicates that the Legislature no longer views the defect pointed out in the aforesaid illustration as a mere irregularity not affecting the validity of the proceeding and vitiates the conviction and sentence(4). In a case reported in *Allu v. Crown*(5), decided under the unamended Code, it was pointed out that the illustration showed the class of irregularity contemplated by the section, as distinguished from a substantial departure from law.

Scope of section.—This section applies only to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law(6). The intention of the section is to remedy defects of a formal character, which may have arisen through inadvertence or neglect on the part of the Magistrate; and which defects, the law, and, the Legislature think, ought not to be made the means of culprit's escaping the just penalties of his crime(7). The section is not intended to cure and does not cure absolute illegalities(8). But it is significant that although their Lordships of the Privy Council drew a distinction between an 'illegality' and 'an irregularity' in the case of *Subrahmanya Iyer v. Emperor*(9), which was decided in the year 1901, the Legislature did not introduce the word "illegality" in this section or anywhere else in the Code although it was amended after that year(10). Ever since the pronouncement of the judicial committee in *Subrahmanya Iyer v. Emperor*(11), it has been the general practice to assume that if a mandatory provision of the Code has been infringed in framing the charge, the court must of necessity be held to have failed in administering justice to the accused(12). This section affords no real

(1) *Brahm Datt v. Emperor*, A. I. R. 1934 Lah. 981=1934 Cr. O. 1875=153 I. C. 547.

(2) *Dore Shah v. Emperor*, 2 Luck. 646=28 Cr. L. J. 681=4 O. W. N. 640=1927 O. 326=103 I. C. 409; *Kali Charan v. Emperor*, A. I. R. 1934 O. 166=11 O. W. N. 473=1934 O. L. R. 857=148 I. C. 784=1934 Cr. C. 582=35 Cr. L. J. 789.

(3) *Brahm Datt v. Emperor*, A. I. R. 1934 Lah. 981=1934 Cr. O. 1875=153 I. C. 547.

(4) *In re Vehvali*, 54 M. 252 (255)=59 M. L. J. 674=32 Cr. L. J. 430=129 I. C. 633.

(5) 4 Lah. 376=75 I. C. 980=1924 Lah. 101=6 Lah. L. J. 108=25 Cr. L. J. 68.

(6) *Tirukha v. Nanak*, 49 A 475;

Weir. 271.

(8) 25 M. 61 P. O.

(10) *Kapoor Chand v. Suraj Prasad*, 142 I. C. 537 (540)=31 A. L. J. 189=Ind. Rul. (1933) A 125=34 Cr. L. J. 414=14 A. 48 Cr.=A. I. R. 1933 A. 264=(1933) Cr. C. 434 F. B.

(11) 25 M. 61 P. C.

(12) *Tirukha v. Nanak*, 49 A. 475=25 A. L. J. 377=28 Cr. L. J. 291=110 I. C. 371; *Allu v. Crown*, 4 Lah. 376; *Banka Singh v. Gokul*, 99 I. C. 1031.=25 A. L. J. 216; *Ganga Singh v.*

the accused a copy of Magistrate's preliminary order along with summons to appear in security proceedings is at the most a defect cured by this section(1). The provisions of s. 137 are imperative and an order passed by a Magistrate in disregard of them, in proceedings under section 133 where the opposite party appeared and showed cause, is bad in law and must be set aside(2). Omission to comply with the provisions of section 139-A is an illegality which goes to the root of the case and cannot be waived by the accused(3), but the omission to ask the party whether he denies the existence of a public right does not vitiate the entire proceedings but is curable by this section(4). The failure to make an order in writing as required by section 145 (1) in proceedings under that section make the procedure of the court irregular but the defect is curable by this section where no party has been prejudiced(5). The failure to serve a copy of the preliminary order under section 145, cl. 1, on the respondent and the failure to post the order on the land are irregularities cured by this section(6).

Court of competent jurisdiction.—This section does not cover a radical defect such as want of jurisdiction to try an offender. A Magistrate who in consequence of personal disqualification, is forbidden by law to try a particular case though he may be authorised generally to try cases of the same class, cannot be said, with respect to that case, to be a court of competent jurisdiction, and his orders, are not covered by the saving provision of this section(7). A Magistrate taking cognizance of an offence under cl. (c) is bound to give the accused an opportunity to be tried by a different Magistrate; and if in spite of objections taken by the accused, he proceeds to try the case himself, he cannot be said to be a court of competent jurisdiction in respect of that case(8). But a trial is not vitiated by the mere fact that the trying Magistrate is a member of the Cantonment Board on behalf of which the complaint is filed(9). If a District Magistrate transfers for trial to a subordinate Magistrate which is not within the competence of that Magistrate the latter is not a court of competent jurisdiction(10). The term "competent jurisdiction" in this section refers to the character and the status of the court which has decided the case(11). A case under s. 401

(1) *Narain Sao v. Emperor*, 81 I. C. 173=25 Cr. L. J. 682=1925 Nag. 31.

(2) *Bhoora v. Tara Singh*, 25 A. L. J. 155; see *In re Kariyappa*, 57 B. 39=68 I. C. 619=24 Bom. L. R. 807=23 Cr. L. J. 587=(1925) B. 381.

(3) *Mahadeo Lal v. Hussaini*, 120 I. O. 289=31 Cr. L. J. 53=Ind. Rul. (1930) Pat 1=A. I. R. 1930 Pat. 199.

(4) *Rajanikanta v. Ibrahim*, 57 O. 252=126 I. C. 205=33 O. W. N. 748=A. I. R. 1929 O. 507=31 Cr. L. J. 973=Ind. Rul. (1930) Cal. 701.

(5) *Mg Po Lon v. Mg Ba On*, 81 I. C. 518=3 Bur. L. J. 256=1925 R. 111=26 Cr. L. J. 324; *Kapoor Chand v. Suraj Prasad*, 55 A. 801=A. I. R. 1933 (All.) 264=142 I. C. 537=34 Cr. L. J. 414=1933 A. L. J. 188; *Emperor v. Narsingdas*, A. I. R. 1931 Nag. 112=151 I. C. 318=85 Cr. L. J. 1881=30 N.

L. R. 311.

(6) *Maung Mauk v. Maung Po Yon*, 2 Rang. 169; *Debi Prasad v. Sheodat Rai*, 6 Cr. L. J. 352=4 A. L. J. 705=(1907) A. W. N. 265.

(7) *Sudhama v. Empress*, 23 C. 928. The mere circumstance that a trying Magistrate is the master of the complainant does not deprive the Magistrate of his jurisdiction; *In re Basapa*, 9 B. 172.

(8) *Empress v. Hawthorne*, 19 A. 815.

(9) *Khushal Chand v. Emperor*, 111 I. C. 826=22 Cr. L. J. 822=A. I. R. 1923 (Lah.) 916=11 A. I. Cr. R. 13.

(10) *Raghu Singh v. Abdul Wahab*, 23 C. 442.

(11) *Emperor v. Menghraj*, 23 Cr. L. J. 305=66 I. C. 657=16 B. L. R. 1.

Subject to the provisions hereinbefore contained.—(1) A question arises as to whether these qualifying words refer to the part of the Code which precedes sec. 537 or they only refer to the Chapter where this section finds a place. The question has been raised, though not expressly decided, whether the provisions referred to are the provisions of the entire Code preceding this section or only the provisions of the Chap. XLV where this section occurs. The former view was adopted in the case of *Raj Chunder v. Gour Chunder*(1) and in the case of *Nilratan v. Jogesh Chandra*(2), and the latter view was put forward by the referring Judges in the case of *Abdul Rahman v. Keramat*(3), but the Full Bench did not decide the question. The prevailing view is that these words must be read as having reference only to secs. 529 to 536 and do not refer to the entire Code that precedes this section(4). This section is more general and comprehensive than the preceding sections in this Chapter, and has been placed after them as a residuary section(5).

(2) *Review under cl. 26 of the Letters Patent.*—This section applies to a case reviewed under clause 26 of the Letters Patent(6), though there is authority to the contrary also(7).

No finding, sentence or order.—This section validates a finding, sentence or order. Thus where a court should pass one only and not separate sentences for each of two offences, and yet two sentences are passed and the aggregate of these does not exceed the punishment provided by law for any one of the offences or the jurisdiction of the court, it is an irregularity only and not an illegality requiring interference by a court of appeal or revision(8). An order binding over a person to keep the peace under s. 107 from whom breach of the peace was apprehended at a place within the Magistrate's jurisdiction but who resided outside it, amounts to an irregularity which is cured by this section(9). An omission to state in an order under s. 112 the substance of information is not merely a technical defect and if the objection was taken before the trial it is always a circumstance to be taken into account. But in some cases it is a ground for setting aside the order of not serving on

(1) 22 C. 176.

(2) 23 C. 983 at p. 990=1 C. W. N. 57.

(3) 27 C. 839=4 C. W. N. 656.

(4) *Ram Subhag v. Emperor*, 19 C. W. N. 972=16 Cr. L. J. 611=30 I. O. 465 per Sharfuddin and Beachcroft JJ. Contra per Fletcher J., See also *Ismail Routher*, 29 M. 149; *In re Perumalla Nayadu*, 31 M. 80=6 Cr. L. J. 882=17 M. J. 533.

(5) *Monnieri v. Emperor*, 6 C. W. N. XLVI.

(6) *Emperor v. Mackey*, 53 C. 350 (363)=43 C. L. J. 310=93 I. C. 33=27 Cr. L. J. 885=30 C. W. N. 276=A. I. R. 1926 C. 470; *Subrahmanya Iyer v. Emperor*, 25 M. 61.

(7) *Fateh Chand v. Emperor*, 21 C. W. N. 33.

(8) *Empress v. Malu*, 23 B. 706

(9) *Ram Deo v. Emperor*, 25 A. L. J. 44=97 I. C. 652=27 Cr. L. J. 1132=

I. O. 41=6 A. I. Cr. R. 280; *Ranga Reddi v. Emperor*, 43 M. 450=58 M. J. 100=27 Cr. L. J. 1132=

the absence of a formal complaint if there is no statement in the order for prosecution that the accused has committed the offence for which he is to be prosecuted(1). Absence of a complaint and consequent failure to examine the complainant on oath is a sufficiently grave irregularity to vitiate the subsequent proceeding(2). Absence of a written complaint required under s. 195 does not, however, vitiate a conviction where the complainant is examined(3). Where, on a complaint by a private person alleging the commission of an offence under section 193, Indian Penal Code, and of other offences in respect of which a complaint under section 476 is not necessary, the court took cognizance of every offence alleged in the complaint but actually convicted the accused under section 467, 109, Indian Penal Code, it was held that the court proceeded upon no legal complaint at all, that the error was much more than an irregularity and could not be cured under s. 537, and that the conviction must be set aside as being without jurisdiction(4). A complaint by a person not authorised to complain under section 228 of the Punjab Municipal Act. in respect of an offence punishable under the Act, is no complaint at all, and where a person has been convicted on the basis of such a complaint the conviction is bad, and the defect is not curable under this section(5). The filing of a complaint by a person not authorised to prosecute the accused under s. 188 I. P. C., is an irregularity which is not cured by this section(6). A complaint under s. 498, Penal Code, cannot be made by a person other than the husband. Unless leave of court is obtained absence of such leave cannot be regarded as a mere irregularity curable by this section(7). A complaint under s. 20, Cattle Trespass Act, made by a wrong person is really no complaint at all and that is a defect which strikes at the root of the matter and which cannot be cured by this section(8). But the pure technical irregularity in the heading of a complaint may be cured(9). The High Court will not, however, interfere with a complaint made by a court merely because of some irregularity committed by the appellate court, when the High Court is satisfied that the court which made the complaint was fully conversant with all the facts of the case and when it is of opinion that the case is one where there ought to be a prosecution(10). Where an application

O. 530 = A. I. R. 1930 Rang. 153 = 31 Cr. L. J. 1060 = Ind. Rul. (1930) Rang 306 = (1930) Cr. Cas. 685.

(1) *Ibid.*

(2) *Golusu v. Emperor*, 125 I. C. 557 = (1930) M. W. N. 413 = 31 Cr. L. J. 895 = Ind. Rul. (1930) Mad. 813 = A. I. R. 1930 W. 2 205 = (1930) Cr. C. 550

1924 P. H. J. 972
= 3 Pat. 815.

36 P. L. R. 180 = A. I. R. 1934 Lah. 972.

(6) *Rasool Buz v. Emperor*, A. I. R. 1933 S. 276 = 1933 Cr. C. 950 = 146 I. C. 407 = 35 Cr. L. J. 26.

(7) *Akshoy Kumar v. Emperor*, A. I. R. 1933 C. 880 = 145 I. C. 874 = 1933 Cr. C. 1530 = 34 Cr. L. J. 1092 = 33 C. W. N. 113.

(8) *Hammir Mal v. Vinayakrao*, 130 I. C. 501 = A. I. R. 1931 Nag. 93 = 1931 Cr. C. 450 = 27 N. L. R. 167 = 132 I. C. 457 = 32 Cr. L. J. 896.

(9) *Brahm Datt v. Emperor*, A. I. R. 1934 Lah. 981 = 1934 Cr. C. 1375 = 153 I. C. 547.

(10) *Bayetulla v. Emperor*, 58 C. 401 = 34 C. W. N. 923 = 1931 Cr. C. 35 = 129 I. C. 317 = 32 Cr. L. J. 325.

of the Penal Code, in which there was an approver, was being tried by a Magistrate with powers under s. 30 of the Code. After evidence had been recorded and arguments were heard, but before judgment was pronounced, the amended Code of 1923 came into force and the jurisdiction of the Magistrate to try the case was expressly taken away. The Magistrate nevertheless pronounced judgment in the case. It was held that the illegality was not one which could be cured under this section(1). The words "a court of competent jurisdiction" in this section must be taken to mean a court of competent jurisdiction in respect of the particular offence charged(2).

Error, omission 'or irregularity'.—An error which in no way prejudices a person convicted and is not fatal to the validity of the decision and is concerned with the proceedings, rather than the mode of trial may be condoned under the provisions of this section(3). The examination of a witness for the prosecution after recording the statement of the accused is an error, but if the case has been decided correctly on the merits the error in no way affects the result so as to vitiate the trial(4). The omission to examine the person called upon, for security, at the close of the prosecution case and before he is called on to enter upon his defence, is not an illegality vitiating the conviction—but an irregularity covered by this section, when he has not been prejudiced by such omission(5). Where the defence has been heard by a court sitting with Assessors, it is an irregularity for the court to acquit without having asked the opinion of the Assessors. In such a case, however, the High Court refused to interfere(6). Where, however, evidence was recorded after the discharge of the Assessors, in a case tried with the aid of Assessors, it was held that this was an irregularity not cured by this section(7). But an irregularity occasioned by a sub-Inspector have been made

without which an offence cannot be taken cognizance of under the law is not a defect curable by the section(9). The want of a complaint for a particular

section(10). An order for prosecution under s. 476 cannot make up for

(1) *Jumun Shah v. Emperor*, 26 Cr. L. J. 549=85 I. C. 615=A. I. R. 1926 Lah. 378

(2) *Empress v. Krishnabhat*, 10 B. 319

(3) *Bechu v. Emperor*, 71 I. C. 115=20 A. L. J. 874=1923 A. 81=24 Cr. L. J. 67=45 A. 124

(4) *Ibid.*

(5) *Binode Behari v. Emperor*, 50 C. 985.

(6) *See per Narayana Das*, 1 A. 610

(7) *See per Narayana Das*, 1 A. 610

19. Bom. 158=25 Cr. L. J. 551=100 I. C. 487.

(10) *Sathi Nedy v. Emperor*, 126 I.

arrested at a railway station within the territories of the Nizam and the accused objected to the warrant on several grounds, it was held that the objections were fully covered by this section(1). The error of a Magistrate in proceeding by warrant instead of by summons furnishes no ground for quashing the proceeding(2). The issue of search warrant to a Sub-Inspector of Police instead of to an Inspector under the Public Gambling Act is an irregularity covered by this section(3). The refusal of a Magistrate to issue process to witnesses named by the accused, when such refusal, in regard to any particular witness, is not based on any of the grounds mentioned in section 257, is an illegality which cannot be cured by this section(4). Nor can this section cure the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses in contravention of proviso (a), section 350(5). Issue of summons to an accused person before examining the complainant as required by sec. 200 is only an irregularity and it cannot vitiate the trial in the absence of any prejudice having been caused to the accused(6).

In the charge.—Any defect or omission from the charge as actually framed does not become fatal unless it occasions a failure of justice to the accused(7). Sections 225 and 537 cure any omission in a charge there might be of particulars required by section 223(8). The failure to enter in the charge the actual words used in the deposition is at most an irregularity cured by this section(9); as also the failure to mention the objectionable words(10).

Omission to frame a charge.—See s. 535 and notes thereto. The true test is whether the facts charged give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge. A case of no prejudice is met by this section(11).

Omission to state common object.—See notes to s. 225 *supra* under the same head. It is no doubt very desirable that in the case of an offence under s. 149 of the Indian Penal Code in framing a charge the common object should be mentioned so as to give the accused clear notice of the charge against them, but the omission to do so is nothing more than an irregularity(12). Where a charge-sheet under s. 149 was framed after

(1) *Yusuf-ud-Din v. Empress*, 1 P. R. 1896 Cr.

(2) *Queen v. Aneef Pulney*, 1 W. R. 16.

(3) *Empress v. Hardeo Dass*, (1884) A. W. N. 286.

(4) *Narayana Mudaly v. Emperor*, 31 M. 191=7 Cr. L. J. 425.

(5) *Gomer Sirdar v. Empress*, 25 C. 863.

(6) *Anil Krista v. Badam Santra*,

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(8) *Gangadhar v. Bhangi Sao*, 81

J. O. 976=25 Cr. L. J. 1152=A. I. R.

(1925) Nag. 147; *Lal Chand v. Emperor*, A. I. R. 1934 O. 370 (2)=35 Cr. L. J. 1161=11 O. W. N. 828.

(9) *Mirabux v. Emperor*, A. I. R. 1923 Nag. 83.

(10) *Shankar Lal v. Emperor*, 104 I. C. 437=28 Cr. L. J. 811=A. I. R. 1937 (Lah) 699.

(11) *Meher Sheikh v. Emperor*, 59 O. 8=132 I. C. 254=1931 Cr. O. 510=32 Cr. L. J. 892=85 O. W. N. 945=A. I. R.

1931 Cal. 414; *Emperor v. Shib Charan*, 53 A. 233; *Mandi Lal v. Emperor*, A. I. R. 1934 O. 244=1934 O. L. R.

479=11 O. W. N. 680=149 I. C. 231=1931 Cr. O. 708=35 Cr. L. J. 935.

(12) *Ghaziuddin v. Emperor*, A. I. R. 1933 O. 19=9 O. W. N. 1109=142 I. C. 681=34 Cr. L. J. 593=8 Luck.

under s. 476 for prosecution of a person is rejected, but on appeal the appellate court, purporting to act under s. 476, remands the proceedings for further inquiry which results in the complaint being filed against the person, and his conviction, the procedure followed is in strict conformity with the Code, and though the order of remand may be illegal, where the illegality has not led to failure of justice, it is sufficiently covered by the wide provisions of this section(1). Where the accused was prosecuted upon a sanction of the Local Government without a formal complaint and no objection was taken to the absence or irregularity of the complaint at the trial, it was held that the defect did not affect the trial, and the irregularity or insufficiency of the complaint was cured by this section(2).

In the summons or warrant.—A summons or warrant is not bad simply because it is initialed and not signed(3). But in a recent Madras case it has been held that initialling of a document is not an irregularity which under the amended Code can be cured by this section(4). An omission to insert in the summons the amount of the recognizance and security required will not invalidate all proceedings had upon a summons(5). Where on an information a summons is issued to the accused, and owing to its disclosing no offence, a fresh summons is issued without any fresh or supplemental information, the error, omission or irregularity in the fresh summons, is not sufficient, under this section, to upset the finding and sentence unless it has in fact occasioned "a failure of justice," that is, unless it has unfairly affected the accused's defence on the merits(6). A warrant purporting to be issued under section 90 for the arrest of an accused person who has been let out on his own bond is illegal unless the court records its reasons as required by the section. This omission to do so is an irregularity not cured by this section(7). The omission to notify the person arrested of the order for his arrest is an irregularity covered by this section(8). A warrant illegally issued under s. 96 cannot be treated as valid under s. 98 by the operation of this section(9). Where, however, the discovery of an excisable article in the possession of the accused is proved by direct evidence, any irregularity or illegality in the search can neither vitiate the trial nor affect the conviction(10). Where on a warrant of the District Magistrate, Simla, on a charge of offence under ss. 116 and 161, I. P. C., the accused a subject of the Nizam of Hyderabad, was

(1) *Rajabali v. Emperor*, A. I. R. 1930 S. 315 = 1930 Cr. C. 1147 = 24 S. L. R. 446.

(2) *Swami Dayal v. Crown*, 8 P. R. 1908 Cr. = 149 P. L. R. 1908.

(3) *Empress v. Janaki Prasad*, 8 A. 293; see also *Subramania Ayyar*, 9 M. 396.

(4) *In re Velivalli*, 54 M. 251 = 59 M. L. J. 674 = 32 Cr. L. J. 430 = 129 I. O. 229 = 12 I. W. 220 = 1 I. B. 1220 = 1 Ad.

(7) *Re Koruthan Ambolam*, 38 M. 1038.

(8) *Nanpal v. Emperor*, 18 Cr. L. J. 666 = 40 I. C. 314.

(9) *Rash Behary v. Emperor*, 35 C. 1076 = 8 Cr. L. J. 245 = 12 C. W. N. 1075.

(10) *Emperor v. Ali Ahmad*, 45 A. 86 = 1924 A. 214 = 21 A. L. J. 858 = L. R. 4 A. 252 Cr. = 81 I. C. 615 = 25 Cr. L. J. 967; *Emperor v. Allahdad*, 35 A. 358 = 14 Cr. L. J. 236 = 19 I. C. 332 = 11 A. L. J. 442; *Ruremal v. Emperor*, A. I. R. 1929 A. 937 = 120 I. C. 266 = 31 Cr. L. J. 35 = 1930 A. L. J. 229 = 1929 Cr. C. 665.

s. 398, Indian Penal Code, the substantive section 393, should be mentioned as well as the supplementary section 398. The omission to specify the section would, however, be covered by this section(1).

Omission to read out and explain fresh charge.—Omission to read out and explain to the accused a fresh charge added at the trial is an irregularity which, unless it has prejudiced the accused, does not affect the result of the trial. Where the accused was defended and his counsel was asked if he wished for a new trial and he declined it, it was held that there was no failure of justice(2).

Joinder of charges.—The joinder of two distinct offences in a single charge is a mere irregularity which may be cured under this section and not an illegality(3). Where a Magistrate acted irregularly in specifying three distinct offences in one head of charge instead of framing a separate charge for each distinct offence, but the accused were not misled or prejudiced by the defective form of the charge and knew perfectly well what offences they were charged with, *held* that there had been no such substantial defect in the charge-sheet as to render the trial or conviction illegal. Such irregularities as these were cured by sections 225 and 537 as they had not occasioned any failure of justice(4). But in some cases it has been held that the joinder of two distinct offences under one charge is an illegality which is fatal to the proceedings(5).

Misjoinder of charges—There is a conflict of judicial opinion on the point whether the joinder of two distinct offences in one charge is an illegality fatal to the trial. In some cases it was held that such a misjoinder amounted to an illegality(6) while in others it was held that it amounted to a mere irregularity(7). The former opinion appears to have been based upon the Privy Council ruling in *Subramania Ayyar*

I R. 1930 Rang. 201=8 Rang. 25=31 Cr. L. J. 793=125 I. O. 266.

(1) *Chan Hok v. Emperor*, 11 I. O. 1004=4 Bur. L. T. 198=12 Cr. L. J. 468.

(2) *Empress v. Appa Subhana*, 8 B. 200.

(3) *Aigar v. Emperor*, 82 C. W. N. 839; *Tamez Khan v. Rajabali*, 100 I. O. 827=31 C. W. N. 337=A. I. R. (1927) Cal. 330=28 Cr. L. J. 347.

(4) *Bachchu v. Pyra*, 2 Luck. 430=28 Cr. L. J. 409=101 I. O. 185.

(5) *Radha Nath v. Emperor*, 50 C. 94=71 I. O. 120=36 C. L. J. 149=24 Cr. L. J. 79=A. I. R. 1922 C. 578; *Sachidanand v. Emperor*, A. I. R. 1933 Pat. 489=1933 Cr. O. 1030=144 I. O. 936=34 Cr. L. J. 892=14 P. L. T. 680.

(6) *Gul Mahomed v. Cheharu*, 10 C. W. N. 53; *Johan v. Emperor*, 10 C. W. N. 620; *Tilakdhari v. Emperor*, 6 C. L. J. 757; *Srish Chandra v. Emperor*, 13 C. W. N. 1067; *Asghar Ali v. Emperor*, 40 C. 846=17 C. W. N. 827; *Emperor v. Fattu*, 26 A. 195; *Seitak v. Emperor*, 113 I. C. 721=L. B.

9 A. 80 Cr.=26 A. L. J. 623=9 A. I. R. 531=A. I. R. 1929 A. 417; *Chakrakodi v. Emperor*, 72 I. O. 622=(1929) M. W. N. 476=1922 M. 435=44 M. L. J. 67=24 Cr. L. J. 461; *Raman Lal v. Emperor*, 99 I. O. 603=28 Cr. L. J. 171=1927 All. 223=49 A. 312; *Paw Tha v. Emperor*, 3 L. B. R. 780; *Shanker v. Emperor*, 11 A. L. J. 188; *Muthusami Pillai v. Tahsildar*, A. I. R. 1933 M. 434(1)=1933 Cr. C. 662=146 I. O. 195=34 Cr. L. J. 1183; *Hira Lal v. Emperor*, 31 C. 1053=1 Cr. L. J. 713.

(7) *Moharuddi v. Jadunath*, 11 C. W.

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2 I. O. 1004=4 Bur. L. T. 198=12 Cr. L. J. 468; *Abdul Rahman v. Emperor*, 1926 Rang. 53=4 Bur. L. J. 213=94 I. O. 717=27 Cr. L. J. 663; *Ajay v. Emperor*, 117 I. O. 596=A. I. R. 1928 C. 700=32 C. W. N. 839.

the whole prosecution evidence had been recorded and the accused were therefore fully cognizant of the case against them, the omission to state the common object cannot be said to have caused the accused any prejudice much less resulted in any failure of justice, and the trial cannot be held to be vitiated thereby(1).

Omission of mention of s. 149.—Section 149, Indian Penal Code, creates no offence, it is merely declaratory of a principle of the common law; hence omission of that section from a charge does not make the charge illegal(2).

Omission of the word "dishonestly" in a charge.—The omission of the word "dishonestly" in a charge under s. 411 Penal Code, for dishonestly receiving stolen property, is no ground for reversing the conviction and sentence, where the accused person has fully understood the nature of the offence with which he is charged and has not been prejudiced by the omission(3).

Omission to set out the guilty intention in a charge.—An objection as to the omission to set out the guilty intention of an accused in the charge is subject to the provisions of s. 537; and before effect can be given to any such objection, it must be shown that the omission complained of has occasioned a failure of justice(4).

Defect in form.—A charge stating that the accused did a particular act in order to commit a certain offence or any other offence punishable with the imprisonment is improper as the accused should know the specific offence with which he is charged. When, however, the accused does not suffer any prejudice the defect in the form of the charge is curable by the provisions of this section(5). It is not sufficient merely to charge the accused in the bare words of a section of the Code. Particulars must always be given sufficient to give him notice of the matter with which he is charged, but the omission to give such particulars is no ground for setting aside conviction if such omission had occasioned no failure of justice(6). Where the accused knows what he is being tried for and there is no failure of justice defects in form of charge are immaterial(7). When the charge is on the face of it meaningless and ununderstandable, but where the accused and his counsel know the nature of the offence the accused is charged with, and no failure of justice has resulted the vagueness or incomprehensibility of the charge is cured by this section(8). In a charge and finding under

193, *In re Venkadu*, 121 I. C. 862=31 L. W. 236=3 Mad. Cr. Cas. 67=A. I. R. 1930 M. 188=Ind. Rul. 1930 Mad. 270=31 Cr. L. J. 347; *Lachhu Singh v. Emperor*, 18 Cr. L. J. 382=38 I. C. 766.

(3) *Reg v. Rahman*, 10 Bom. H. C. R. 373.

(4) *Balmakand v. Ghansamram*, 22 C. 391.

(5) *Balaram v. Emperor*, 82 I. C. 50=25 Cr. L. J. 1185=A. I. R. (1925) Cal. 160.

O. 781.

Cr. C. 321=131 I. C. 458=82 Cr. L. J. 759=35 M. I. W. 98.

(8) *K. C. V. Reddy v. Emperor*, A.

misappropriation committed in the course of one transaction, with another forgery or criminal misappropriation committed in the course of another transaction is illegal(2).

Joint trial of two parties arrayed against each other in a riot.—The joint trial of two parties arrayed against each other in a riot is not warranted by sections 233 and 239 and is altogether illegal and void and not merely irregular within the purview of this section. But the High Court is not bound to interfere on the Revision side in such a case, when no prejudice is shown to have been caused by the joint trial(2).

Misjoinder of parties.—Where a woman, a member of the dancing girl caste who obtained from another woman, a minor girl, who was employed by her for the purpose of prostitution, while still a minor and who subsequently took in adoption another girl of the same caste, was charged and tried together with the parents of the second girl on charges relating to both the girls, *held*, that, although the Magistrate was in error in trying the two charges together, the irregularity had not occasioned a failure of justice(3).

Misjoinder of parties and charges.—Where four accused were at one and the same tried for offences of murder and robbery committed in the course of one transaction and for another robbery committed two or three hours previously and at a place close to the scene of the robbery and murder, it was held that the trial of these separate offences together, though an error or irregularity within the meaning of this section, would not necessarily render the whole trial void(4). Where, at the same trial, the prisoner was charged with cheating A on two occasions and B on another occasion, and was convicted on all those charges, the conviction on the appeal was affirmed, though it was held that the proceedings were irregular(5). Where a person was charged with theft and two others were charged with rescuing the former from lawful custody and the Magistrate tried both the cases together and convicted all the accused in one trial, *held* that, although it was irregular to try both cases together, the accused, under the circumstances of the case, were not prejudiced by the irregularity(6). The failure to try the charges separately is an error, omission or irregularity in the proceedings before or during the trial, which unless there has been a failure of justice, is cured by this section(7).

Joinder in a case under s. 107.—The main principles applicable to a criminal trial regarding joinder of charges and the joint trial of accused persons are also applicable to inquiries under s. 107. Where both the parties to a proceeding under s. 107 were tried together, some of them having been examined as witnesses also, it was held that they could not be said to have been concerned in the same

(1) *Nga Tun Maung v. Emperor*, 2 L. B. R. 10.

(2) *Ala Dya v. Emperor*, 5 P. R. 1006 Cr. L. J. 75.

(3) *Empress v. Ramanna*, 12 M. 273 = 1 Weir 375.

(4) *Empress v. Mulua*, 14 A. 502.

(5) *Empress v. Murari*, 4 A. 147.

(6) *Empress v. Kulti*, 11 M. 441 = 1 Weir 210.

(7) *Abdur Rahman v. Keramat*, 21 27 C. 839 (845) = 4 C. W. N. 656.

v. *King Emperor*(1). In that case the accused person was charged with no less than 41 offences committed within the space of two years. Their Lordships of the Privy Council remarked as follows :—"The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity". Different interpretations have been put on that ruling since 1901, when that case was decided(2). What their Lordships of the Privy Council have decided in *Subramania Ayyar's* case is, that if the law has expressly provided a particular mode of trial, "trial. But it is doubtful . . . but the joint trial of . . . trial. And so, the joinder in one charge of two distinct offences in contravention of the provisions of sec. 233 is not an "illegality" within the meaning of the rule laid down in the above Privy Council case, but is only an irregularity curable by section 537(3). But a joinder of two offences committed on two different dates, one following the other, in one charge is an illegality and cannot be cured by this section(4). In a case under sections 330, 348, against four Police Officers, it was held that where there are several disconnected charges, or the prospect of a fair trial is endangered by the production of a mass of evidence, the propriety of combining the charges may well be questioned(5), especially if the wrongful confinement and torture were committed at several distinct times and place(6). Where a person is charged under s. 477 of the Penal Code for fraudulently destroying a document and secreting other documents, and under ss. 109 and 408 for abetting a criminal breach of trust, he is charged with three distinct offences and cannot be tried at the same trial under s. 233, unless the offences charged are so connected together as to form one and the same transaction(7). Where two offences are quite distinct and separate and there is also an interval of time between their commission they cannot be said to form the same transaction and a joint trial in respect of them is illegal(8). Where the accused cut a large number of trees on eight or

the complainant on several occasions a joint trial in respect of them is illegal(10). The joinder at one trial of charges of forgery and of criminal

(1) 25 M. 61; See *Pearey Lal v. Emperor*, A I R. 1935 O. 273.

(2) *Abdul Rahman v. Emperor*, 27 Cr. L. J. 669 (673)=94 I. C. 717=4 Bur. L. J. 213=A. I. R. (1926) Rang. 53.

(3) *Public Prosecutor v. Maliyakal*, 29 M. L. J. 101.

(4) *John v. Emperor*, 2 C. L. J. 618=3 Cr. L. J. 111.

(5) *Empress v. Fakirappa*, 15 B. 491.

(6) *Emperor v. Kumaramuthu*, 25

M. L. T. 879.

(7) *Chandl Singh v. Empress*, 14 C 395.

(8) *Shafi v. Emperor*, 81 I. C. 612=21 A. L. J. 859=1924 A. 211=25 Cr. L. J. 964.

(9) *Raghavendra Rao v. Emperor*, (1911) 2 M. W. N. 467=12 I. C. 655=12 Cr. L. J. 567.

(10) *Ali Muhammad v. Emperor*, A. I. R. 1930 B 62=110 I. C. 532.

which a Magistrate has written his judgment, where it does not amount to an "absence" of a judgment can legitimately be brought within the provisions of this section(1). The section does not, however, cure the defects in a judgment which is clearly at variance with the direction given in sections 367 and 424 and which materially prejudices the accused in their trial(2).

Omission to state reasons for judgment.—In a trial with the aid of Assessors, the Judge's omission to state the reasons for his judgment is an irregularity which does not vitiate the finding(3). The omission to make the record required by proviso of s. 250, in passing an order for compensation, cannot be held to amount to more than "an omission in the judgment or other proceedings during trial"(4).

Omission to sign judgment.—The failure of the Magistrate to sign a judgment which he has written with his own hand is a mere irregularity curable by this section(5). In a trial before a Bench of Magistrates, by whomsoever the judgment and record may have been written, they should, under s. 265, be signed by all the members of the bench present, but failure to comply with this provision is not necessarily an illegality; and may, where no failure of justice had been occasioned, be cured by this section(6).

Failure to write judgment before pronouncing sentence.—The omission of a Magistrate to write a judgment before sentence is pronounced is an omission 'or irregularity' which is covered by this section and is curable except where it has occasioned a failure of justice(7). In some cases, however, it has been held that omission to write the judgment before pronouncing sentence is not an irregularity cured by this section(8).

Judgment written and signed by one Magistrate pronounced by another.—Where a Magistrate after finishing the trial of a case, but before delivering the judgment is physically incapacitated to come to court, and therefore, writes and signs his judgment and sends it to be delivered by another Magistrate, who delivers it, the wrong procedure

(1) *Patilbua v. Emperor*, 97 I. C. 737=28 Bom. L. R. 1029=1926 B. 512=27 Cr. L. J. 1153; *Fakir Bux v. Emperor*, 95 I. C. 755=27 Cr. L. J. 833; cf. *Passapa v. Emperor*, 3 Cr. Law. Bom. 53=32 Bom. L. R. 353=125 I. C. 710=A. I. R. 1030 B. 163.

(2) *Kanhay Singh v. Emperor*, 17 I. C. 795=10 A. L. J. 435=19 Cr. L. J. 859; *Rambit v. Emperor*, 73 I. C. 328=1923 R. 41=24 Cr. L. J. 584.

(3) *Reg v. Kala Karsan*, 6 Bom. H. C. R. (C. C.) 55. As to omission of Honorary Presidency Magistrate to record reasons, see *In re Thorman*, 81 I. C. 908=20 L. W. 330=25 Cr. L. J. 1084=1924 M. 799, also *Namdeo v. Emperor*, 26 Bom. L. R. 1236=85 I. C. 140.

(4) *Kalla Ramudu v. Ravipati*, 2 Weir 711.

(5) *Emperor v. Ram Sukh*, 47 A. 231=86 I. C. 64=23 A. L. J. 5=L. R. 6 A. 41 Cr.=26 Cr. L. J. 668=A. I. R.

(1925) A. 299; *Muhammad Hayat v. Emperor*, 7 Rang. 370=120 I. C. 225=30 Cr. L. J. 1166=1930 Cr. C. 203.

(6) *In re Nathan*, 53 M. 165=124 I. C. 501=57 M. L. J. 763=30 L. W. 883=A. I. R. 1930 M. 187=(1930) M. W. N. 78=31 Cr. L. J. 715.

(7) *Ala Muhammad v. Emperor*, 81 I. C. 193=25 Cr. L. J. 705; *Reg v. Kala Karsan*, 6 Bom. H. C. R. (C. C.) 55.

(8) *Devendra Shicapa v. Emperor*, 17 Bom. L. R. 1085; *Emperor v. Kala Karsan*, 6 Bom. H. C. R. (C. C.) 55. 1922 M. 50.

(9) *Devendra Shicapa v. Emperor*, 17 Bom. L. R. 1085; *Emperor v. Kala Karsan*, 6 Bom. H. C. R. (C. C.) 55.

transaction in any proper sense of the term, and that the inquiry was therefore most irregular; and the irregularity was not covered by this section(1). The two opposing parties in a dispute cannot be proceeded against under s. 107 and bound over to keep the peace, in one proceeding(2).

Addition of new charges.—Although a charge may be added or altered at any time before the judgment is pronounced, still it is illegal to do so at a late stage of the proceedings, e.g., after the prosecution case has been closed and the defence evidence has been recorded(3). Where persons, charged with the offence of wrongful confinement, raised the defence, that they had a lawful excuse for confining the persons, inasmuch as they were caught in the house of one of the prisoners under circumstances, which led to the belief, that they had committed house breaking by night with intent to commit theft, and the Magistrate disbelieving the story and the evidence of the defence, committed the accused to the Sessions, not only for the wrongful confinement, but also, for fabricating false evidence and for bringing a false charge, and, at the Sessions trial, they were found guilty on all the three charges, *held*, that the conviction on the last two charges was illegal inasmuch as, in putting the accused upon their trial in respect of the two additional charges, the Magistrate was really prejudging the defence which they had raised to the first charge(4).

Further charge without further examination.—A prisoner originally charged with an offence under one section (302) and acquitted of that charge was committed, the day following that on which she was acquitted, for trial under another section (307) without any witnesses being examined on the charge under section 307 and without having any opportunity of cross examining the witnesses on the first charge with respect to the second charge. It was held that the irregularity was one which was not covered by this section and that the prisoner had been prejudiced thereby in her defence(5).

Proclamation.—The provisions of s. 87 (a) as to publishing are imperative and failure to comply with them will vitiate the proclamation(6). Where, however, a proclamation under that section is made and is read and published in the places where the absconders are most likely to hear of it, the mere omission to affix a copy of it to the court house, unless it prejudices the absconders, is an irregularity curable by this section(7).

Judgment.—The provisions of this section are mandatory and a judgment must contain the decision and the reasons for the decision and it must be dated and signed by the presiding officer in open court at the time of pronouncing it(8). But an irregularity in the mode in

(1) *Pran Krishna v. Emperor*, 8 C. W. N. 180.

(2) *Ganpat v. Emperor*, 5 N. L. R. 65=9 Cr. L. J. 560=1 I. C. 240; *Kamal Narain v. Emperor*, 5 C. L. J. 231=5 Cr. L. J. 197=11 C. W. N. 472.

(3) *Emperor v. Isap Muhammad*, 81 B. 218.

(4) *In re Turibullah*, 4 C. L. R. 339.

(5) *Queen v. Ilcoriya*, 22 W. R. Cr. 14.

(6) *Subbarayar v. Empress*, 19 M. 8 at p. 5; *Empress v. Abdullah*, 22 A. 216.

(7) *Mala Singh v. Crown*, 17 Cr. L. J. 414=35 I. C. 974=40 P. W. R. 1916 Cr.

(8) *Jhari Lal v. Emperor*, 122 I. C. 531=8 Pat 504=A. I. R. 1930 Pat 145=31 Cr. L. 416=Ind. Bul. (1930) Pat. 211.

to examine a complainant before issuing process against the accused is not an illegality but a mere irregularity which will not vitiate the trial in the absence of any prejudice to the accused(1), though there are authorities to the contrary also(2).

Omission to examine the accused.—The procedure prescribed by this section is binding on the courts and the omission to comply with the provisions of that section is not a mere irregularity such as can be cured under this section, but is an illegality vitiating the trial(3). The question whether the non-compliance with strict provisions of s. 342 has caused any prejudice to the accused or not does not arise in such cases(4). Non-compliance with provisions of this section which are mandatory renders the trial null and void, it is not a mere irregularity that can be cured under this section(5). The non-compliance vitiates the trial even though the accused has not been prejudiced(6). But in some cases it has been held that mere omission to comply with the provisions of this section will not vitiate a trial unless there has been a failure of justice as a result of the irregularity(7).

Failure to ask accused if he wishes to further cross-examine prosecution witnesses.—There is a difference of opinion as to whether the failure of the court to ask the accused whether they wished to cross-examine the prosecution witnesses after the framing of the charge

T. 346=51 I. C. 465 (468)=20 Cr. L. J. 481; *Moolchand v. Kessoomal*, 15 S. L. R. 200, *Loke Nath v. Sanyasi*, 30 C. 923; *Fazlar Rahman v. Abidar Rahman*, 23 O. W. N. 892 (893); *Haladhar v. Emperor*, 9 O. W. N. 199; *Satya Charan v. Chairman*, 3 C. W. N. 17.

(1) *Anil Krista v. Badam Santra*, 116 I. C. 722=1929 C. 175=30 Cr. L. J. 706; *Phagu Shahu v. Emperor*, 1 Pat. L. J. 592, 595; *Bharat v. Judhistir*, 9 Pat. 707=30 Cr. L. J. 1056 (1058); *Heman v. Emperor*, 21 Cr. L. J. 779=1 Pat. L. T. 349=58 I. C. 459 (460); *Bhairab Chandra v. Emperor*, 46 C. 807; *Emperor v. Batehar*, 37 A. 628.

(2) See the cases in the last but one note and *Jitan v. Emperor*, 1 Pat. L. T. 564; *Mahadeo v. Emperor*, 27 C. 921 (924); *Ali Muhammad v. Crown*, 2 P. R. 1912 Cr.

Sinamani, 32 Cr. L. J. 757=131 I. C. 493=(1930) M. W. N. 914=A. I. R. 1931 Mad. 241; *Routher v. Emperor*, 73 I. C. 163=44 M. L. J. 567=46 Mad. 449=A. I. R. 1925 Mad. 609=24 Cr. L. J. 547; *Ram Varisaiwar v. Emperor*, 6 Pat. L. T. 493; *Raghu v. Emperor*, 5 Pat. L. J. 430; *Suraj v. Emperor*, 1 Pat. L. T. 641; *Tani v. Emperor*, 20 Cr. L. J. 12=48 I. C. 487; *Haro Nath v. Ala Buz*, 28 C. W. N. 119; *Ram Nath v. Emperor*, 2 Pat. L. T. 549; *Fatu Santal v. Emperor*, 6 Pat. L. J. 147.

(5) *Durgoji v. Excise Inspector*, 7 Mys. L. J. 258; *Fernandez v. Emperor*, 45 B. 672; *Haro Nath v. Ala Buz*, 28 C. W. N. 119; *Fatu Santal v. Emperor*, 6 Pat. L. J. 147; *Varisai Routher v. Emperor*, 46 M. 449 F. B.; *Pramatha v. Emperor*, 50 C. 518; *Mazhar v. Emperor*, 50 C. 223; *Emperor v. Gamadi*, 50 B. 34 Cr.

(6) *Pramatha Nath v. Emperor*, 50 C. 518; *Mozhar v. Emperor*, 50 C. 223; *Ram Charan v. Emperor*, 7 Pat. L. T. 259=26 Cr. L. J. 1289; *Ghulla v. Crown*, 1 P. R. 1918 Cr.

(7) *Gurdial Singh v. Bhola*, 120 I. C. 753=10 Pat. L. T. 106; *Subbaya Naidu v. Emperor*, 7 Rang 470; *Pyram v. Emperor*, A. I. R. 1932 O. 118=9 O. W. N. 116; *Emperor v. Sheodot*, 31 Cr. L. J. 771; *Monadu v. Emperor*, 30 Bom. L. R. 1035.

R. 26=I. L. T. 40 Lah. 188; *Lachhman Singh v. Emperor*, 7 Lah. 664=96 I. C. 683=2 Lah. Cas. 333=27 Cr. L. J. 1007=A. I. R. 1926 Lah. 551=27 P. I. R. 427; *Hari v. Emperor*, 31 N. L. R. 49.

(4) *Nataraja Mudaliar v. Deta*

thus adopted is a mere irregularity and is completely covered by this section(1).

Judgment prepared by Magistrate after he ceased to have local jurisdiction in the local area.—Where a trying Magistrate prepares his judgment in a criminal trial after he has ceased to have jurisdiction in the local area his judgment is entirely without jurisdiction and is vitiated by an illegality which cannot be cured by invoking the provisions of this section although there is no suggestion of any actual failure or probable prejudice or failure of justice(2).

Omission to record preliminary order or reasons.—The omission to record preliminary order, however objectionable, is not sufficient to discharge the final order and is cured by the provisions of this section(3); as also the omission to record in the said reasons why he is satisfied about the likelihood of a breach of the peace(4).

Clause (a). Irregularities before or during trial.—The omission to make the record required by the proviso to section 250, in passing an order for compensation cannot be held to amount to more than an omission in the judgment or other proceedings during trial(5).

Want of certificate required by s. 188.—The trial of a case without a certificate required by s. 188 is an irregularity which is cured by this section, if no prejudice is alleged or proved(6), though there are authorities to the contrary also(7). The objection as to absence of certificate from the political agent should be taken at the trial of the case and if it is not taken till after conviction in the original court, absence of certificate is not fatal to the prosecution(8).

Failure to examine complainant.—The failure to comply with the provisions of section 200 is an irregularity which, unless it has occasioned a miscarriage of justice, is curable by this section(9). The only person prejudiced by such an omission is the complainant and not the accused(10). But in some cases it has been held that the omission to examine the complainant under s. 200 is a serious irregularity justifying interference in revision by the High Court(11). Omission

(1) *Nur Muhammad v. Emperor*, 71 I. C. 525=21 A. L. J. 137=24 Cr. L. J. 173=1923 A. 276.

(2) *Jhingur v. Emperor*, A. I. R. 1931 Pat. 886=12 Pat. L. T. 647=1931 Cr. C. 914=32 Cr. L. J. 1224=134 I. C. 625.

(3) *Mohan Lal v. Morni*, A. I. R. 1933 Pesh. 88=145 I. C. 868=34 Cr. L. J. 1138.

(4) *Emperor v. Narsingdas*, 30 N. L. R. 311.

(5) *Katta Ramudu v. Ratipati*, 2 Weir 711.

(6) *Shamir Khan v. Empress*, 35 P.

1902 Cr.=21 P. L. R. 1902; *Shamir Khan v. Empress*, 35 P. R. 1878 Cr.

(9) *Chiragh Din v. Crown*, 4 Lah. 359=76 I. C. 189=23 Cr. L. J. 189=A. I. R. (1924) Lah. 259; *Emperor v. Baldeva*, 56 A. 33; *Maliappa Goundan v. Emperor*, A. I. R. 1928 M. 1235=23 L. W. 621=115 I. C. 242=1. Mad. Cr. Cas 317; *Erayya v. Sobaga*, 4 Mys. L. J. 127; *Baljoov v. Emperor*, 6 C. W. N. 840; *Empress v. Monu*, 11 M. 443; *Emperor v. Nga Po Kan*, 20 I. C. 404=1 U. B. R. (1913) 162=14 Cr. L. J. 420; *Ambayara v. Pachamuthu*, 19 L. W. 461.

(10) *Ambayara v. Pachamuthu*, 19 L. W. 461.

(11) *Ambayara v. Pachamuthu*, 19 L. W. 461.

section and does not vitiate the trial(1). The trial will, however, be invalid if a portion of the trial which consists in the taking of additional evidence takes place after the discharge of the Assessors(2).

Infringement of s. 162.—The infringement of the provisions of s. 162 is an irregularity which can be cured under this section if it has not occasioned a failure of justice(3).

Omission to read over deposition to witness.—Omission to read over to each witness his deposition in accordance with the provisions of s. 360 does not vitiate the trial if the accused has not been prejudiced(4), though there are authorities to the contrary also(5).

Omission to record reason for granting pardon.—Omission to record the reasons for granting a pardon under section 337 (1) (a) is a mere irregularity which would be cured by this section where no prejudice has been caused thereby(6).

Omission to translate English deposition of witnesses.—Omission to translate depositions of witnesses given in English is a mere irregularity which can be cured by this section(7).

Irregularity in conducting inquiry.—An irregularity in the conduct of an inquiry, even though sufficiently serious to induce the High Court to annul a commitment, is not sufficient to justify the annulment of the trial after the commitment had been made and a trial had upon it, unless the irregularity has caused a failure of justice by prejudicing the accused in his defence(8).

Failure to record memo of local Inspection.—A failure to record a memorandum of a local inspection under section 539-B is an irregularity which does not vitiate the whole proceedings unless it has occasioned a failure of justice by prejudicing the accused(9).

Omission to conduct inquiry by Magistrate himself.—A Magistrate in proceedings under s. 133 has no jurisdiction to make over the inquiry under s. 139-A to any Magistrate subordinate to him, and omission to conduct it himself is an irregularity incurable by this section(10).

Absence of commitment.—The absence of commitment is defect in substance, not in form, and therefore not covered by this section(11).

(1) *Kallu v. Bashiruddin*, 53 A. 172=82 Cr. L. J. 372=159 I. C. 269; *Sankatha v. Bishwanath*, 32 Cr. L. J. 868=129 I. C. 265=1931 A. 2.

(2) *Empress v. Ram Lal*, 15 A. 136

(3) *Nur Muhammad v. Emperor*, A. I. R. 1930 B. 595=32 Bom. L. R. 1279=54 B. 934=129 I. C. 156.

(4) *Abdul Rahman v. Emperor*, 5 Rang. 53=100 I. C. 227=1927 P. O. 44=31 C. W. N. 271=28 Cr. L. J. 259; *Jagwa v. Emperor*, 5 Pat. 63; *Fatier v. Emperor*, 31 C. W. N. 691=28 Cr. L. J. 751=1927 C. 575.

(5) *Hira Lal v. Emperor*, 52 C. 150=28 C. W. N. 268; *Haronath v. Sonaimia*, 28 C. W. N. 119=38 C. L. J. 281=25 Cr. L. J. 282.

(6) *Emperor v. Dukhu*, 120 I. C. 126=A. I. R. 1929 A. 321=27 A. L. J. 227=30 Cr. L. J. 1157.

(7) *In re Annai Erapappa*, 125 I. C. 253=(1929) M. W. N. 698=A. I. B. 1930 M. 186=31 L. W. 386.

(8) *Jamshedji*, Bom. H. C. Rev. No. 152 of 1881 cited in *Annadurai Aiyar's Cr. P. C.* 1918 Ed. p. 1639. But see *Adoo v. Emperor*, 18 Cr. L. J. 621.

(9) *Emperor v. Raghunandan Prasad*, 53 A. 706.

(10) *Inasaddar Ali v. Isimulla*, A. I. R. 1929 C. 813=50 C. L. J. 291=124 I. C. 491=34 C. W. N. 228.

(11) *Sharina v. Empress*, 42 P. R. 1691 Cr.

vitiates the whole proceedings. In some cases it has been held that the provisions of s. 256 are imperative and the omission to follow the section usually involves remand and retrial of the case from the point of the drawing of the charge(1). In others it has been held that the provisions of section 256 are not provisions relating to the mode of trial and failure to follow those provisions strictly amounts to not more than an irregularity in procedure, and would not be a ground for setting aside the conviction unless the irregularity has occasioned a failure of justice(2).

Omission to state particulars of offence to accused.—The statement of the particulars to the accused, and questioning him if he has any cause to show, under s. 242, is a material and inseparable part of the procedure in the trial of a summons case, and non-compliance therewith is an illegality as to the mode of trial which vitiates the conviction(3).

Omission to inform accused of his right to be tried before another Magistrate.—The failure to inform the accused of his right to be tried before another Magistrate is not a mere irregularity that can be cured by this section but an illegality that vitiates the trial(4).

Omission to examine witness.—Omission to examine a public servant in regard to the *yadast* or letter requesting the Magistrate to take action against the accused is only an irregularity of procedure(5).

Examination of prosecution witness after close of defence.—Although it is irregular to allow a witness to be examined on behalf of the prosecution after the accused has made his defence, when the witness is not a witness to contradict any new case set up by the prisoner yet, if the prisoner has had full notice of the evidence which was to be given by such witness and made his defence in allusion to the evidence of the witness the irregularity is not sufficient to vitiate the proceedings, but will be covered by this section(6).

Irregularity in recording evidence.—The recording of evidence in a language which is not the language of the court is not merely an irregularity but an illegality which vitiates the trial(7). But in some cases it has been held that omission to record the evidence in the mode prescribed by this section is only a mere irregularity curable under this

(1) *Moola v Crown*, 11 P. R. 1914

C. L. J. 875=1917 Cal. 196.

(4) *Narain Dass v. Emperor*, 5 A. I. Cr. R. 205.

(5) *Empress v. Moun*, 11 M. 413 (414).

(6) *Queen v. Sham Kishore*, 13 W. R. Cr. 36.

(7) *Janhi Prasad v. Emperor*, 19 Cr. L. J. 235=43 L. C. 821;

unamended s. 537 was omitted by s. 148, Act 18 of 1923 in consequence of the amendment made in s. 195. A prosecution for an offence under sections 30 and 65 of the Stamp Act cannot be validly initiated without the sanction of the Collector, and the defect in the initiation of a prosecution, without such sanction cannot be cured by obtaining the necessary sanction at a subsequent stage of the proceedings(1). It is absolutely essential to obtain the previous sanction of the registration authorities, for the prosecution of the accused under s. 83 of the Act and the prosecution without permission is illegal and contrary to the provisions of that section. And neither subsequent sanction nor s. 532 or s. 537 will cure the defect of want of such permission(2). The absence of the sanction of the High Court, required by section 339, sub-section (3), to a prosecution for giving false evidence in respect of a statement made by a person who has accepted a tender of pardon, is an illegality which invalidates the trial(3). A court cannot take cognizance of an offence under s. 467, Penal Code, without a complaint as required by s. 195(c). Want of sanction or complaint under s. 195, vitiates the whole proceedings and the defect is not cured by this section(4). When a charge of disobedience is tried by the Magistrate whose order has been disobeyed it may be presumed that he has sanctioned the prosecution under s. 195 or section 476 and, in any case, the want of sanction in such a case, is an irregularity which is effectively cured by this section(5). Failure to record a separate order for sanction to prosecute as contemplated by section 476 and its inclusion in the complaint is a trifling irregularity curable under this section(6). An irregularity in a sanction, as required by section 314 of the U. P. Municipalities Act, cannot be cured by the provisions of this section, which are not applicable to the sanction under section 314 of the U. P. Municipalities Act(7).

Clause (d): Misdirection in charging the Jury.—The expression 'misdirection', as used in the Code, includes not only an error in laying down the law by which the Jury are to be guided, but also an error in summing up the evidence(8). Merely telling the Jury that there are

(1) *Ramjiwan v. Lachhmi*, 104 I. O. 108=1927 Nag. 202=10 N. L. J. 21; *Empress v. Jethmal*, 9 B. 27; *Emperor v. Ramjilal*, 21 P. R. 1915 Cr.; *Empress v. Morton*, 9 B. 288; *Barindra Kumar v. Emperor*, 37 O. 467.

(2) *Emperor v. Muhammad Mehdi*, A. I. R. 1934 A. 963=4 A. W. R. 524=152 I. C. 667=36 Cr. L. J. 187.

(3) *Emperor v. Htuktalwe*, 2 L. B. R. 302.

(4) *Itam Samujh v. Emperor*, 96 I. O. 521=27 Cr. L. J. 969=3 O. W. N. 614=1926 O. 485; *Girdhari Lal v. Emperor*, A. I. R. 1925 O. 413=12 O. L. J. 194=2 O. W. N. 174=86 I. C. 933=26 Cr. L. J. 929.

(5) *J. R. Das v. Emperor*, 76 I. C. 698=2 Bur. L. J. 146=1 Rang. 549=1924 R. 35=25 Cr. L. J. 229.

(6) *Inayat Ullah v. Emperor*, 101 I. C. 186=1927 L. 379=28 Cr. L. J. 410.

(7) *Emperor v. Emperor*, 23 Cr. L. J.

41.

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of

witnesses does not amount to a misdirection; *Sham Lal v. Emperor*, 85 I. C. 716=26 Cr. L. J. 572. A direction to return a verdict of not guilty owing to witnesses for prosecution not being present amounts to a misdirection; *Supdt. v. Sader*, 1926 C. 584=30 O. W. N. 190=27 Cr. L. J. 125=91 I. C. 701; as also a direction that there is a presumption of law that the witness who has spoken untruth must be believed in so far as he deposes to facts spoken to by other witnesses; *Sagirudin v. Emperor*, A. I. R. 1928 C. 651.

Misreception of evidence.—Misreception of a piece of evidence which is inadmissible but which has very little weight does not vitiate the trial(1).

Irregularity in procedure.—If in conducting a trial a Judge adopts a procedure which is unauthorized, it would amount to a violation of law, which cannot be cured under this section(2). Omission to follow the procedure prescribed by ss. 190 (c) and 191 is an irregularity which cannot be cured by this section(3). The failure of the Magistrate to follow the procedure enjoined by s. 137 (1) vitiates his order(4).

Treating evidence in one case as evidence in counter or cross-case.—Where evidence in one case was treated as the evidence in the counter or cross case, the procedure is illegal and not curable under this section(5).

Irregularity in selecting Assessors.—The Assessors must be chosen from the persons summoned to act as such. The Judge is not competent to select any one to act as an Assessor who has not been summoned under s. 326 or 327. Where out of several persons summoned the Judge selected only one, and he selected two other persons at random from the persons present in court, it was held that the trial was illegal, and section 537 would not apply to such a case(6).

Trial with less than prescribed number of Assessors.—Where a trial is commenced and held throughout with less than the minimum number of Assessors prescribed by law, the court is not properly constituted and this section does not apply(7).

Irregularity in selecting Jurors.—Where owing to the fact that only three Jurors attended the court the Judge summoned Jurors from among the residents of the town on the day fixed for trial it was held that this was a serious irregularity which could not be cured by this section(8). Where the Judge, instead of hearing and deciding objection, proceeded to exempt some of the persons present merely on their own representations, the procedure was irregular and the irregularity could not be cured by s. 537(9).

Delay in taking proceedings.—Where a Magistrate in whose presence contempt was committed took cognizance of the offence immediately, but in order to give the 'accused an opportunity of showing cause, postponed his final order for some days,—held that such action, though it might be irregular, was not illegal, 'and, as' the accused had not been in any way prejudiced, was covered by this section(10).

Want of, or any irregularity in, sanction.—Cl. (b) of the old

(1) *Sohrai Sao v. Emperor*, 124 I. C. 836=11 Pat. L. T. 148=9 Pat. 474 =A. I. R. 1930 Pat. 247=31 Cr. L. J. 721=Ind. Rul. 1930 Pat. 452; see *Janki v. Emperor*, 11 C. L. J. 182=11 Cr. L. J. 244.

(2) *Allu v. Crown*, 4 Lah. 376; *Lyme v. Crown*, 4 Lah. 392.

(3) *Kanhaya Lal v. Crown*, 6 P. L. R. 143.

(4) *Tiraha v. Nanak*, A. I. R. 1927 A. 350=100 I. C. 371=29 Cr. L. J. 291

=49 A. 475

(5) *Allu v. Crown*, 4 Lah. 376.

(6) *Empress v. Badri*, (1894) A. W. N. 207

(7) *Ram Narain v. Emperor*, 27 O. C. 213=64 I. C. 711=1925 O. 110=26 Cr. L. J. 359.

(8) *Brojendra Lal v. Emperor*, 7 O. W. N. 168.

(9) *Ibid* at p. 192.

(10) *Empress v. Paimbar Balhsh*, 11 A. 361,

shifted on him under s. 114 and that unless he proved affirmatively that he acquired the property lawfully the Jury must convict him(1).

Failure to point out as to irrelevancy of confessions.—Where a Session Judge in his charge to Jury made no reference to the relevancy otherwise of a confession made to a village Magistrate on inducement, but merely told the Jury that if the confession was true it was enough to warrant the conviction of the accused, it was held to be a material and important misdirection likely to lead to an erroneous verdict(2). It is a misdirection to tell the Jury generally that confessions to the police if followed by the production of stolen property are admissible, without more; omission to point out that such confessions are only admissible in so far as they relate distinctly to the fact thereby discovered vitiates the trial(3).

Omission to direct the Jury upon the evidentiary value of a retracted confession.—The omission to direct the Jury that a retracted confession should have practically no weight as against a person other than the maker, and that the very fullest corroboration was necessary, for more than was required for the sworn testimony of an accomplice on oath, held to be a serious misdirection(4).

Omission to caution Jury to accept the uncorroborated testimony of accomplice.—The omission to caution the Jury not to accept the uncorroborated testimony of an accomplice has been held to amount to a misdirection(5).

Omissions amounting to misdirections.—An omission to point out to the Jury the absence of evidence material to the case of the prosecution is a misdirection(6); so also an omission to give aid to the Jury in the arrangement of facts(7). But omission to enter into details regarding the identification of stolen property does not amount to misdirection(8). But omission to give any direction to the Jury as to how they should treat, and what weight they should give to the evidence of an accused person against his co-accused amounts to misdirection(9).

Improper admission or rejection of evidence.—The words "in any case" in s. 167 of the Evidence Act, are wide enough and include criminal trials by Jury. The English Law with reference to the granting of new trials when evidence has been improperly admitted, does not apply to India. Where part of the evidence which has been allowed to go to the Jury is held to be inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining

(1) *Bhutnath v. Emperor*, A. I. R. 1931 O 617=33 Cr. L. J. 40=134 I. C. 1071=35 C. W. N. 291=1931 Cr. C. 801.

(2) *Thandraya v. Emperor*, 26 M. 38.

(3) *Achhabha v. Emperor*, 18 M. L. J. 250.

(4) *Hemanta v. Emperor*, 47 C. 46.

(5) *Emperor v. ...*

(6) *...*

(7) *...*

(8) *...*

(9) *...*

26 Cr. L. J. 1037=87 I. C. 925=1935 C. 872

(6) *Queen v. Ganga Govind*, 23 W. R. Cr. 21.

(7) *Queen v. Ram Gopal*, 10 W. R. Cr. 57.

(8) *Queen v. Madhub Mal*, 1 W. R. Cr. 22

(9) *Bikram Ali v. Emperor*, 124 I. C. 66=50 C. L. J. 467=A. I. R. 1930 O. 139=31 Cr. L. J. 610=Ind. Bul. (1930)

Cal. 386=57 Cal. 801=(1930) Cr. Cas. 139.

material discrepancies without telling them anything about the discrepancies is a misdirection(1). An omission in the charge to bring to the notice of the Jury important points in favour of the defence, which, if believed, would entitle the accused to an acquittal constitutes misdirection(2). In order to constitute misdirection, the point omitted

or refer to it renders the question of title in a

A conviction obtained cause the charge to the

Jury was not happily expressed or there was misdirection in the charge, If otherwise there has been no failure of justice, section 537(d) would cover such a case(5).

Omission to explain the law.—The omission to explain the law to the Jury amounts to a misdirection. Some statement should appear on the record of a trial by Jury to show that the law bearing on the charges has been explained to the Jury(6). A Judge is bound to explain the law to the Jury with clearness and distinctness and failure to do so prejudices the trial(7). Failure of the Judge to inform Jury the necessary ingredients of the offences under sections 380 and 467 of the Indian Penal Code will seriously prejudice the accused(8). Where in a charge of dacoity, the Judge said to the Jury "the accused are charged with dacoity; dacoity is committed when any number of persons not less than five conjointly committed robbery", but did not explain to the Jury what is

Omission to explain to the jury the difference between murder and culpable homicide, or to tell them under what view of the facts the accused ought to be convicted of murder or culpable homicide or to be acquitted, is a misdirection(10). The total absence of direction by the presiding Judge as to the law cannot be cured under this section(11).

Wrong explanation as to presumption under s. 114.—Where in his charge to the Jury the Judge told the Jury that since the stolen goods had been found in the possession of the accused the onus of proof

(1) *Enayat Husain v. Emperor*, 6 A. I. Cr. R. 282=A. I. R. 1926 A. 752=25 A. L. J. 33=99 I. C. 47=7 L. R. A. Cr. 167.

(2) *Abdul Aziz v. Emperor*, 1934 Nag. 94=149 I. C. 447=30 N. L. R. 262;

(7) *Emperor v. Israel*, A. I. R. 1930 A. 24=3 Cr. Law, All 80=1929 A. L. J. 1261=31 Cr. L. J. 83=120 I. C. 264.

(8) *Ibid.*

(9) *Mari Valayan v. Emperor*, 30 M. 44; *Naicab Ali v. Emperor*, 11 O. L. J. 315=25 Cr. L. J. 1129

(10) *Hla Gyi v. Emperor*, 3 L. B. R. 75. Failure to explain exceptions amounts to misdirection: *Jahur v. Emperor*, 30 C. W. N. 912=A. I. R. 1926 C. 1107=45 C. L. J. 20=93 I. C. 714=27 Cr. L. J. 1402; *Emperor v. Muham-*

(5) *Hooper v. Emperor*, 31 I. C. 686=12 A. L. J. 149=14 Cr. L. J. 638.

(6) *Biru v. Emperor*, 25 C. 561; *Abbas v. Emperor*, 2 C. W. N. 484=25 O. 736.

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erroneous inspite of the misdirection. But a grave omission on the part of the trial Judge to direct the Jury on a valid point cannot be made good merely by counsel's calling attention to it at the termination of the summing up(1). A Magistrate acts irregularly in specifying three distinct offences in one head of charge but such an irregularity is not a ground for retrial unless it has occasioned a failure of justice(2).

Non-direction.—Mere non-direction is not necessarily misdirection, those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Non-direction when it consists in omission to put the material facts or to put defence to the Jury is sufficient to cause the court to quash the conviction, if the court comes to the conclusion that it is reasonably probable that verdict of the Jury was affected thereby(3).

Failure of justice.—The provisions in this section are not provisions relating to the mode of trial, and failure to follow those provisions strictly amounts to no more than an irregularity in procedure, and would not be a ground for setting aside the conviction, unless the irregularity has occasioned a failure of justice(4). The breach of a mandatory provision of the Code does not necessarily amount to such an illegality as vitiates the whole trial or proceedings(5). In this case a mandatory provision had been broken. But their Lordships of the Privy Council held nevertheless that it was merely an irregularity which was curable under s. 537 of the Code as no failure of justice had been occasioned and the accused had not been in any way prejudiced. The sole criterion given by this section is whether the accused person has been prejudiced or not. The object of procedure is to enable the court to do justice, but if inspite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong(6). In view of the Privy Council ruling it is no longer open to a High Court to hold that this section will not apply when there has been a breach of a mandatory provision of procedure, on the ground that such a breach is an

(1) *Padam Prasad v. Emperor*, 32 O. W. N. 1121=50 C. L. J. 106=30 C. L. J. 993.

(2) *Bachchu v. Piyara*, 101 T. O. 185=28 Cr. L. J. 409=1917 O. 235=4 O. W. N. 341.

(3) *Emperor v. Barendra*, 81 I. C. 353=28 O. W. N. 170=38 C. L. J. 411=25 Cr. L. J. 817=A. I. R. 1924 C. 257 F. B.; *Ekanath v. Emperor*, 1 Pat. L. J. 317=17 Cr. L. J. 353=35 I. O. 657.

(4) *Emperor v. Chajju*, 49 A. 316=28 Cr. L. J. 229=L. R. 8 A. 37 Cr.=1927 A. 217=99 I. O. 1029=25 A. L. J. 111; *Ghasili v. Emperor*, 6 Lah. 554; *Gokaran v. Emperor*, 137 I. O. 684=9 O. W. N. 334=31 Cr. L. J. 506=1932 Cr. O. 405=A. I. R. 1932 O. 242; *Shra-*

wan v. Rajeshwar, 108 I. O. 439=A. I. R. 1928 Nag. 135=29 Cr. L. J. 384; *Ghanshamdas v. Emperor*, A. I. R. 1913 S. 135=1933 Cr. C. 333=147 I. C. 802.

(5) *Abdul Rahman v. Emperor*, 5 Rang. 53=54 I. A. 96=100 I. C. 227=A. I. R. 1927 P. C. 44=28 Cr. L. J. 287=31 O. W. N. 271=25 A. L. J. 117=(1927) M. W. N. 103=38 M. L. T. 64=8 Pat. L. T. 155=4 O. W. N. 283=6 Bur. L. J. 65=52 M. L. J. 585=29 Bom. L. R. 813=45 O. L. J. 441 P. C.

(6) *Emperor v. Dooda*, 137 I. O. 684=9 O. W. N. 334=31 Cr. L. J. 506=1932 Cr. O. 405=A. I. R. 1932 O. 242; *Shra-*

evidence on the record, or to quash the verdict and order a new trial(1). When a misdirection is established, the High Court is not bound in all cases to order a retrial, except where it thinks that a different verdict is possible on any view of the evidence, and the High Court can go into the evidence to satisfy itself whether a different verdict is possible on any view of the case(2). But reception of inadmissible evidence by the Judge and his failure to warn the Jury against considering such evidence amounts to misdirection, which vitiates the whole proceedings(3).

Misdirection in respect of common object.—Where, on a charge under s. 149 of the Penal Code, the prosecution alleged a certain common object, but the Judge amended the charge and added an alternative common object considering, possibly, that the common object alleged by the prosecution might be considered not to have been proved, and where it was found that it was impossible to say whether the Jury intended to find that the accused acted with the common object alleged by the prosecution, or with that inserted in the charge by the Judge or with both, or some with one and some with other, it was held that the Judge had misdirected the Jury and the conviction should be set aside(4).

Effect of misdirection.—This section does not authorise the High Court, in cases where it finds that the lower court has misdirected the Jury, to go into the evidence and to decide upon the fact whether or not the accused have been rightly convicted. The only course it can adopt is to direct a re-trial(5). In some cases, however, it has been held that the High Court is not bound in all cases to order a re-trial, except where it thinks that a different verdict is possible on any view of the evidence, and the High Court can go into the evidence to satisfy itself whether a different verdict is possible on any view of the case(6). A misdirection does not justify a reversal of the verdict of the Jury unless the misdirection has in fact occasioned a failure of justice(7). Unless there is a material mistake of law or misdirection in the charge, the verdict will not be set aside(8). In *Emperor v. Naimaddi*(9) the High Court did not set aside the verdict holding that it was not

Panchkour, 52 C. 67=29 C. W. N. 300
=26 Cr. L. J. 782=86 I. C. 414=1925
C. 587; *Kutubuddin v. Emperor*, 1926
B. 238=28 Bom. L. R. 231=93 I. C. 881
=27 Cr. L. J. 481.

(4) *Wafadar Khan v. Emperor*, 21
C. 955.

642.

(2) *Empress v. Smither*, 26 M. 1;
Elahees Buksh v. Queen, 5 W. R. Cr.
80; *Ch. Haidar Khan v. Empress*, 21
C. 955; *Ali Fakir v. Emperor*, 25 C.
230.

(7) *Supt. and Remem. of Legal
affairs v. Shayam Sundar*, 23 C. W. N.
559; *Ramdas v. Emperor*, 8 Pat. 314=
30 Cr. L. J. 721=10 Pat. L. T. 403=117 I.
C. 173=A. I. R. 1919 Pat. 313.

(8) *In re Mullimayandi*, 45 M. L. J.
815; *Wafadar v. Empress*, 21 C. 955.

(9) 24 C. W. N. 572.

101=23 Cr. L. J. 91; *Emperor v.*

sedition is defective if it does not set out the speeches or the passages in the speeches which the prosecution alleges to be seditious, but this defect does not vitiate the charge; especially where no objection is taken by the accused till a very late stage in the proceedings and he is not misled by the omission and no failure of justice has been occasioned by such omission(1).

538. No attachment made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, writ of attachment or other proceedings relating thereto.

Attachment not illegal nor distrainer a trespasser for defect or want of form in proceedings.

The word "attachment" has been substituted for the word "distress" by s. 149 of Act XVIII of 1923.

(1) *In re Subramania Siva*, 5 M. L. T. 1-9 Cr. L. J. 109,

illegality and not a mere irregularity(1). Omission to state the name of the prosecutor or the particulars of the offence in the summons or a delay in the filing of the complaint or the hearing of the case within less than seven days from the date of the service of summons, would certainly be an irregularity but that alone is not sufficient to make the conviction illegal, unless such omission, error or irregularity has in fact occasioned a failure of justice(2). This section protects errors, omissions or irregularities in a charge from interference on appeal or revision unless such error, omission or irregularity has in fact occasioned a failure of justice(3). Each evasion of the toll is a separate act and where the complaint mentions six offences the accused is presumably tried for all those six offences and one sentence is imposed, the conviction is bad as contravening the provisions of s. 234; and the irregularity cannot be regarded as one not material and not having prejudiced the accused at the trial(4). Where an application under s. 526 (8) is made, the question whether there is or is not good ground upon which the Chief Court might order a transfer is not a question for the trial Judge himself. The section gives him no discretion. It is imperative. The application having been made it was his duty to adjourn the case for a reasonable time, and any proceedings taken thereafter would be unwarranted by law. And where such irregularity is not devoid of any probability of failure of justice, this section will not justify the subsequent proceedings being taken(5). Where a complaint is dismissed under s. 203, no fresh proceedings upon a new complaint on the same facts can be taken unless the order of dismissal is set aside in the manner provided by s. 203 by a competent authority. If such proceedings are instituted without setting aside the order of dismissal, the defect cannot be cured by this section(6).

'In fact'.—These words have been added to emphasize the reality of the requirement that no failure of justice has been occasioned(7).

Explanation—In considering whether the defect in a charge has occasioned a failure of justice, regard must be had to the time when the objection to it was taken(8). The objection as to the frame of charge should be raised at an early stage(9). Although the wording of a charge may be very obscure or even meaningless, yet if the accused and his advocate are all along aware what the actual charge is and no injustice has resulted, the irregularity is cured under the provisions of this section. Where an advocate has had opportunities to object to the wording of a charge, it is too late to raise such an objection only in his concluding address at the trial(10). A charge of

I.R. 1935 S. 37

(6) *Niratan v. Jogesh*, 23 O. 983; cf. *Jhamandas v. Emperor*, 12 Cr. L. J. 320—10 L. C. 616.

(7) *Gangadhar v. Emperor*, 43 C. 173 (177)—20 C. W. N. 63.

(8) *Chidambaram v. Emperor*, 32 M. 3 (13).

(9) *Chidambaram v. Emperor*, 32 M. 3 (13).
(10) *Rang* 25; *Chidambaram v. Emperor*, 32 M. 3.

539-A. (1) When any application is made to any court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the court may, if it thinks fit, order that evidence relating to such facts be so given.

An affidavit to be used before any court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate.

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief.

(2) The court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended.

This section has been enacted in the year 1923. The following is the Statement of Objects and Reasons appended to the Bill: "This new section is intended to discourage the making of false and scandalous statements in petitions filed before the courts, if such petition seeks to impugn the action of subordinate authorities."

Courts and persons before whom affidavit may be sworn.—An affidavit may be sworn or affirmed in the manner prescribed by s. 539, or before any Magistrate. An affidavit sworn before a Bench Magistrate in Sind is one sworn before a proper person under section 539 according to the rules of the Sind Judicial Commissioner's Court(1). But a Nazir of a Subordinate Judge's Court has no authority to administer an oath for the purpose of an affidavit or statement to be used in a criminal court and a statement made in an affidavit sworn before him for being used in a Magistrate's court cannot, therefore, sustain a conviction under sec. 193, Penal Code(2).

Prosecution for perjury.—This section applies to any person who chooses to make allegations respecting a public servant and in support of those allegations swears an affidavit. There is nothing to show that the section does not apply to an accused person, and if he swears a false

(1) *Emperor v. Kundan*, 90 I. O. 600-28 Cr. L. J. 168 = 1927 S. 128.

(2) *Ganpat Devaji v. Emperor*, 116

I. O. 248 = 1929 B. 136 = 2 Cr. Law. 231 = 31 Bom. L. R. 144 = 1929 Bom. 136 = 20 Cr. L. J. 593

CHAPTER XLVI

MISCELLANEOUS

539. Affidavits and affirmations to be used before

Courts and persons before whom affidavits may be sworn.

any High Court or any officer of such court may be sworn and affirmed before such court or the Clerk of the Crown, or any Commissioner or other person appointed by such court for that purpose, or any Judge, or any Commissioner for taking affidavits in any court of record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland.

Courts and persons before whom affidavits may be sworn.—

This section states before which officers affidavits to be used in a High Court are to be affirmed. Under this section an affidavit cannot be affirmed before a Magistrate(1). A Magistrate is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. Therefore, an affidavit sworn before him in connection with a case when he has not the seisin of the case, cannot be used in the High Court(2). Section 139 of the Civil Procedure Code allows affidavits to be affirmed before a Magistrate and an affidavit which has been affirmed before a Deputy Magistrate in the mofussil may be used in a civil proceeding(3). Affidavits sworn before a Presidency Magistrate of Calcutta are not admissible in the Patna High Court(4).

Contents of affidavit.—An affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. As human beings are liable to make mistakes in reciting facts, the law requires that the contents of affidavits should be carefully read over by the person who takes them.

they will take proper care to see that the provisions of the law are duly carried out(5).

(1) *In re Issac Chunder*, 14 C. 653.

(2) *Ram Chandra v. Emperor*, 27 Cr. L. J. 496=93 I. C. 963=5 Pat. 110=7 Pat. L. T. 804=A. I. R. (1926) Pat. 213.

(3) *Dinobundhu v. Hurrymutty*, 8 C. W. N. 21.

(4) *Bn. Ry. Co. v. Makkul*, 27 Cr. L. J. 313=92 I. C. 697=A. I. R. 1925 Pat. 755=1926 Pat. 74=7 Pat. L. T. 243.

(5) *Emperor v. Mangal*, 86 A. 13 (16)=21 I. C. 140=11 A. L. J. 986=15 Cr. L. J. 164.

appreciating the evidence given at the trial, and that in the case of trial by Jury or with Assessors, the Judge should only view if the Jury or Assessors do the same under sec. 293. We also think that notice should be given to the parties of the intention of the Judge or Magistrate to visit the *locus*. We would also provide that the memorandum to be made by the Judge or Magistrate shall form part of the record of the case, and that a copy of it may be furnished to both sides."

Local Inspection.—This section only embodies an already recognized rule. A Magistrate may inspect the place of the occurrence of an offence in cases where he cannot follow, or understand the evidence without seeing the features of the land and he does not, merely by doing so, disqualify himself from trying the case. But every possible precaution should be taken that the inspection is only a view of the local features, and an immediate report of what he has seen should be placed on the record and laid open to the scrutiny of the parties(1). The Magistrate can use the testimony of his own senses to test the veracity of the witnesses before him as regards the features of the locality, but he cannot import into the case other matters or facts which he has himself observed(2). A local inspection by a Magistrate must be held sparingly, and the danger of such local inspection is intensified when one or both of the parties are absent at the time of the local inspection(3). A Magistrate when making an inspection of the scene of offence, should invariably be accompanied by both the parties or their pleaders, who should draw his attention to facts if they choose and thus prevent him from drawing wrong inferences(4). A Magistrate is entitled to inspect a place in order to understand the evidence. But if he receives an impression which is in favour of one side or the other, he should give an opportunity to the side against which he forms an impression to explain away, if possible, the impression created in his mind by the inspection. If instead of doing this, he allows the impression to greatly weigh in his mind in considering the evidence and convicts the accused, the conviction must be set aside in revision(5).

Object of local inspection.—The object of a local inspection is to allow the Magistrate properly to appreciate the evidence given at the inquiry or trial and not for the purpose of the Magistrate becoming the principal witness in the case on a question of fact(6). A local inspection by a Magistrate is only permitted by this section for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself(7). Where a Magistrate held a local inquiry and used his local inquiry not for the purpose of understanding the evidence only but, as appeared clearly on the face of his judgment, for the purpose of

(1) *Babbon Sheik v. Emperor*, 37 C. 840.

(2) *Ibid*

(3) *Ram Sahai v. Dwarka Singh*, 61 I. C. 712=1 Pat. L. T. 569=22 Cr. L. J. 424.

(4) *Empress v. Chaubasappa*, Rnt. Un. Cr. Cas 854; *Alam Khan v. Empress*, 19 M. 263 (266); *In re Krishnappa*, 2 Weir 727.

(5) *Kader Batcha v. Emperor*, 84 M. L. J. 442=(1928) M. W. N. 69=27 L. W. 654=A. I. R. 1928 M. 494=29 Cr. L. J. 689=109 I. C. 868

(6) *Jowala Singh v. Emperor*, 110 I. C. 468=A. I. R. 1928 Lah. 479=10 A. I. Cr. R. 435=29 Cr. L. J. 719.

(7) *Tirkha v. Nanah*, 40 A. 475=100 I. C. 371=28 Cr. L. J. 291=25 A. L. J.

affidavit he is liable to be prosecuted for perjury(1). A person who in an affidavit filed under this section, makes a false statement as of a fact within his personal knowledge can be convicted of an offence under sec. 199 Penal Code, even though he has not separately stated in the affidavit facts which are within his personal knowledge and facts which are merely believed by him to be true as required by this section(2). A person making a false statement in an affidavit filed in support of an application for transfer of a criminal case as required by the provisions of section 526 (4), is guilty of an offence under section 191 of the Penal Code(3). A person swearing an affidavit in support of an application under section 429 as required by this section and the rules of the court of the Judicial Commissioner of Sind, renders himself liable to prosecution for false statements made therein(4).

539-B. (1) Any Judge or Magistrate may, at any

Local inspection.

stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the public prosecutor, complainant or accused so desires, a copy of the Memorandum shall be furnished to him free of cost:

Provided that in the case of a trial by Jury or with the aid of Assessors, the Judge shall not act under this section unless such Jury or Assessors are also allowed a view under section 293.

This section has been enacted by Act XVIII of 1923. In the Statement of Objects and Reasons the following note occurs: "This section is inserted definitely prescribing that any Judge or Magistrate may, at any stage of any inquiry or trial, visit and inspect any place connected with the occurrence, subject to his recording a note of inspection." The Select Committee to whom the Bill was referred approved of it in the following terms: "We are of opinion that the Judge or Magistrate shall view the *locus in quo* only for the purpose of properly

(1) *Badri Prasad v Jagmman*, 55 A 114=A 1 R 1923 A 47=30 A L J. 1076=14 L R. A. Cr 3=1933 Cr. C. 23=19 A. I Cr. R 20=84 Cr L J. 457=142 I C. 900.

(2) *Ram Serup v Emperor*, 116 I. C. 755=1929 Pat. 156=2 Cr. Law. 361=

10 Pat. L T. 95=1929 Pat. 156=30 Cr. L. J. 645.

(3) *Sanwal v. Emperor*, 99 I. C. 841=28 Cr. L. J 133=1927 S 113.

(4) *Impeior v Kundan*, 99 I C. 600=28 Cr. L. J. 168=1927 S. 128.

the inspection he made and the facts that he found which would be helpful to him in appreciating the evidence given at the trial he did not comply with provisions of this section which were imperative(1).

Duty of Magistrate to record memo of inspection and furnish copy to accused.—A Judicial Officer conducting a local investigation should place upon record the result of his inspection at once so that the parties may have an opportunity of seeing what the facts are which the Judicial Officer considered to be established by the local investigation(2). A Magistrate should not after making a local investigation deliver his judgment relying upon that investigation without giving an opportunity to the parties to rebut his opinion(3). Where a Magistrate has failed to record a memorandum of his local inspection and to supply the petitioner with a copy of the record, the result of such inspection cannot be used against the accused(4).

Omission to make a memorandum.—A failure to record a memorandum of a local inspection under this section is an irregularity which does not vitiate the whole proceedings unless it has occasioned a failure of justice(5). But in one case it has been held otherwise(6). Where, however, the appellate court has not relied on anything it saw or heard at the time of inspection, there is no prejudice caused to the accused by the non-recording of inspection notes; it is only a curable irregularity(7). But where the Magistrate received in evidence at the time of the local inspection certain utaras which he did not place on the record and the judgment which was ultimately delivered acquitting the non-applicant was based mostly on the spot inspection note and these utaras, it was held to be not a legal judgment(8). And where after the Magistrate had made a local inspection, he gave judgment convicting the accused and then after delivering judgment he made a note of the result of such inspection in the order sheet, the procedure, was held to be irregular; but as the Magistrate's judgment was based on other evidence and the inspection note was used only to confirm that evidence, the judgment was not set aside(9).

(1) *Wilayat Hussain v. Emperor*, 7 Luck. 208=A. I. R. 1931 O 388=8 O W. N. 857=1931 Cr. O. 820.

(2) *Jowala Singh v. Emperor*, 29 Cr. L. J. 719=110 I. C. 463=A. I. R. 1928 Lah. 479=10 A. I. Cr. R. 435=10 Lah. 188.

(3) *Baboo Sheikh v. Emperor*, 37 O. 840=5 I. C. 365=14 C. W. N. 422=11 C. L. J. 935=11 Cr. L. J. 121.

(4) *Jowala Singh v. Emperor*, 29 Cr. L. J. 719=10 Lah. 188=110 I. C. 463=A. I. R. 1928 Lah. 479=10 A. I. Cr. R. 435.

(5) *Emperor v. Raghunandan Prasad*, 53 A. 705=A. I. R. 1931 A. 433=29 A. L. J. 912=16 A. I. Cr. R. 96=12 I. R. A. Cr. 108=1931 Cr. O. 705; *Todar Mal v. Hardeo*, 53 A. 216=A. I. R. 1931 A. 14=28 A. L. J. 1437=82 Cr. L.

J. 809=129 I. C. 441; *Khushal Jeram v. Emperor*, 50 B. 680; *Nurudin v. Emperor*, 30 Bom. L. R. 954=119 I. C. 221=A. I. R. 1928 B. 433=29 Cr. L. J. 1005; *Forbes v. Ali Haidar*, 53 C. 46=90 I. C. 308=A. I. R. 1925 C. 1246=42 C. L. J. 131=26 Cr. L. J. 1524=5 A. I. Cr. R. 184.

(6) *Hriday v. Emperor*, 52 C. 148=1924 C. 1035=40 C. L. J. 149=23 Cr. L.

(7) *Vithal v. Munoo, A.*
Mag. 77.

(9) *Bhola Nath v. Kadar*, 25 Cr. L. J. 705=A. I. R. 1925 C. 353=81 I. C. 193

obtaining information which did not appear in the evidence of witnesses, it was held that the procedure was quite irregular and, in adopting it, the Magistrate went beyond the powers which were granted to him by this section(1). It is irregular, on local inspection to take into account the evidence of witnesses not recorded on oath(2).

Local inspection in absence of parties.—Notice should be given to the parties of the intention of the Judge or Magistrate to visit the *locus*(3). An order of discharge passed by a Magistrate after local inspection cannot be held to be illegal on the ground that notice of the inspection was not given to the parties as required by Cl. (b), when previous notice was given and the accused's pleader and the Public Prosecutor was present at the time of the inspection(4).

Local inspection by one of the Magistrates.—If a case is tried by a Bench of Magistrates, the local inspection under this section must be made by all the Magistrates and the memorandum drawn up by some of the Magistrates would be of no use or finality to a Magistrate who has not seen the spot and consequently cannot be in a position to state whether the description therein is correct. The local inspection is an essential part of the proceedings of the court and if one of the two Magistrates who preside over a court does not join in any of the proceedings the trial cannot be said to be proper(5).

Local Inspection by Sessions Judge.—If in a Sessions trial, the Judge should think it necessary or desirable to visit the place of the alleged occurrences, he should give due notice to the parties and should proceed thither with the Assessors, before the case is closed(6). In a case tried with the aid of Assessors the Assessors form an integral part of the court and any proceedings taken by the Judge in the absence of the Jurors or Assessors are void and illegal. In such a case if the Judge alone inspects the spot under this section the inspection note must be ruled out and if it has been utilised by the Sessions Judge, all reference to it must be excluded from consideration(7). Where the Sessions Judge when he went to make a local inspection did not see to it that the accused or their counsel were present when he made the inspection and did not make a separate record concerning

877=A. I. R. 1927 A. 350; *Ram Sahai*

(3) *Ram Sahai v. Dwarka Singh*, 61 I. O. 712=1 Pat. L. T. 569=27 Cr. L. J. 424.

(4) *Emperor v. Jodhraj*, 99 I. C. 852=28 Cr. L. J. 180.

(5) *Vithal v. Madho*, A. I. R. 1935 Nag. 77=17 N. L. J. 269; *Sebastian Lobo v. D'Souza*, 1931 M. 676=1932 Cr. C. 831=133 I. C. 603=33 Cr. L. J. 655=1932 M. W. N. 615=37 L. W. 149.

(6) *In re Oudh Behari*, 1 C. L. R. 143; *Deiya v. Emperor*, 17 Cr. L. J. 500=36 I. C. 463=9 L. B. R. 83=9 Bur. L. T. 133.

(7) *Raj Bahadur v. Emperor*, A. I. R. 1934 O. 493=152 I. C. 103=11 O. W. N. 1303=1934 O. L. R. 810=1934 Cr. C. 1379=35 Cr. L. J. 1496.

O. 556.

(9) *Nisarali v. Municipal Committee, Nagpur*, A. I. R. 1927 Nag. 250=28 Cr. L. J. 495=101 I. C. 671=8 A. I. Cr. R. 296; *Gallagher v. Emperor*, 101 I. C. 657=54 C. 52=1927 O. 307=29 Cr. L. J. 481.

At any stage, etc.—Although a court has to exercise proper discretion in calling court witnesses, the terms of this section are extremely wide and the court may at any stage of any inquiry, trial or other proceedings summon any person as a court witness if his evidence appears to it essential to the just decision of the case(1). This section authorises a Magistrate to summon and examine, or recall and examine, any person at any stage of the case if his evidence appears to him essential to the just decision of the case(2). It is entirely within the discretion of a Magistrate conducting a trial in a warrant-case to admit evidence on behalf of either side at any stage of the trial, but the Magistrate, in exercising the discretion conferred on him by this section, ought to have good reason for allowing witnesses on the part of the prosecution to be interposed in the midst of the case of the accused(3). The practice of examining witnesses for the prosecution after the defence is closed, to bolster up the prosecution if it appeared that the evidence was prejudicial is to be highly condemned(4). But the prosecution may be allowed to produce rebutting evidence even at a late stage, for the purpose of contradicting the evidence adduced on behalf of the defence, if such rebutting evidence appears to be essential for the just decision of the case(5). A Magistrate is not justified, under this section, in receiving fresh evidence after evidence on both sides has been taken, arguments have been heard and a date has been fixed for delivery of judgment(6), though there is authority to the contrary also(7). The accused who has exhausted his power of summoning witnesses by filing his first list cannot summon any other witness otherwise than by moving the court to act under this section(8).

May summon.—Where in a case of dacoity, the police do not call the persons, who according to the complainant saw the dacoity, as witnesses, it is the duty of the Magistrate to summon and examine them(9). Court has powers to summon any person as witness if his evidence appears essential for the just decision of the case. And no question of bias against the accused can arise unless it is shown that the court was guiding or assisting the prosecution(10). A witness whom the prosecution declines to examine and who is examined by the court on its own initiative is a witness

(1) *In re Perumal*, 77 I. C. 290=19 I. W. 272=46 M. L. J. 325=(1924) M. W. N. 303=34 M. L. T. 165=25 Cr. L. J. 354.

(2) *Mangat Rai v. Emperor*, 110 I. C. 676=10 A. I. R. 519=10 Lab. L. J. 262=29 P. L. R. 703=1928 L. 647.

(3) *Queen v. Kasvi Singh*, 21 W. R. Cr. 61.

(4) *Radha Madhab v. Emperor*, 9 I. C. 46=13 Cr. L. J. 7; *Alex Pimento v. Emperor*, 22 Cr. L. J. 58=63 I. C. 459=34 C. L. J. 200; *Karam Chand v. Emperor*, A. I. R. 1928 Lah. 953=29 P. L. R. 613.

(5) *Nayan Mandal v. Emperor*, 125 I. C. 746=34 C. W. N. 170=A. I. R. 1930 C. 134; See *Maung Po Hmyin v. Bhattacharjee*, A. I. R. 1923 Rang. 216.

(6) *Natabar v. Adyanath*, 27 C. W.

N. 675=37 C. L. J. 415=A. I. R. 1923 C. 690=75 I. C. 541.

(7) *In re Ananda Chandra*, 21 C. 167.

(8) *Emperor v. Mangal*, 36 A. 13=22 I. C. 740=11 A. L. J. 986=15 Cr. L. J. 164.

(9) *Nga Win v. Emperor*, A. I. R. 1934 Rang. 105=161 I. C. 615=35 Cr. L. J. 1362.

(10) *Fasiuddin v. Emperor*, 1929 Nag. 172=117 I. C. 218=30 Cr. L. J. 728. The power of a Magistrate to take further evidence under this section should not be exercised to the prejudice of the accused. *Narayanan v. Manikith*, 38 M. L. T. 59=100 I. C. 123=25 L. W. 151=62 M. L. J. 118=1927 M. 861.

540. Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Power to summon material witness or examine person present.

Scope of the section.—The first part of this section is an enabling provision whereby a court, in the exercise of its discretion, is empowered at any time before it actually pronounces judgment, to take further evidence, either for the prosecution or for the defence, and for the purpose it may adjourn the hearing of a case in order to procure the attendance of the proper persons. In many instances it happens that new light is thrown on the case by a witness for the defence and it then becomes desirable, sometimes in the interest of the accused himself, that fresh evidence should be called for. Where this fresh evidence is likely to prove prejudicial to the accused, the court should proceed with the utmost circumspection. It should not exercise its power under the section merely because the prosecution desires it to do so. The second part of the section, on the other hand, is imperative. If the new evidence appears to the court essential to the just decision of the case, and this must depend entirely on the particular circumstances of each case, the court has no choice but is bound to take the evidence(1). The power conferred by this section on Magistrates is very wide but the wider the power, the more cautions should be the exercise of discretion on the part of the Magistrate(2). It is, however, a Magistrate's business to find out the truth and to supplement defects in the case either of the prosecution or of the defence by using the powers to postpone or adjourn proceedings, and to summon material witnesses, which are conferred by sections 344 and 540(3). It is wrong to say that this section relates only to "important documents overlooked by the prosecution". It is equally available to the defence and it is mandatory if the evidence appears to the court to be essential to a just decision of the case(4).

Any court—A court of criminal appeal can take additional evidence at any time, only it must record its reasons for so doing(5).

541=37 C. L. J. 415=27 C. W. N. 675=1929 C. 690=25 Cr. L. J. 957; *Sitab Singh v. Dalganjan*, 21 I. C. 1002=12 A. L. J. 15=14 Cr. L. J. 692.

(3) *Shree Ko v. Emperor*, 3 L. B. R. 129=3 Cr. L. J. 361.

(4) *Tadep Alli v. Emperor*, A. I. R. 1931 M. 735=(1934) M. W. N. 903=40 L. W. 691=163 I. C. 627.

(5) *In re Bhami Luruman*, 8 M.

Judge has no power to take further evidence after the opinions of the Assessors have been given, as the trial is at an end, except for the purpose of giving judgment(1). The Assessors are merely an advisory part of the tribunal and when once they are discharged after giving their opinion there is no machinery for securing their re attendance. The Judge is not bound to summon them nor are they bound to come(2).

Necessity of notifying parties beforehand.—A Magistrate is competent to summon any person as a court witness at any stage of the proceedings, but he should (save under exceptional circumstances) inform the parties beforehand of the names of such witnesses, so as to afford them an opportunity of proper cross-examination(3). In a maintenance case under s. 488 the Magistrate when the witnesses on both sides had been examined finding that he was not in a position to come to a conclusion as to the legitimacy of the children went to the parties' village and without any previous notices to the parties examined as court witnesses some of the residents there and then based his judgment mainly on the evidence of the court witnesses. It was held that action of the Magistrate was highly improper(4). This section provides that a Magistrate may summon any witness whose evidence appears to be necessary, but the power to summon a witness does not by any means imply a power to discover such witness by personal inquiry out of court. Where a Magistrate makes a personal inquiry in a case out of court without notice to the parties and as a result summons certain witnesses, his action is improper and not in accordance with law, and disqualifies him from conducting the trial(5).

Duty of Judge to have a document admitted in evidence by recalling witness.—Where an essential document has been overlooked by the prosecution in a criminal case, it is the Judge's duty to have it admitted in evidence by recalling a witness at any stage of the trial under this section(6).

Right of prosecution and defence to cross examine.—If a witness is called by the court under this section, both sides have a right to cross-examine the witness freely(7). Where a Judge thinks it necessary to call a witness and examines him *suo motu*, he ought to allow the accused an opportunity to cross-examine the witness(8). There is nothing in s. 165 of the Evidence Act debarring or disqualifying a party to a proceeding from cross-examining any witness summoned by the court(9). Where witnesses are called by the appellate court, under

(1) *Hasan v. Empress*, 29 P. R. 1868 Cr.; *Empress v. Ram Lal*, 15 A 136; *Emperor v. Jaisukh*, 43 A 25=22 Cr. L. J. 127.

(2) *Birbal v Emperor*, 8 Cr L.J. 433

(3) *Udho Ram v. Crown*, 10 Lah. 790=A. I. R. 1929 Lah. 120=31 P. L. R. 39=122 I. C. 95.

681=90 L. W. 642=(1929) M. W. N. 901
=A. I. R. 1929 M. 847=3 Cr. Law Mad.
C. G. V. 1929 M. 847=3 Cr. Law Mad.

C. 614.

(9) *Gopal Lall v. Manik Lall*, 24 C.
288.

called by the court within the meaning of this section(1). Where a prosecution witness is on the application of the Public Prosecutor, called as witness by the court, so that both parties may cross-examine him he is not a court witness properly so called and his evidence stands on the same footing as that of a hostile witness and should be accepted or rejected *in toto*(2). It is the duty of the Magistrate to ascertain the names of persons, likely to be acquainted with the facts of the case. This section confers wide powers on a court and it is not intended that they should be exercised at the bidding of any person but only to prevent miscarriage of justice by failure to call any material witness. The convenience of the witness has to be considered. Where a fresh list of witnesses is put in by the complainant after the first hearing, it is irregular on the court to accept the list without scrutiny. In fact there is no section in the Code authorising the complainant to file a fresh list(3).

Any person as a witness.—This section does not authorise the examination of the accused(4), though there is authority to the contrary also(5). The Magistrate may summon and examine any person as a witness. The power to summon a witness is not limited to the witnesses cited for the prosecution or the defence(6). The fact that certain witnesses who were present at the time of the murder are related to the accused is not a ground for regarding their evidence as worthless and dispensing with their examination in the Sessions Court. If neither the prosecution nor the defence examines such witnesses the court might very well exercise its powers under this section and examine them(7). But the power of the Magistrate will not be exercised where the prosecution has wantonly failed to examine the witness, and when the application to the court to examine the witnesses as a court witness is made after the whole case has closed(8). A person who has been suspected and charged with an offence, and discharged for want of evidence, may be afterwards admitted as a witness for the prosecution(9). A person apprehended by the police and brought before the Magistrate with the accused, is a competent witness though not discharged by the Magistrate provided he be not charged along with the accused(10).

Postponement discretionary.—Under section 244 . . .

a court refusing to postpone a case for the evidence of a witness(12).

Taking fresh evidence after Assessor's opinion.—A Sessions

(1) *Emperor v. Satyendra Kumar*, 71 I. C. 657=37 O. L. J. 173=24 Cr. L. J. 193=1923 O. 463

(2) *Ibid*

(3) *Sitab Singh v. Emperor*, 12 A. L. J. 15=14 Cr. L. J. 682=21 I. C. 1002.

(4) *Empress v. Subbaya*, 12 M. 451.

(5) *Har Narain v. Emperor*, L. R. 5 A. Cr. 14=84 I. C. 706=26 Cr. L. J. 354=22 A. L. J. 1100.

(6) *Chetu v. Duttu*, 11 P. R. 1888 Cr.

(7) *Nga Mai Shai v. Emperor*, 32 Cr. L. J. 1067=A. I. R. 1931 Rang. 163=

1931 Cr. O. 659=133 I. C. 488; see *Crown v. Ujagar Singh*, 2 Lah. L. J. 349.

(8) *Collet v. Emperor*, (1929) M. W. N. 395 (396).

(9) *Queen v. Behary Lal*, 7 W. R. Cr. 44.

(10) *Reg v. Narayan Sundar*, 5 Bom. H. C. R. 1.

(11) See *Empress v. Sagambar*, 12 C. L. R. 120.

(12) *Queen v. Radhoo Jana*, 12 W. R. 44 Cr.

and at the same time interviewed those witnesses and ordered them to give evidence. The Magistrate complied with the Assistant Collector's direction. It was held (reversing the conviction and sentence) that, as the Magistrate had virtually abdicated his Magisterial function and become a mere delegate of the Assistant Collector, the trial was without jurisdiction(1).

Shall summon and examine.—The second part of this section being imperative, the court is bound to admit fresh evidence when it appears essential to the just decision of the case(2). In a case in which there is a matter necessitating inquiry or question to be cleared up and the witness proposed to be called is one upon whose testimony the court could place confidence, the court should call him(3). The court would not be bound to issue summons to witnesses, under this section, unless it is satisfied that their evidence will be very material(4). But the Judge of the Sessions Court has an inherent power, if he thinks proper to exercise it, to sanction the summoning of witnesses other than those named in the list delivered to the committing Magistrate(5).

Accused's right to be examined further.—The rule laid down in s. 342 that an accused person must be examined generally in the case for the purpose of enabling him to explain circumstances appearing in the evidence against him after the witnesses for the prosecution have been examined and before he is called on for his defence applies even when additional evidence is introduced not by the prosecutor but by the court itself under this section and even if it be after the defence evidence is concluded; but to this general rule there is an exception, namely, when the additional evidence does not really disclose any fresh facts or does not affect the decision of the case and the accused is in no way prejudiced in not having had an opportunity to render a further explanation(6).

Absence of opportunity of rebuttal.—Omission of a Magistrate to give an opportunity to the accused to call evidence in rebuttal of the additional evidence and to hear arguments therein, is an illegality which is not curable under s. 537, and which vitiates the trial(7).

(1) *Nabibux v. Emperor*, 15 Cr. L. J. 375=23 I. C. 743=7 S. L. R. 82.

(2) *Maung Po Hmyin v. Emperor*, 1 Rang 308; *Mangat Rai v. Emperor*, 110 I. C. 676; *Kesava Pillai v. Emperor*, 125 I. C. 77=30 L. W. 642=57 M. L. J. 681=A. I. R. 1929 M. 837=(1929) M. W. N. 901=53 M. 160; *In re Perumal*, 46 M. L. J. 325=19 L. W. 272.

(3) *Empress v. Kaliprossuno*, 14 C. 245 at p. 248.

(4) *Empress v. Shakir Ali*, 19 A 502.

(5) *In re Raja of Kantli*, 8 A 668; *Empress v. Hayfield*, 14 A. 212,

(6) *Allah Dito v. Emperor*, 111 I. C. 852=1929 S. 5=29 Cr. L. J. 931; *Mahadu v. Emperor*, 112 I. C. 561=30 Bom. L. R. 1085=A. I. R. 1929 B 389; *In re Perumal*, 77 I. C. 290=25 Cr. L. J. 354=19 L. W. 272=46 M. L. J. 325=(1924) M. W. N. 303=34 M. L. T. 165=A. I. R. 1924 M. 587; *In re Ananta Chunder*, 24 C. 167; *Fazal Karim v. Emperor*, 89 I. C. 842=1 Lah. Cas. 270=26 Cr. L. J. 1418; cf. *Prayag Gope v. Emperor*, 9 Pat. 1015=82 I. C. 244=25 Cr. L. J. 1276.

(7) *Shugan Chand v. Emperor*, 67 I. C. 923=26 Cr. L. J. 1035=26 P. L. B. 312=A. I. R. 1925 Lah. 531.

this section, each party has a right to cross-examine them and the court has no power to put any restrictions on such cross-examination(1). An accused person had obtained a process for the attendance of a witness, but before his appearance, asked court to countermand the order for his attendance. On the court refusing to do so, the accused declined to examine him and the witness was examined by court. *Held*, that under the circumstances, the witness could not be regarded as a witness for defence, and that accused was entitled to cross-examine him(2). It is not a proper cross-examination if the defence counsel is merely allowed to suggest certain questions to the Magistrate, and the Magistrate puts those questions to the witness(3). There is nothing in s. 139 A, which can exclude the court's power under this section(4). Where in a criminal trial after the evidence for the defence was closed, the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross-examine them, the High Court declined to interfere in revision(5).

Tendering witnesses for cross-examination.—The ordinary practice in properly constituted courts is, that where a witness for the prosecution is not called on the part of the crown, he is placed in the witness-box in order that the defence may have an opportunity of cross-examining(6). The prosecution is not, however, bound to tender for cross-examination all the witnesses called before the committing Magistrate; nor ought a court under s. 504 to call a witness summoned but not produced by the prosecution, if it cannot rely upon his evidence(7).

Value of evidence.—A Magistrate misuses this section in using it to anticipate the defence of an accused person to his prejudice; and in using it, after satisfying himself that he has good defence to discharge instead of acquitting him. He cannot properly resort to the section in order to avoid the responsibility of making up his mind as to the value of the evidence for the prosecution(8). But he can call and examine a prosecution witness at the instance of the accused and once such evidence has been admitted on the record, he is bound to consider it while deciding whether a charge should or should not be framed(9).

Recall.—A complaint for misappropriation of Government monies was filed by the order of an Assistant Collector. After the close of the case for the prosecution, the Assistant Collector directed the Magistrate to recall and re-examine two of the prosecution witnesses

(1) *Chintamon v. Emperor*, 35 O. 243.

(2) *Mohendra v. Emperor*, 29 O. 387.

(3) *Emperor v. Pita*, 47 A 147=26 Cr. L. J. 575=85 I. O. 719=1925 A 285.

(4) *Kishorimohan v. Krishnabihari*, 59 C. 461=A. I. R. 1931 C 527=1931 Cr. O. 679=32 Cr. L. J. 1187=131 I. O. 574.

(5) *Gur Bahsh v. Emperor*, 21 O. C 5=19 Cr. L. J. 630=45 I. O. 678.

(6) *Empress v. Grish Chunder*, 5 C 614=5 C L. R. 364, *Gopal Lal v. Emperor*, 1917 O. 200.

(7) *Emperor v. Pita*, 47 A 147=26 Cr. L. J. 575=85 I. O. 719=1925 A 285.

(8) *Chelu v. Ditto*, 11 P. R. 1896 Cr.

(9) *Ducan Singh v. Emperor*, A I R 1933 Lah. 561=141 I C 331=31 P. L. R. 712=34 Cr. L. J. 735.

be accused and can be cured under this section(1).

Sub-section (2).—The "pleader" contemplated in this sub-section must be one who represents the accused, and not a person who is appointed without his consent. The court has no inherent power, in the interests of justice, to appoint a pleader for an accused person without his consent and to treat such pleader as his representative within the meaning of this section(2).

541. (1) Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

Power to appoint place of imprisonment.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail.

(3) When a person is removed to a criminal jail under sub-section (2), he shall, on being released therefrom, be sent back to the civil jail, unless either—

(a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under section 342 of the Code of Civil Procedure, 1882, or

(b) the court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under section 341 of the Code of Civil Procedure, 1882.

Sub-section (1) : Confinement in police lock-up.—Sub-section (1) empowers the Local Government to prescribe a place for the confinement of the person mentioned, and it cannot be invoked for the purpose of prescribing the custody in which he is to be kept. It can come into operation only when there is no other law providing for the custody in question(3). There is no warrant either in principle or in law for detaining an approver as such in police custody. A notification directing the confinement of the approvers in police custody is *ultra vires*(4).

(1) *Emperor v. Radha Raman*, A. I. R. 1930 A. 817=28 A. L. J. 1076=129 I. C. 260=1930 Cr. C. 1201.

(2) *Crown v. Sukh Dev*, 11 Lah. 220, 126 I. C. 72=A. I. R. 1929 Lah. 705=31 P. L. R. 824.

(3) *In re Khairati Ram*, 12 Lah. 635(636)=132 I. C. 519=32 P. L. R.

493=A. I. R. 1931 Lah. 476=Ind. Rul. (1931) Lah. 615=(1931) Cr. Cas. 700=32 Cr. L. J. 913; *Kundan Lal v. Crown*, 12 Lah. 601=131 I. C. 625=32 P. L. R. 423=A. I. R. 1931 Lah. 353=Ind. Rul. (1931) Lah. 481=(1931) Cr. Cas. 625=32 Cr. L. J. 785.

(4) See the cases cited in the last note.

540-A. (1) At any stage of an inquiry or trial under

Provision for inquiries and trials being held in the absence of accused in certain cases.

this Code, where two or more accused are before the court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with any inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

Dispensing with presence of accused.—This section, which was enacted by the Criminal Procedure Code (Amendment) Act, XVIII of 1923, provides for a case in which there are a large number of accused persons, and one or more of them cannot remain before the court. In such a case the court, instead of adjourning the inquiry or trial, has the discretion to dispense with the personal attendance of the accused, and proceed with the hearing, provided that such accused is represented by a pleader(1). But the court can dispense with the attendance of an accused person who is represented by a pleader and proceed with the trial in his absence only if the court is satisfied that the accused is incapable of remaining before the court. No discretion is given to dispense with the attendance of an accused upon any other ground(2). The words "incapable of remaining before the court" in this section cannot be made to include the case of a person who is in no way incapacitated from attending the court but wishes to go to a remote place for private reasons(3). It would create a most dangerous precedent to grant exemption from attending the court to the accused for reasons which are not covered by this section(4). Where, however, the Judge wrongly dispenses with the presence of the accused at his request and the accused is represented by a counsel at his own request throughout the trial, the error is not such an illegality as to vitiate the proceedings or sentence against

(1) *Crown v. Sukh Dev*, 11 Lab. 220 (223)=126 I. O. 72=A. I. R. 1929 Lab. 705=31 Cr. L. J. 997=Ind. Rul. 1929 Lab. 600.

1932 Lab. 103=135 I. C. 209=Ind. Rul. (1932) Lab. 81=33 Cr. L. J. 97=1932 Cr. C. 123

(2) *Emperor v. Radha Raman*, A. I. R. 1930 A. 817=29 A. L. J. 1076=129 I. C. 260=1930 Cr. C. 1201.

(3) *Desai v. Emperor*, A. I. R. 1932 A. 504=1932 Cr. C. 586.

(4) *Ibid*.

Statement how recorded.—The language in which a statement is conveyed to the court by the interpreter is the language in which it should be recorded(1).

544. Subject to any rules made by the Local Government, * * * * any criminal court, may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such court under this Code..

Scope.—This section empowers the court to order that the expenses of the complainant and his witnesses should be paid by the Government under certain circumstances that may be considered proper by the court. It does not empower the court trying a complaint to order payment of diet money of a witness produced before it(2).

Rules made by Local Government.—This section is subject to rules made by the Local Government(3).

Bombay.—This section and Rule No. 11 framed by the Government of Bombay under the section, give a discretion to a Magistrate in the matter of the expenses of complainants and witnesses, but such discretion should be exercised not arbitrarily but on sound judicial principles(4).

Oudh.—The general rule is that in private prosecutions the complainant must pay the reasonable expenses of the witnesses, although it is open to the Local Government to make rules which would permit in certain cases the liability to be transferred to the crown(5).

Central Provinces.—In the case of a private prosecution in respect of a bailable offence, the only case in which the Government can be made to pay the expenses of prosecution witnesses in the Central Provinces, is where it appears to the Magistrate that prosecution is directly in the interest of public justice within the meaning of the rules contained in Judicial Commissioner's Criminal Circular No. 1-37(6).

Expenses of witnesses recalled by the succeeding Magistrate.—Where on the transfer of the trying Magistrate the accused claims under section 250 to have the witnesses re-examined by the succeeding Magistrate, the witnesses should be re-examined without payment of any fees(7).

545. (1) Whenever under any law in force for the time being, a criminal court imposes a fine or confirms in appeal, revision or otherwise a sentence or fine, or a sentence of which fine forms a part, the court may,

Power of Court to pay expenses or compensation out of fine.

(1) *Empress v. Vaimbilee*, 5 O. 826.

(2) *Kamal Mandaline v. Pramasukh*, 29 O. W. N. 1033 (1034)—90 I. C. 488—A. I. R. 1926 O. 289.

(3) *Radha Kishan v. Ram Krishna*, 25 Cr. L. J. 912—81 I. C. 448—7 N. L. J. 57—1924 Nag. 114.

(4) *Emperor v. Ganesh*, 9 Bom. L. R. 353—5 Cr. L. J. 329.

(5) *Ram Dulari v. Mushtaq Ahmad*, 3 Luck. 363—9 A. I. Cr. R. 431—A. I. R. 1928 O. 226—5 O. W. N. 26—29 Cr. L. J. 661—110 I. C. 216.

(6) *Radha Kishan v. Ram Krishna*, 25 Cr. L. J. 912—81 I. C. 448—7 N. L. J. 57—1924 Nag. 114.

(7) *Elias v. Ezekiel*, 26 I. C. 133—13 Cr. L. J. 687.

The law views with disfavour detention in police custody and confines it within narrow limits, under stringent conditions, even in the case of an accused person(1). It is illegal for a Magistrate to direct the accused to be imprisoned in a police lock-up. A jail is a prison within the meaning of the Prisons' Act and the Prisoners Act, but it does not include a police lock up(2).

Confinement in different jails.—The power of directing imprisonment to be in different jails belongs to the Local Government and the Inspector-General of Prisons, and not to the criminal court passing sentence(3).

542. (1) Notwithstanding anything contained in the Prisoner's Testimony Act, 1869, any Presidency Magistrate desirous of examining, as a witness or an accused person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.

543. When the services of an interpreter are required by any criminal court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

Employment of witness for prosecution as Court Interpreter.—A witness, who has taken an active part during the police investigation, who has given evidence in the committing Magistrate's court on behalf of the prosecution, and who is ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man, who was charged with very serious offences under sections 302 and 304, Indian Penal Code, should not be chosen to act as an interpreter in that case(4).

Omission to administer oath to Interpreter.—The omission to administer an oath to an interpreter, under s. 5 (b) of the Oaths Act (X of 1873) does not, by reason of s. 13, render the evidence of a witness whose evidence was interpreted by him inadmissible against the latter on his subsequent trial for giving false evidence. The only effect of the omission is to make it incumbent on the prosecution to prove the accuracy of the translation(5).

(1) See the cases cited in the last but one note

(2) *Emperor v Po Khin*, 7 L B R 62-92 L C 154-15 Cr L J 10

(3) *Empress v. Radha*, Rat Un, Cr

C 827

(4) *Ali Sai v. Emperor*, 53 C. 659-27 Cr L J 805-95 L C 469.

(5) *Rakhal Chandra v Emperor* 36 C. 608.

this section where the accused is discharged(1) or acquitted(2), or else is dealt with under s. 562(3) without the imposition of any fine. A Magistrate cannot without imposing a substantive sentence of fine, order payment of compensation to the complainant(4). Nor can a Magistrate, under this section, order payment of compensation to the complainant in addition to the fine. The prescribed course under this section is to impose a fine, and out of the fine realised, to direct payment to the complainant of such amount as the court thinks fit, having regard to the provision of this section(5). The fine should be calculated according to the nature of the offence and the means of the offender and not according to the expenses which the complainant may reasonably or unreasonably incur on matters in some way connected with the offence(6). This section has no application to order for forfeiture of property. Where, therefore, a person was, under s. 62 of the I. P. C., sentenced to undergo a term of transportation and adjudged to forfeit to Government the rents and profits of his property during that term, it was held that it was not competent to the court before which he was tried and convicted to award any portion of the said rents and profits as compensation to the complainant(7). When a person is convicted under s. 14 of Bom. Act II of 1868, it is not competent to a Magistrate to order sale of the boat under s. 517, Cr. P. C., and to award out of the sale-proceeds, compensation to the complainant under this section(8).

Confirms in appeal, revision or otherwise.—The High Court has power to pass an order for compensation in revision(9).

When passing judgment.—This section lays down that an order for compensation shall be made by a criminal court, if at all, when passing judgment, and, in the absence of any special provision on the subject, the analogy of this rule might properly be followed. Hence it is only when passing judgment that the court can order the payment of a reward out of a fine, and when once the judgment has been pronounced, the court is *functus officio* and has no power to make further orders in the case(10).

The whole or any part of the fine.—This section justifies the order of compensation out of and only to the extent of the fine imposed and recovered but nothing in addition to it(11), though under s. 31 of the Court Fees Act, court-fees and process may be recovered in addition to the penalty(12). If in addition to these costs, a Magistrate wishes to award compensation to the complainant, he can only

(1) *In re Bastoo Dumaji*, 22 B. 717.
(2) *Empress v. Govind Narayan*, Rat. Un. Cr. C. 407.

(3) *Munney Mirza v. Emperor*, 25 Cr. L. J. 1116=81 I. C. 910=A. I. R. 1925 O. 110.

(4) *Ananymous*, 2 Welr 715.

(5) *Mohesh v. Bholanath*, 3 C. L. R. 404.

(6) *Maud Allay v. Empress*, 1 L. B. R. 48.

(7) *Empress v. Nana Fallu*, Rat. Un. Cr. Cas 146.

(8) *Empress v. Deera*, Rat. Un. Cr.

Cas 688.

(9) *Bishen v. Ismail*, 6 Bur. L. J. 61=28 Cr. L. J. 757=103 I. C. 837=1927 Rang 240=8 A. I. C. B. 441.

(10) *Empress v. Nga Hlice*, U. D. R. (1892-96) 80; *Queen v. Gaur Chunnu*, 11 W. R. Cr. 53.

(11) *Beera*, Bom. Cr. Rg. 10 of 1894, cited in *Annadurai Aiyar*, p. 1678; *Emperor v. Nga Tun*, L. B. R. (1873-1892) 595; *Crown v. Po Hlaw*, 1 L. B. R. 203.

(12) *In re Pavadai Pillai*, 1 Welr. 722; *Crown v. Po Hlaw*, 1 L. B. R. 203.

when passing judgment, order the whole or any part of the fine recovered to be applied—

- (a) In defraying expenses properly incurred in the prosecution;
- (b) In the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court; and
- (c) When any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any *bona-fide* purchaser of such property for the loss of the same, if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

Amendment.—The present clause (b) has been substituted for the old one and clause (c) has been newly added by s. 152 of Act No. XVIII of 1923. The following extract from the Statement of Objects and Reasons may be read in this connection. "Clause (b) makes it clear that compensation under section 545 may be paid to *any person* by whom it would be recoverable in a civil court. The payment of compensation to an innocent purchaser of stolen property is provided for in clause (c) when the property is restored to the possession of the person entitled thereto" (1).

Criminal court.—As the Police Patel's Court is not a criminal court within the enumeration contained in s. 6, he has no power to make an order under this section (2).

Imposes a fine.—Where a Magistrate has not imposed any fine on the accused, an order directing payment of money compensation to the complainant is not justified under the provisions of this section (3). An order for payment of compensation cannot be legally passed under

(1) Statement of Objects and Reasons (1914).

(2) *Empress v. Ramo*, Rat. Un. Cr. Cas. 317.

(3) *Munny Mirza v. Emperor*, 23 Cr. L. J. 1116=81 I. C. 940=A 1 B. 1925 O 110; *In re Bastco Dumaji*, 23 B 717; *Empress v. Gorinda Narayan*, Rat. Un. Cr. C. 407.

Compensation : Amount of compensation.—Where a complainant cannot recover substantial compensation in a civil court, compensation cannot be awarded to him under clause (b), but a sum may be awarded to him under clause (a) to defray the expenses of the prosecution(1). It is improper to award, out of the fine imposed, compensation to complainants, in petty cases, where no damage of any kind to occasion the pecuniary loss has been sustained(2). A court in a prosecution under section 193, Indian Penal Code can award under this section, only the expenses properly incurred in the prosecution, and has no power to award compensation under clause (b) for perjury(3). Similarly, compensation cannot be awarded in a prosecution for cheating(4). Compensation exceeding the loss incurred by the complainant cannot be awarded to him under this section(5).

Compensation to whom to be awarded.—Under the old law there was a conflict of opinion among the High Courts. *In re Lutchmaka*(6), it was held that section 545 of the Code did not contemplate an order for compensation, to be paid out of a fine imposed under section 304-A, to the widow of the man whose death was caused by the rash or negligent act in question. The same question arising in *Yala Gangulu v. Mamiadi Dali*(7), was referred to a Full Bench, because the correctness of the ruling in *Lutchanak's* case was doubted. The Full Bench confirmed that ruling holding that the Codes of 1872 and 1882 had made no change in the law. This was disapproved by a Full Bench of the Punjab Chief Court in *Queen Empress v. Saif Ali*(8). The Calcutta High Court adopted the same view as the Punjab Chief Court and held that section 545 (1) (b) provided for compensation, in cases where it was recoverable under Act XIII of 1855, to the persons therein indicated, viz., "the wife, husband, parent and child, if any" of the deceased(9). The Madras rulings are no longer good law as the present amendment makes it clear that compensation can be awarded to any person by whom it can be recovered in a civil court. Criminal courts should not award compensation out of the fine to the relations of the deceased where the fight is the result of the encroachment made by the deceased and his family on the field of the accused(10). An order of compensation to the nearest heirs without specifying who those heirs may be is not a sufficient compliance with law(11). Compensation may be awarded under this section to a husband whose wife has been enticed away with criminal intent(12).

(1) *Nga Tha Ya v. Emperor*, 24 I. C. 963=15 Cr. L. J. 555.

(2) *Mi Yin v. Empress*, 1 Bur. L. R. 688.

(3) *Mangalchand v. Mohan*, 14 N. L. R. 131.

(4) *Emperor v. Ramchandra*, 24 Bom. L. R. 382=23 Cr. L. J. 341=66 I. C. 937; *Kesar Singh v. Empress*, 10 P. R. 1878.

(5) *Shib Das v. Emperor*, 21 I. C. 839=14 Cr. L. J. 659=40 P. W. R. 1913 Cr.=335 P. L. R. 1913.

(6) 14 M. 352.

(7) 21 M. 74 F. D.

(8) 17 P. R. 1898 F. B.

(9) *Emperor v. Morgan*, 36 C. 302.

There are two cases of the Calcutta High Court, which interpreted the law in the same way as the Full Bench of the Madras High Court, but the words of the Code which they had to consider were entirely different from the words which are now to be found; see *In re Roop Lal*, 10 W. R. Cr. 39; *Queen v. Moorat Lal*, 6 W. R. Cr. 23.

(10) *Mahammad Shah v. Emperor*, A. I. B. 1934 Lab. 519=35 P. L. R. 370 (11) *Chuha v. Crown*, 18 P. R. 1913 Cr.=201, C. 1002=41 P. W. R. 1913 Cr.=14 Cr. L. J. 522.

(12) *Kesar Singh v. Crown*, 10 P. R. 1878 Cr.; *Crown v. Alhoo*, 14 P. R. 1878 Cr.

do so by awarding it out of the fine imposed(1). The duty of a Magistrate to order payment of court and process fees under s. 31 of the Court-Fees Act is imperative; whereas under this section, he has a discretion to award the expenses of the prosecution or to refuse to do so. It follows that this section must be taken to exclude those expenses in regard to which the court has no discretion(2). The court should record under what section, or on what grounds, it orders a portion of the fines inflicted on prisoners convicted of dacoity to be made over to the complainant(3). As an instance of the case in which the order for the payment of the whole of the fines as compensation was held to be not justified under this section, see *Emperor v. Maung Thin*(4).

Of the fine recovered.—When expenses properly incurred in the prosecution of a criminal charge are ordered to be paid by the accused under this section, such expenses should be paid out of the fine imposed; a separate order for such expenses is improper(5). Compensation cannot be awarded in addition to fine imposed on the accused(6). It is quite competent to a court, when ordering compensation to be paid out of the fine imposed, to provide by its order for the proportionate distribution of the amount realised. In the absence of any such direction, an order providing for payment of compensation out of fine imposed ought not to be construed as meaning that nothing was payable until the full amount of fine was realised(7).

Expenses.—All legitimate costs as the pleader's fees and the stamp on the power of attorney etc., and not merely process-fees, may be awarded under this section as well as compensation for the injury caused(8). Compensation for loss caused by inability of the complainant to attend to his work on account of his time being taken up with the prosecution of the accused, cannot be ordered to be paid under this section which deals with expenses incurred in the prosecution and with compensation for the injury only(9). A Magistrate cannot direct that a portion of a fine inflicted under s. 434 of the Indian Penal Code be paid to an Amin for the purpose of paying the expenses of his being deputed to restore land-marks destroyed by the opposite party(10). There is no provision in Ch. XLIII or this section for ordering the payment of a sum of money to the owner of the article stolen by way of indemnity(11).

In the prosecution.—This section does not apply to such expenses as are incurred in bringing the offender before the Magistrate(12).

(1) *Empress v. Nga Tun*, L. B. R. (1872-1892), 595.

(2) *Empress v. Yamuna Rao*, 24 M 305; *In re Pavadas Pillai*, 1 Weir. 722.

(3) *Queen v. Bissonath*, 2 W R Cr. 58.

(4) 5 L B R. 50.

(5) *Empress v. Sasharam*, Rat. Un. Cr. C. 341; *Emperor v. Tukaram*, 4 Bom L R. 677.

(6) *Emperor v. Rajubhai*, 5 Bom. L R 126; *Emperor v. Bhujanga*, 6

Bom. L R 976.

(7) *In re Khaddam Venkata*, 2 L. W. 22=16 Cr. L J. 59=26 I C. 650.

(8) L B. R. (1872-1892), 409; *Empress v. Yamuna Rao*, 24 M 305.

(9) *Imperatrix v. Narayan*, 22 B. 438.

(10) *Queen v. Monrut Lall*, 6 W. R. Cr. 93; *Hyat v. Mamun*, 6 P. R. 1890 Cr.

(11) *Bhura v. Emperor*, 90 I. C. 151=26 Cr L J 1495=A I R 1926 Nsg 89.

(12) *Empress v. Ramaswamy*, Rat. Un. Cr. C. 608.

Under the old law, it was held that an order awarding compensation to the innocent purchaser of property found to have been stolen was not authorized by the section(1). The injury to such purchaser was held to be not the consequence of theft or misappropriation, but of the sale without title to pass the property(2). These cases are no longer good law. No compensation can, however, be awarded to an innocent pledgee or mortgagee who has advanced money to the accused on the stolen property(3).

Notice of appeal to complainant.—It is the settled practice of the Calcutta High Court, in a case where compensation has been awarded to the complainant, to give notice of the appeal to him, and an acquittal, in the absence of such notice, is liable to be set aside by the High Court in revision(4).

Security proceedings.—This section has no application to a case under section 107. An order directing the accused in the case, to pay costs of the complainant is *ultra vires*(5).

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under section 545.

Payments to be taken into account in subsequent suit.

Taken into account.—This expression means that the compensation awarded by the Magistrate is to be taken into consideration by the court in subsequent civil suit, not that it is to be afterwards deducted from the damages awarded(6).

Civil suit for costs of prosecution.—Where a complainant has prosecuted an accused person for a wrongful act and obtained a conviction, he can in a subsequent suit recover the amount of the costs incurred by him in the prosecution of the criminal case in addition to damages for the injury done to him by the accused(7).

546-A. (1) Whenever any complaint of a non-cognizable offence is made to a court, the court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

Order of payment of certain fees paid by complainant in non-cognizable cases.

(a) The fee (if any) paid on the petition of

(1) *Queen v. Reddon*, 6 M. 286; *Anonymous*, 2 Weir. 715; See *Empress v. Abdul*, 3 Bom. L. R. 419; *Nobo Kristo v. Lall Chand*, 20 W. R. 38; P. R.

891=66 I. C. 927=24 Bom. L. R. 382=23 Cr. L. J. 341.

(4) *Bhar sa v. Sukhdeo*, 27 Cr. L. J. 1086=53 G. 969=43 I. L. J. 583=27 I. C. 62=A. I. R. 1926 C. 1051.

(5) *Sheo Prasad v. Mahango*, 77 I. C. 818=25 Cr. L. J. 476=1921 A. C. 91=L. R. 5 A. 13 Cr.

(6) *Lore v. Hume*, 22 W. R. 336 (Civ.)

(7) *Gangadhar v. Bhangi Sao*, 95 I. C. 85=A. I. R. 1926 Nag. 963.

(2) *Re Manyappa*, 2 Weir. 716.

(3) *Emperor v. Ramchandra*, 46 B.

Compensation for offences other than those which form the subject of inquiry.—This section does not empower a court to award compensation for alleged offences other than those which form the subject of inquiry in the case in which the order is made(1).

Compensation for injury caused by the offence—Bodily pain suffered from the administration of poison is not an injury that can be compensated by money. The question of compensating a complainant out of fine depends upon whether the loss, injury or damage has been occasioned by the offence which can be appraised in money(2). Where the accused was convicted and fined for being drunk on a public road, no compensation could be awarded to the constable who in arresting the accused had to struggle with him and in so doing lost his whistle and rupees 5; because such compensation is not for injury caused by the offence committed(3). An order for compensation is illegal where there is no proof that any loss or special damage has been caused to the complainant by the hurt inflicted by the accused(4). The payment of compensation to the Municipality as damages on account of the expenses incurred by it in disinfecting a house from out of the fine imposed on the accused under section 188, I. P. C., for having brought his sister who was suffering from plague into a town without informing the authorities about it(5). So also, the payment of a reward to complainant, a forest servant, from out of fine imposed on the accused under I. P. C. for cutting teak trees, was held illegal(6).

Refund of compensation.—There is no provision in the Code, under which an accused person can obtain a summary order from the criminal courts, directing the refund of a fine which has been paid as compensation to a complainant under this section, and subsequently remitted by a superior court(7). But it has been held by the Allahabad High Court that the amount may be recovered by a process under section 547 and not necessarily by a suit in a civil court(8). The Madras High Court has, however, held that where a conviction is set aside on appeal, and a refund of the fines levied is ordered, the only remedy, if the person who has received a portion of the money as compensation refuses to refund it, lies in a civil court(9).

Compensation for injuries to one other than the person injured.—Where an accused person is fined for injuries caused to one, compensation out of the fines cannot be awarded to another. The latter can receive compensation, only if the fine is inflicted on the accused for an injury caused to himself(10).

Clause (c).—"The payment of compensation to an innocent purchaser of stolen property is provided for in clause (c) when the property is restored to the possession of the person entitled thereto"(11).

(1) *Empress v. Govind Narayan*, Rat Un. Cr Cas. 407

(2) *Crown v. Dinda*, 12 P. R. 1876 Cr.

(3) *Anonymous*, U D R (1892—96) 79

(4) *Reg v. Samson*, 3 Bom H. C. R. O. C. 43

(5) *Empress v. Rahimathulla*, Rat Un. Cr. Cas. 959.

Cr. P. C.—125

(6) *Empress v. Bhikari*, Rat. Un Cr. C 241

(7) *Chogatta v. Empress*, 3 P. R. 1889 Cr.

(8) *Mutsuddi v. Mani Ram*, 19 A. 112

(9) *Anonymous*, 2 Weir 717.

(10) *Pub Pros. v. Vobanna*, 2 Weir. 719

(11) *Statements of Objects and Reasons* (1914)

Under the old law, it was held that an order awarding compensation to the innocent purchaser of property found to have been stolen was not authorized by the section(1). The injury to such purchaser was held to be not the consequence of theft or misappropriation, but of the sale without title to pass the property(2). These cases are no longer good law. No compensation can, however, be awarded to an innocent pledgee or mortgagee who has advanced money to the accused on the stolen property(3).

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Security proceedings.—This section has no application to a case under section 107. An order directing the accused in the case, to pay costs of the complainant is *ultra vires*(5).

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under section 545.

Payments to be taken into account in subsequent suit.

Taken into account.—This expression means that the compensation awarded by the Magistrate is to be taken into consideration by the court in subsequent civil suit, not that it is to be afterwards deducted from the damages awarded(6).

Civil suit for costs of prosecution.—Where a complainant has prosecuted an accused person for a wrongful act and obtained a conviction, he can in a subsequent suit recover the amount of the costs incurred by him in the prosecution of the criminal case in addition to damages for the injury done to him by the accused(7).

546-A. (1) Whenever any complaint of a non-cognizable offence is made to a court, the court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

Order of payment of certain fees paid by complainant in non-cognizable cases

(a) The fee (if any) paid on the petition of

(1) *Queen v. Reddon*, 6 M. 286; *Anonymous*, 2 Weir. 715; See *Empress v. Abdul*, 3 Bom. L. R. 449; *Noda Kristo v. Lall Chand*, 20 W. R. 38; *Faiz Muhammad v. Emperor*, 2 P. R. 1908 Cr.—7 Cr. L. J. 279; See also *Khairati Ram v. Budhu*, (1893) A. W. N. 61; *Saican v. Crown*, 21 P. R. 1878 Cr.

(2) *Re Manyappa*, 2 Weir. 716.

(3) *Emperor v. Ramchandra*, 46 B.

893=66 I. C. 997=21 Bom. L. R. 382=23 Cr. L. J. 341.

(4) *Bhar sa v. Sukhdeo*, 27 Cr. L. J. 1046=53 C. 969=43 L. J. 583=27 I. C. 62=A. I. R. 1926 C. 1051.

(5) *Sheo Prasad v. Mahangoo*, 77 I. C. 818=25 Cr. L. J. 476=1921 A. C. 91=L. R. 5 A. 13 Cr.

(6) *Love v. Hume*, 22 W. R. 336 (Civ.)

(7) *Gangadhar v. Bhangi Sao*, 95 I. C. 95=A. I. R. 1926 Nag. 965.

complaint, or for the examination of the complainant, and

(b) Any fees paid by the complainant for serving process on his witnesses or on the accused, and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days,

(2) An order under this section may also be made by an appellate court, or by the High Court when exercising its powers of revision.

This section has been inserted by section 153 of Act No. XVIII of 1923. It embodies the provisions of section of the Court Fees Act since repealed.

Scope of the section.—This section merely provides for the refund of process fees in non-cognizable cases when paid, but does not authorise their payment(1). An order for payment of costs cannot be made under the provisions of this section(2). Neither the complainant nor the accused can be compelled to pay process fees for the production of witnesses, although the complainant must, under s. 204 of the Cr. P. C., in the ordinary course of events, pay process fees for the summoning of the accused(3).

Complainant when entitled to refund of court fee.—Repayment of court-fee on a complaint cannot be ordered if the complaint is not required by law to be stamped. The fact that the court fee has been illegally levied by the court will not be a ground for ordering the accused to pay the fee on conviction(4). Complaints made by Municipal Officers, no process fee being leviable on such complaints and the accused consequently not being bound to refund the sum illegally levied(5). An accused person ordered, under s. 2 of the Workman's Contract Act, to repay the sum advanced to him, cannot also be ordered to pay the court-fee on the complaint(6).

Order for payment of fee in addition to fine—In cases to which this section applies there ought to be an order for the repayment to the complainant of the fee paid by him in addition to the fine. The provisions of this section are not controlled by section 545(7).

Appealable sentence.—An order directing an accused person to pay the complainant the court fee paid on his petition is no part of the sentence so as to make it a sentence of fine within the terms of section 413(8). But in one case it has been held otherwise(9).

(1) *Emperor v. Mg San Nyein*, 27 Cr. L. J 415 (416)=1926 Rang 13=4 Bur. L. J 187=93 I C 79

(2) *Nur ud Din v. Emperor*, 81 I C 985=25 Cr. L. J 1161=A I R 1925 O 107.

(3) *Emperor v. Mg San Nyein*, 27 Cr. L. J 415=1926 Rang 13=4 Bur. L. J 187=93 I C 79

(4) *Reg v. Auji Naru*, 8 Bom. H C 9. (C C.) 24.

(5) *Empress v. Khojabhoy*, 16 M. 423=1 Weir 723.

(6) *Empress v. Budhu*, Rat Un Cr. Cas. 534, *Emperor v. Dhondu*, 6 Bom. L. R 245

(7) *In re Paradas Pillai*, 1 Weir 722, *Empress v. Yamuna Rao*, 21 M 305.

(8) *Madan v. Haran*, 20 C 697

(9) *Empress v. Thangavelu*, 22 M. 153=1 Weir. 724.

"May".—The following extract from the report of the Joint Committee may be read in this connection: "We think the court should not be bound to exercise the power conferred by this section in trivial cases, and we have accordingly used the word 'may'."

547. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine.

Moneys ordered to be paid recoverable as fines.

Amendment.—The words "and the method provided for" have been inserted by section 154 of Act No. XVIII of 1923.

Money payable.—This section only provides a summary method for realising "money payable" and these words cannot be stretched so as to include live-stock or other goods(1). Diet money cannot be recovered under this section, but it can be recovered by the witness in a civil suit(2).

Refund of compensation ordered to be paid under s. 545.—Money ordered to be paid as compensation under s. 545 is recoverable by process under this section(3), though there is authority to the contrary also(4).

Refund of compensation ordered to be paid under s. 250.—This section provides that money ordered to be paid as compensation under section 250 is recoverable as if it were a fine and the methods of recovering a fine are provided for in section 386 of which clause (1) (a) provides for the realisation by issue of warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender(5). The provisions of this section confer authority on criminal courts to realize compensation paid to accused under s. 250, as if it were fine, when the order of payment of compensation is set aside by an appellate court or a court of revision(6).

548. If any person affected by a judgment or order passed by a criminal court desires to have a copy of the Judge's charge to the Jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith:

Copies of proceedings.

Provided that he pays for the same, unless the court, for some special reason, thinks fit to furnish it free of cost.

"Any person affected by a judgment or order."—These words

(1) *Emperor v. Phuniman Ram*, 23 Cr. L. J. 157=651 C 621

(2) *Kamal Mandalini v. Paramasulh*, 90 I. C. 488=29 C. W. N. 1033=A. I. R. 1926 O. 289

(3) *Mulsaddi Lal v. Mani Ram*, 19 A. 112=(1896) A. W. N. 182, *Ishri v. Bakshi*, 6 A. 96; *Empress v. Pola*

Varapu, 7 M 563; *Ali Ahmad v. Nathu*, 14 P. R. 1884 Cr.; *Empress v. Rajji*, Rat Un. (r Cas 213

(4) *Anonymous*, 2 Weir 717.

(5) *Ram Chander v. Emperor*, 13 Pat. L. T. 536=1932 Cr. C. 773.

(6) *Crown v. Hira Nand*, 29 P. R. 1903 Cr.=2 P. L. R. 1904.

complaint, or for the examination of the complainant, and

(b) Any fees paid by the complainant for serving process on his witnesses or on the accused, and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days,

(2) An order under this section may also be made by an appellate court, or by the High Court when exercising its powers of revision.

This section has been inserted by section 153 of Act No. XVIII of 1923. It embodies the provisions of section of the Court Fees Act since repealed.

Scope of the section.—This section merely provides for the refund of process fees in non-cognizable cases when paid, but does not authorise their payment(1). An order for payment of costs cannot be made under the provisions of this section(2). Neither the complainant nor the accused can be compelled to pay process fees for the production of witnesses, although the complainant must, under s. 204 of the Cr. P. C., in the ordinary course of events, pay process fees for the summoning of the accused(3).

Complainant when entitled to refund of court fee.—Repayment of court-fee on a complaint cannot be ordered if the complaint is not required by law to be stamped. The fact that the court fee has been illegally levied by the court will not be a ground for ordering the accused to pay the fee on conviction(4). Complaints made by Municipal Officers, no process-fee being leviable on such complaints and the accused consequently not being bound to refund the sum illegally levied(5). An accused person ordered, under s. 2 of the Workman's Contract Act, to repay the sum advanced to him, cannot also be ordered to pay the court-fee on the complaint(6).

Order for payment of fee in addition to fine—In cases to which this section applies there ought to be an order for the repayment to the complainant of the fee paid by him in addition to the fine. The provisions of this section are not controlled by section 545(7).

Appealable sentence.—An order directing an accused person to pay the complainant the court-fee paid on his petition is no part of the sentence so as to make it a sentence of fine within the terms of section 413(8). But in one case it has been held otherwise(9).

(1) *Emperor v. Mg. San Nyein*, 27 Cr. L. J. 415 (416)—1926 Rang. 13—4 Bur. L. J. 187—93 I. C. 79

(2) *Nur ud Din v. Emperor*, 81 I. C. 985—25 Cr. L. J. 1161—A. I. R. 1925 O. 109.

(3) *Emperor v. Mg. San Nyein*, 27 Cr. L. J. 415—1926 Rang. 13—4 Bur. L. J. 187—93 I. C. 79.

(4) *Reg v. Auji Naru*, 8 Bom. H. O. R. (O. C.) 24.

(5) *Empress v. Khojabhoy*, 16 M. 423—1 Weir 723.

(6) *Empress v. Budhu*, Rat. Up. Cr. Cas. 534; *Emperor v. Dhondu*, 6 Bom. L. R. 215

(7) *In re Paradai Pillai*, 1 Weir 722; *Empress v. Yamuna Rao*, 24 M. 303.

(8) *Madan v. Haran*, 20 O. 637.

(9) *Empress v. Thangarelu*, 22 M. 153—1 Weir. 721.

court to which this Code applies, or by court martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, section 41, or under the Air Force Act, section 41, to be tried by a court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the Commanding Officer of the regiment, corps or detachment to which he belongs, or to the Commanding Officer of the nearest military or air force station, as the case may be, for the purpose of being tried by court-martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the Commanding Officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

550. Any Police Officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

Seize.—The power to seize property is given by this section. Where, therefore, a Police Sub-Inspector suspected that certain logs were lying on trucks at a railway station, were stolen property, and, instead of seizing them under this section issued an order to the Station Master directing him to detain the same, it was held that the order was irregular and objectionable(1).

To have been stolen.—This section gives the police very wide powers with regard to the seizure of cattle alleged or suspected to have been stolen, but it does not extend to the taking away other cattle, simply because they are mixed up with the stolen ones(2).

Found under circumstances which create suspicion of the commission of any offence.—A Sub-Inspector of Police on receiving a report of theft and cheating against a shop-keeper went to the shop and closed it to prevent the removal of the goods. The shop remained closed during the pendency of criminal proceedings for about 15 months. The shop-keeper did not take any steps to get the shop released, but after his acquittal brought a suit for damages against Sub-Inspector. It was

(1) *Emperor v. Bithal Nath*, 16 O. C. 371=22 I. C. 753=15 Cr. L. J. 177.

(2) *Sada v. Cattan*, 14 P. W. R. 1109 Cr.=4 I. C. 980=11 Cr. L. J. 99.

should not be construed narrowly : they cannot be confined to a person who is a party to the judgment or order, for the rights of the accused to a copy of the judgment are dealt with elsewhere in the Code. The public as a whole cannot fail to be affected by every judgment of a criminal court. For example, the judgment in a criminal case dealing with sedition affects the general public. It is a rule of law that every member of the public is presumed to know the law ; it follows that the public must have a right of access to the judgments of the courts which express that law(1). But in a Bombay case it has been held that a third party, *i. e.*, a member of the public who is not a party to the case, is not a person affected by a judgment or order, and is not entitled to apply for copies of depositions and judgment(2). A prisoner is entitled to have copies of all documents for which he asks, and which he thinks necessary for his defence(3). Inasmuch as every one complaining of an offence by which he is injured is affected by the disposal of his complaint, whether the case has been sent up by a Police Officer, or not, he is entitled to a copy of the Magistrate's order of discharge under s. 253(4).

Order.—A charge is not an order of a criminal court within the meaning of this section. A Magistrate therefore is not bound by the provisions of this section to grant to an accused person under trial before him copies of depositions of the witnesses for the Crown where the trial has not reached a more advanced stage than the recording of the evidence for the prosecution(5).

Part of the record.—"Record" means only the Magisterial record, and such record begins in security cases, only with the order under section 112. Hence, the information or report, earlier than the order under section 112, is not "part of the record" within the meaning of this section. So the person proceeded against is not entitled to a copy of the information or the report(6). But the report of the Police under s. 202 is part of the record and there is no reason to refuse a copy of the same to the accused(7).

549. (1) The Governor-General in Council may

Delivery to military authorities of persons liable to be tried by court martial.

make rules, consistent with this Code and the Army Act and the Air Force Act or any similar law for the time being in force, as to the cases in which persons subject to military or air force law shall be tried by a

(1) *Emperor v. Ladli Prasad*, 53 A. 724 = A. I. R. 1931 A. 364 = 32 Cr. L. J. 864 = 1931 Cr. C. 620 = 132 I. O. 827 = 12 L. R. A. Cr. 50 = 15 A. I. Cr. R. 463 = 29 A. L. J. 405.

C 166.

(5) *Empress v. Prag Singh*, (1932) A. W. N. 140.

should not be so construed as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian, *c. g.*, detention of a female child, against the will of her parents or guardians, for the purposes of being brought up in a religion which such parent or guardian disapproved of(1).

"Unlawful detention for an unlawful purpose."—Although the detention of a child, against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or guardian disapproved of, and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child would amount to an unlawful detention, notwithstanding the consent of the girl to such detention, yet, it could not amount to "an unlawful detention for an unlawful purpose"(2). If the "unlawful detention" is, however, for a purpose which is an "offence" or is legally prohibited or which is a civil wrong it would constitute an "unlawful purpose". Firstly because bigamy is declared an offence by s. 494, Penal Code. Secondly if the girl is being detained by her father contrary to her own wish, such detention would also fall within the purview of s. 339, Penal Code, and would equally be detention "for an unlawful purpose". Lastly, since the unlawful detention of his minor wife by his father-in-law *prima facie* affords a cause of action to the husband to recover possession of his wife by a civil action. The purpose of such detention would likewise be "unlawful" within the meaning of this section(3). But where a husband complained to the District Magistrate that his father-in-law was wrongfully detaining his wife and refused to send her to his house, without alleging that she was being so detained contrary to her own wish, and the District Magistrate passed an order under this section directing her restoration to the husband without making any inquiry into the matter of the complainant, it was held that on the facts the case was not one to which the provisions of this section should be applied and that, if the husband had any grievance, he should seek his remedy in the civil court(4).

Jurisdiction of District Magistrate to transfer complaint under this section.—A District Magistrate alone has jurisdiction to entertain a complaint and make an order under this section. He has no power to transfer such a case to a subordinate Magistrate, and that Magistrate would have no jurisdiction therein(5).

Procedure.—The proceedings under s. 491 and this section being, in some measure, analogous, the same procedure should be followed in cases falling under both the sections, in the absence of any, especially prescribed by the Code(6).

(1) *Abraham v. Mohtalo*, 16 C. 467; *Thakoredas v. Bhagwandas*, 4 Bcm. L. R. 609.

(2) *Abraham v. Mahtalo*, 16 C. 467.

(3) *Tulsidas v. Chetandas*, A. I. R. 1938 Nag. 574=16 N. I. J. 810=1938 Cr. C. 1573.

(4) *Nathu v. Nari Lal*, 16 Cr. I. J. 712=26 I. C. 160.

(5) *Bai Dahi v. Jagjwan*, Rat Un. Cr. Cas. 963.

(6) *Tulsidas v. Chetandas*, A. I. R. 1938 Nag. 574=16 N. I. J. 810=1938 Cr. C. 1573; *In re Southi*, 16 B. 507.

held that the act of the sub-Inspector in closing the shop was not illegal inasmuch as the goods in the shop could under the circumstances be regarded as having been found in the shop keeper's possession under circumstances creating suspicion of an offence, within the meaning of this section(1).

Claim of person in possession.—The police seized property on suspicion of its being stolen property under this section, and the Magistrate issued a proclamation before satisfying himself as to the claim of the person in possession. It was held that it was not incumbent on the Magistrate to decide the claim before issuing the proclamation, as the person in whose possession the property was found has an opportunity of making good his claim to the Magistrate even after the issue of the proclamation(2).

551. Police Officers superior in rank to an Officer in charge of a police station may exercise the same powers, throughout the local areas to which they are appointed, as may be exercised by such officer within the limits of his station.

Search made by Sub-Inspector not in charge of police station under Circle Inspector's supervision.—Where a search is made actually by a Sub Inspector of Police who is not in charge of a police-station, but it is made under the supervision of a Circle Inspector, the search is not illegal(3).

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian, or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

Amendment.—The word 'sixteen' has been substituted for the word 'fourteen' by the Amending Act V of 1924.

Scope of the section.—This section applies to women and female children only. This combination and the exclusion of male children go to show not only that some definite purpose, unlawful in itself, was contemplated, but that the purpose has some special reference to the sex of the person against whom it was entertained. Therefore, it

(1) *Karan Singh v. Nand Kishore*, 124 I. C. 254—A. I. R. 1929 Nag 334—3 Cr. Law Nag 1—Ind. bul. (1930) Nag. 270.

(2) *Ganga Ram v. Crcun*, 2 E.L.R.

Cr. 32=10 Cr. L. J. 198.

(3) *Shiam Lal v. Emperor*, A. I. R., 1927 A 516=28 Cr. L. J. 652=103 I. C., 108=8 A. I. Cr. R 7=8 L. R. A. Cr. 92.

554. (1) With the previous sanction of the Governor-General in Council, the High Court at Fort William, and with the previous sanction of the Local Government, any other High Court established by Royal Charter may, from time to time, make rules for the inspection of the records of subordinate courts.

Power of chartered High Courts to make rules for inspection of records of subordinate courts.

(2) Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,—

Power of other High Courts to make rules for other purposes.

- (a) make rules for keeping all books, entries and accounts to be kept in all criminal courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such courts;
- (b) frame forms for every proceeding in the said courts for which it thinks that a form should be provided ;
- (c) make rules for regulating its own practice and proceedings and the practice and proceedings of all criminal courts subordinate to it ; and
- (d) make rules for regulating the execution of warrants issued under this Code for the levy of fines :

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the Local Official Gazette.

Allahabad High Court Rules.—On general principles as well as under the existing statutes and rules prescribed by the High Court any member of the general public is entitled to inspect and have copies of the judgments of the subordinate criminal courts(1).

555. Subject to the power conferred by s. 554, and by s. 107 of the Government of India Act, 1915, the forms set forth in the

Forms.

(1) *Ladli Prasad v. Emperor*, 82 Cr. L.J. 464=53 A. 724=A. L. R. 1431 A. 864=1931 Cr. C. 620=182 J. C. 327=12 L. R. A. Cr. 89=15 A. L. Cr. R. 463=1931 A. L. J. 405.

Preliminary inquiry.—The provisions of ss. 200 to 203 which relate to the procedure to be employed by a Magistrate taking cognizance of an offence do not apply to this section where no offence is alleged(1). The District Magistrate has no power to order a preliminary inquiry by his Sub-Divisional Magistrate in a case under this section. A preliminary inquiry is neither permissible nor desirable in such a case even by the District Magistrate himself(2). A person proceeded against under this section is not an accused and liberty is therefore expressly reserved to him to offer himself as a witness in such proceedings by s. 340 (2) of the Code(3).

Absence of proof of unlawful detention.—Where a Magistrate has reason to believe that a woman is being unlawfully detained but cannot find who so detains her, the proper course is for the Magistrate to issue an order to have the woman brought before him and to examine her. An order in general terms that a woman be restored to liberty without finding that she was unlawfully detained by any one or without ordering any person to restore her to liberty is not one contemplated by the section(4). Where, however, on an application made under this section to a Magistrate of the first class, he examined the applicant on oath, recorded a statement of facts alleging wrongful detention of his wife, and directed the issue of a search warrant under s. 100, it was held that he had jurisdiction to do so(5).

553. (1) Whenever any person causes a Police Officer to arrest another person in a presidency town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

(1) *Thakoredas v. Bhagwandas*, 4 Bom. L. R. 603; *Tulsidas v. Chetandas*, A. I. R. 1933 Nag. 374.

(2) *Tulsidas v. Chetandas*, A. I. R.

1033 Nag. 374.

(3) *Ibid.*, at p. 376.

(4) *Umar v. Darood*, 2 Weir. 721.

(5) *Gora v. Abdul*, 39 C. 403.

is interested in the result of a cause, he cannot sit in judgment upon it(1). The maxim *Nemo debet esse iudex in propria sua causa* (no man can be judge in his own cause), is a firm and sound maxim and it rests, not upon any suspicion as to the honesty of the Judge or his capacity for the technicalities of law. It rests upon the philosophy that says that human beings are after all human beings, and, with all honour due to the honesty and integrity of Judges, they are not to hear cases in which they are themselves concerned(2). "It is of the last importance that the maxim that no man ought to be a Judge in his own cause, should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest"(3). Any direct pecuniary interest, however small, in the subject-matter of inquiry will disqualify a Judge(4), and any interest, though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias(5).

No Judge or Magistrate.—The disqualification under this section is personal to the Judge or Magistrate.

Except with the permission of the court to which an appeal lies.—Under this section a Magistrate who is personally interested can try a case with the permission of the court to which an appeal lies from his court(6). Where a Magistrate who was also a member of a club asked the Sessions Judge, who was also a member, permission for proceeding with the trial of an offence under s. 409, I. P. C., against the servant of the club, *held*, that there was nothing in this section to suggest that the Sessions Judge had not jurisdiction to grant permission to try the case or to commit it for trial(7). A Magistrate who applies to prosecute the accused for making false charges against himself should take the further orders of the District Magistrate as to whether he is to go on with the case(8).

Try any case.—These words are comprehensive enough to include the hearing of an appeal(9). But a Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where, as an Insolvency Judge, he allowed the prosecution to proceed. A Judge may, however, object to hearing such a case if he remembers being acquainted with it before(10). A Sessions Judge is not disqualified from hearing an appeal from the conviction of an

(1) *Brooks v. Earl of Rivers*, Hardw 503; *Earl of Derby's Case*, 12 Rep. 114; *Anon.*, 1 Salk 396; *Worsely v. S. Devon R. Co.*, 16 Q. B. 539.

(2) *Empress v. Polpi*, 13 A. 171 (174)

(3) Per Lord Campbell in *Dimes v. Grand Junction Canal Co.*, 3 H. L. Cas. 759.

(4) *Reg. v. Rand*, L. R. 1 Q. B. 232; *Reg. v. Gaisford*, 1892, 1 Q. B. 381; *Queen v. Bholanath*, 2 C. 21=25 W. R. Cr. 57; *Parashuram v. Cooke*, 53 B. 716=31 Bom. L. R. 975=A. I. R. 1929 B. 404; *In re Rodrigues*, 20 B. 502

(5) *Allison v. Gen. Council of*

Medical Education, 1894, 1 Q. B. 760; *Reg. v. Burton*, 1897, 2 Q. B. 468; *Reg. v. Huggins*, 1895, 1 Q. B. 563

(6) *Parashuram v. Cooke*, 53 B. 716 (721).

(7) *Empress v. Fateh Bahadur*, 20 A. 181.

(8) *Ram Lall v. Emperor*, 2 L. B. R. 220

(9) *Nistarini v. Ghose*, 23 C. 44; *Fazl Mohammad v. Emperor*, 9 N. L. R. 81; *Mamoon v. Emperor*, 67 I. C. 622=23 Cr. L. J. 446=61 P. L. R. 1922.

(10) *Sri Krishna v. Emperor*, 71 I. C. 368=21 A. L. J. 40=24 Cr. L. J. 114=1923 A. 193.

fifth Schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

Form of warrant.—This section deals with the form of the warrant itself and nothing more. The words of this section are not intended to supersede the provisions of section 90. If, therefore, a Magistrate under s. 90, issues a warrant drawn up in the terms of form VII of Schedule V of the Code, for the arrest of any person as therein specified but does not first record its reasons in writing (that is, apart from the statement in the warrant), the warrant so issued, is valid(1). If the substance of the warrant issued under section 100, complies with the requirements of that section the warrant is perfectly legal, no matter what prescribed form is used for the warrant(2).

"With such variation."—There being no prescribed form of warrant under s. 100, a Magistrate issuing such a warrant adapted a form under section 96, to the provisions of s. 100 by altering the figures and also by drawing up the warrant in terms required by section 100. It was held that the warrant was perfectly legal(3).

556. No Judge or Magistrate shall, except with the permission of the court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Explanation.—A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Illustration.

A, as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate.

Principle.—It is a rule observed in practice, that where a Judge

(1) *Gout of Assam v Sahelulla*, 38 C. L. J. 77.

(2) *Supdt and Memm v Mozam molla*, 48 I. C. 687=28 C. L. J. 204=20 Cr. L. J. 47=45 C. 905; *Gurameah v Emperor*, 39 C. 403=13 I. C. 1002=16

C. W. N. 336=13 Cr. L. J. 185.

(3) *Supdt and Memm v. Mozam-molla*, 48 I. C. 687=45 C. 905; see also *Gurameah v. Emperor*, 39 C. 403=13 I. C. 1002=16 C. W. N. 336=13 Cr. L. J. 185.

which he had taken an active part as District Superintendent of Police(1). But in a petty case under the Penal Code where the offence committed is within a Magistrate's cognisance the accused should not be committed to the Sessions on the ground that the Magistrate was a witness to the identification proceedings(2).

In which he is a party.—Where a Magistrate is himself one of those obstructed by the driving of the accused on the wrong side of the road, he should not himself try the accused under ss. 28 and 29 of the Bombay Village Police Act(3).

Personally interested.—In this section the words "personally interested" cannot mean that a public officer whose duty it is to see that the law is obeyed is merely by reason of that duty a personally interested in the prosecution and trial of an offender against the statute law. They cannot refer to any very remote interest in the matter, and must refer to some particular and immediate personal interest in the case and its results. A Magistrate cannot be said to be "personally interested" within the meaning of this section merely by reason of its being his duty as an officer under the Government to see the law relating to the sale of opium enforced and maintained in that part of the district of which he has charge. He is, therefore, not precluded from trying an offence under the Opium Act(4). This section does not debar an Excise Officer from trying a case under the Excise Act, 1896, in which he himself is responsible for the prosecution(5). The phrase "interested", as used in this section, does not imply mere intellectual "interest," but something of the nature of an expectation of advantage to be gained, or of a loss, or of some disadvantage to be avoided, by the person who is said to be interested in the case. The mere fact that the inquiry was made by the Magistrate is not to be regarded as a disqualifying ground under this section(6). A Magistrate, who had been a Member of the Sub-Committee of a Municipal Board which recommended the prosecution of a certain person for an alleged obstruction caused by him in a public thoroughfare, was not, by reason only of this fact, "personally interested" in the case afterwards initiated against such person so as to be debarred under this section from trying it(7). On the day when the courts were closed for the Christmas holidays two persons came to a Magistrate's private house, and there made an oral complaint to him. When the courts re-opened the same persons filed a written complaint in the Magistrate's court, which resulted in certain persons being put upon their trial before the same Magistrate for an offence under section 323 of the Indian Penal Code. During the course of the trial the Magistrate considered it his duty to record his own evidence as to the circumstances attending the making of the oral complaint at his house, and he was duly cross-examined and re-examined. It was held that the

(1) *Empress v. Maung Lat*, 1 Cr. L. J. 477=2 I. B. R. 209

(2) *Emperor v. Ram Jatan*, 21 A. L. J. 420=25 Cr. L. J. 665=A. I. R. 1924 A. 185.

(3) *Empress v. Lahana*, Rat. Un. Cr. Cas. 321.

(4) *In re Ganeshi*, 15 A. 192, followed

in *Emperor v. Nanhe*, 27 A. 33=(1904) A. W. N. 157.

(5) *Janki Das v. Emperor*, 5 A. L. J. 357=(1908) A. W. N. 95=7 Cr. L. J. 393.

(6) *Emperor v. Chollappa*, 8 Bom. L. R. 947=5 Cr. L. J. 2.

(7) *Emperor v. Mohan Lal*, 27 A. 25.

accused for giving false evidence merely because he has himself directed that the said accused should be tried for that offence, though it is undesirable that a Judge should under such circumstance hear the appeal(1). A Magistrate who did not take cognizance of a complaint or order a local investigation but, acting as the officer in charge of the Sudder Sub-Division, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under this section, to hear the appeal on conviction of the accused(2). A Sessions Judge who makes a complaint as a District Judge against an insolvent in accordance with section 70 (5) of the Provincial Insolvency Act is incompetent to hear an appeal against his conviction notwithstanding the consent of the appellant or his counsel(3). A Magistrate who is disqualified by this section from trying a case is equally debarred from interfering in revision to the prejudice of the accused(4). A Sessions Judge who makes a complaint under s. 476 is a party to the proceedings initiated in pursuance of his complaint within the meaning of this section, and is, therefore, disqualified from hearing an application to revise an order discharging the persons complained against(5). But in one case it has been held otherwise(6). Where, however, a Deputy Commissioner, as the Head of a District sanctions or orders a prosecution merely because the matter before him demands elucidation by judicial inquiry having formed no opinion of his own on the merits thereof, he is debarred by this section from subsequently acting judicially in the case(7).

The expression 'try any case' is wide enough to include a proceeding under s. 437(8).

Or commit for trial—A commitment is not invalid merely because the committing Magistrate himself had held an identification parade before the commencement of proceedings in his court and is himself an important witness at the trial for prosecution. The position of a committing Magistrate is wholly different in this respect from that of a Magistrate trying a case(9). An opposite view was taken by the Chief Court of Lower Burma in a case in which the District Magistrate, without obtaining the permission of the court to which an appeal lay from his court, committed to Sessions the case in the investigation of

(1) *Bostan Khan v. Empress*, 39 P. R. 1884 Cr.; *Pandia Mahar v. Emperor*, 26 Cr. L. J. 1481=89 I. C. 1019.

(2) *Dasarath Rai v. Emperor*, 36 C. 869.

(3) *Mamoon v. Emperor*, 4 Lah. L. J. 452=67 I. C. 622=23 Cr. L. J. 446=1923 A. 193.

(4) *Emperor v. Nataraja Ayer*, (1904-06) 1 U. B. R. 37 Cr.

(5) *In re Mud Kaya*, 99 I. C. 85=28 Bom. L. R. 1302=7 A. I. Cr. R. 227=1927 B. 35=28 Cr. L. J. 53.

(6) *Emperor v. Banka Behari*, 7 C. W. N. 708.

(7) *Faiz Mohammad v. Emperor*, 9 N. L. R. 81; *Pandia Mahar v. Emperor*, 26 Cr. L. J. 1481=89 I. C. 1089.

(8) *Imperator v. Bhojraj*, 13 I. C. 222=5 S. L. R. 137=18 Cr. L. J. 80; *Emperor v. Mohan Lal*, 27 A. 25.

(9) *Emperor v. Nataraja Ayer*, (1904-06) 1 U. B. R. 37 Cr.

disqualified from trying the matter in his judicial capacity(1). The explanation covers only those cases in which the Magistrate, though a member, has not taken part in directing or sanctioning the prosecution(2). A Magistrate who in his capacity of President of the Town Committee merely authorizes but, does not direct a prosecution is disqualified from trying the case under this section. It is extremely undesirable however, that when other Magistrates are available a Magistrate should try a case in which he has in a different official capacity given formal sanction to the prosecution(3). But a Magistrate who himself orders the prosecution of an accused in his capacity of Talsildar and further orders the search of the accused's house, not on the complaint or report of Collector or Excise Officer but on that of an opium contractor, is incompetent to try the offence(4). But a Magistrate who takes a mere formal part in the prosecution cannot be said to direct the prosecution and is not therefore deprived of his jurisdiction in the case. Thus, a Magistrate who simply issued process as officer-in-charge of the Sudder Sub-Division is not precluded from hearing an appeal in the case(5). It is even held that a court which sanctions or directs a prosecution is not thereby rendered incompetent to try the offence or to hear an appeal against the conviction for it(6), though there is authority to the contrary also(7). A disqualifying interest may result from a purely official connection with the initiation of proceedings(8), as where the Magistrate as Prosecutor has initiated and directed the proceedings and taken pains to collect the evidence against the accused(9), or where a District Magistrate is not only actively concerned in the institution of the proceedings under Chapter VIII, but where those proceedings originate in, and with him in the discharge of his duties as executive head(10). It is one of unavoidable incidents of Executive and Magisterial duties being united in one and the same person, that the Magistrates from time to time become acquainted executively with the circumstances of cases that come before them judicially(11). Thus, where a Forest Officer asked the Deputy Commissioner to give a warning to the accused for having made a false report to that officer, but the Deputy Commissioner directed prosecution of the accused under s. 182, I. P. C., on the ground

(1) *Muhammad Buksh v. Crown*, 10 Lah. 718=30 P. L. R. 706=2 Cr. Law. 638=116 I. C. 881=80 Cr. L. J. 698=1929 Lah. 718; *Hem Raj v. Emperor*, 108 I. C. 271=9 Lah. L. J. 583=A. I. R. 1928 Lah. 114; *Puran Mall v. Empress*, 3 P. R. 1895 Cr.; *Fazal Hahi v. Municipal Committee of Murree*, 5 P. R. 1896 Cr.; *Emperor v. Bisheshar*, 32 A. 635.

(2) *Muhammad Buksh v. Crown*, 10 Lah. 718 (721, 724).

(3) *Crown v. ...*

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256=20 A. L. J. 911=1922 A. 528=24 Cr. L. J. 128

(4) *Mangal v. Emperor*, 14 I. C. 759=5 P. W. R. 1912 Cr.=64 P. L. R. 1912=13 Cr. L. J. 204.

(5) *Dasarath Rai v. Emperor*, 88 C. 860.

(6) *In re Pandia*, 76 I. C. 395=25 Cr. L. J. 171=1924 Nag. 23.

(7) *Emperor v. Htutalwe*, 2 L. B. R. 302.

(8) *Nistorini v. Ghose*, 23 C. 44.

(9) *Girish Chandra v. Empress*, 20 C. 857; *Sudhama v. Empress*, 23 C. 282.

(10) *Empress v. Mahomed Shah*, 1 S. L. R. 98=8 (r. L. J. 356).

(11) *Empress v. Basant Rai*, (1833) A. W. N. 181.

127; *Hira Lal v. Emperor*, 71 I. C.

Magistrate could not be considered to be "personally interested" in the case within the meaning of this section(1). But if the Judge has any legal interest in the decision of the question, he is disqualified, no matter how small the interest may be. The law in laying down the strict rule, has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. The object is to clear away every thing which might engender suspicion and distrust of the tribunal, and so promote the feeling of confidence in the administration of justice(2). It is essential not only that there should be no personal interest or prejudice on the part of a Judicial Officer which would disqualify him from trying a particular case but also that the mere appearance of prejudice should be avoided for the sake of protecting the administration of justice from the possibility of an imputation of partiality or unfairness(3).

Interest as head of the department.—The Magistrate of a District is not, on account of his being the head of the police of district, debarred from trying a person accused of a breach of orders under s. 29 of the Police Act, 1861(4). But a District Magistrate, who as Inspector of Factories ordered an inquiry to be made and in the same capacity sanctioned the prosecution, is disqualified by this section from trying the case(5). This section does not, however, debar an Excise Officer from trying a case under the Excise Act, 1896, in which he himself is responsible for the prosecution(6).

Interest as Collector and representative of the Court of Wards.—The District Magistrate is not merely as Collector and representative of the Court of Wards, disqualified under this section from trying a case in which the Court of Wards is interested when he has nothing to do with the initiation of the prosecution(7). The mere fact that the District Magistrate is, in his capacity as Collector, concerned in the management of an estate under the Court of Wards is no ground for the transfer of a case, brought against the tenants of the estate, to another District from the file of a Subordinate Magistrate before whom the case was pending(8).

Interest as shareholder in a company.—A Magistrate who is himself a shareholder in the company against whose auditors, a prosecution is started under s. 282, Companies Act, must be deemed to be personally interested within the meaning of this section, and is not qualified to try the case without the permission of the court to which appeal lies from his court(9). In *In re Rodrigues*(10), where a compounder in the employ of Treacher and Co. was convicted by the Presidency Magistrate of criminal breach of trust and it appeared that

(1) *Emperor v. Nanhe*, 27 A 33= (1904) A. W. N. 157.

(2) *Sergeant v. Dale*, 2 Q. B. D. 558

(3) *Nga Thaw v. Empress*, (1897—01) 1 U. B. R. 123.

(4) *Empress v. Narain Singh*, 21 A. 310

(5) *Lorinda Ram v. Crown*, 1 Lah. 35; *Dev Chand v. Emperor*, 22 Cr. L. J. 717=63 L. C. 677.

(6) *Emperor v. Janli Das*, (1908) A. W. N. 95=7 Cr. L. J. 393.

(7) *Amrit Majri v. Emperor*, 46 C. 854; cf. *Asghar Iteza v. Emperor*, 9 C. W. N. cccxvi.

(8) *Baktu Singh v. Koli Pershad*, 28 C. 297.

(9) *Shamdasani, In re*, 53 B 716=A I. R. 1929 B 404=31 Bom. L. R. 925.

(10) 20 B. 602

disqualified from trying the matter in his judicial capacity(1). The explanation covers only those cases in which the Magistrate, though a member, has not taken part in directing or sanctioning the prosecution(2). A Magistrate who in his capacity of President of the Town Committee merely authorizes but, does not direct a prosecution is disqualified from trying the case under this section. It is extremely undesirable however, that when other Magistrates are available a Magistrate should try a case in which he has in a different official capacity given formal sanction to the prosecution(3). But a Magistrate who himself orders the prosecution of an accused in his capacity of Tahsildar and further orders the search of the accused's house, not on the complaint or report of Collector or Excise Officer but on that of an opium contractor, is incompetent to try the offence(4). But a Magistrate who takes a mere formal part in the prosecution cannot be said to direct the prosecution and is not therefore deprived of his jurisdiction in the case. Thus, a Magistrate who simply issued process as officer-in-charge of the Sudder Sub-Division is not precluded from hearing an appeal in the case(5). It is even held that a court which sanctions or directs a prosecution is not thereby rendered incompetent to try the offence or to hear an appeal against the conviction for it(6), though there is authority to the contrary also(7). A disqualifying interest may result from a purely official connection with the initiation of proceedings(8), as where the Magistrate as Prosecutor has initiated and directed the proceedings and taken pains to collect the evidence against the accused(9), or where a District Magistrate is not only actively concerned in the institution of the proceedings under Chapter VIII, but where those proceedings originate in, and with him in the discharge of his duties as executive head(10). It is one of unavoidable incidents of Executive and Magisterial duties being united in one and the same person, that the Magistrates from time to time become acquainted executively with the circumstances of cases that come before them judicially(11). Thus, where a Forest Officer asked the Deputy Commissioner to give a warning to the accused for having made a false report to that officer, but the Deputy Commissioner directed prosecution of the accused under s. 182, I. P. C., on the ground

(1) *Muhammad Buksh v. Crown*, 10 Lah. 718=30 P. L. R. 706=2 Cr. Law. 638=116 I. C. 881=30 Cr. L. J. 698=1929 Lah. 718; *Hem Raj v. Emperor*, 108 I. C. 271=9 Lah. L. J. 683=A. I. R. 1928 Lah. 114; *Puran Mall v. Empress*, 3 P. R. 1895 Cr.; *Fazal Allah v. Municipal Committee of Murree*, 5 P. R. 1896 Cr.; *Emperor v. Bisheshar*, 32 A. 635.

(2) *Muhammad Buksh v. Crown*, 10 Lah. 718 (721, 724).

(3) *Gopi Chand v. Emperor*, 76 I. C. 865=1 Rang. 517=1923 Rang. 87=25 Cr. L. J. 273; *Empress v. Chenchu Reddy*, 24 M. 228; *Empress v. Nga Aung Gyi*, (1897-1901) 1 U. B. R. 127; *Hira Lal v. Emperor*, 71 I. C.

256=20 A. L. J. 911=1922 A. 528=24 Cr. L. J. 128.

(4) *Mangal v. Emperor*, 14 I. C. 758=5 P. W. R. 1912 Cr.=64 P. L. R. 1912=13 Cr. L. J. 291.

(5) *Dasarath Rai v. Emperor*, 30 C. 869.

(6) *In re Pandia*, 76 I. C. 395=25 Cr. L. J. 171=1924 Nag. 23.

(7) *Emperor v. Htutalee*, 2 L. B. R. 302.

(8) *Nistorini v. Ghose*, 29 C. 44.

(9) *Gurish Chandra v. Empress*, 20 C. 857; *Sudhama v. Empress*, 23 C. 282.

(10) *Empress v. Mahomed Shah*, 1 S. L. R. 98=8 Cr. L. J. 356.

(11) *Empress v. Basant Rai*, (1889) A. W. N. 181.

that he was satisfied that there was a clear case of a false report deliberately made, it was held that the Deputy Commissioner was disqualified from hearing the case as Magistrate(1). A Magistrate who merely lays before an Inspector of Police certain information and directs the said Inspector to make an inquiry on the basis of that information does not thereby lose his jurisdiction under this section(2).

Magistrate issuing warrant.—A Magistrate who issues a warrant under section 6 of the Burma Gambling Act is disqualified from himself trying the case(3). But the mere fact that the Magistrate had issued a search warrant does not disqualify him from trying the case, if he may possibly be impartial.

Meaning of this section(4). Where a Cantonment Magistrate convicted the accused for obstructing the Bailiff of the Cantonment Small Cause Court in the execution of a warrant issued by the Magistrate in his capacity of the Small Cause Court Judge, it was held that in issuing the warrant as a Small Cause Court Judge the Magistrate was concerned in the matter only in his public capacity and was, therefore, neither a party nor "personally interested" in the case within the meaning of this section(5).

Taking part in police investigation.—A Magistrate who takes more than a formal part in a police investigation should not try the case(6). A Magistrate taking an active part in forwarding the police inquiries and collecting evidence against the accused is disqualified from trying the accused(7). But there is nothing in the Code which disqualifies a Magistrate, who holds a preliminary inquiry under s. 202(8).

Explanation.—Under the explanation a Magistrate is not deemed to be a party as personally interested in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity. But the illustration makes it clear that the effect of the section is only partially to relax the rule that no man is to be a judge in his own cause. A Collector who was *qua* Collector is interested in the protection of the *fisc* may as Magistrate try an offence against the Excise Laws. He is not "by reason only" that he is a Collector. But if in his capacity as Collector he has directed the prosecution, he is disqualified from trying the case not by reason of the fact that he is the Collector, but by reason of the further fact that he has constituted himself the prosecutor(9). So

(1) *Fais Muhammad v. Emperor*, 9 N. L. R. 81=14 Cr. L. J. 885.

(2) *Babu Ram v. Emperor*, 22 I. C. 161=11 A. L. J. 852=15 Cr. L. J. 17.

(3) *Chin Pin v. Emperor*, 22 Cr. L. J. 451=61 I. C. 815=13 Bur. L. T. 154.

(4) *Muhammad Ali v. Emperor*, 24 A. I. J. 568=25 I. C. 319=7 L. R. A. Cr. 137=27 Cr. L. J. 783=A. I. R. 1926 A. 428=5 A. I. Cr. R. 647.

(5) *Muso v. Emperor*, 25 I. C. 977=8 S. L. R. 41=15 Cr. L. J. 649.

(6) *Nga Po v. Emperor*, 4 Bur. L. J. 65=26 Cr. L. J. 1817=49 I. C. 561.

(7) *Sudhama v. Empress*, 23 O. 323, *Girish Chander v. Empress*, 20 O. 867.

(8) *Ananda Chunder v. Dasu Mudli*, 24 O. 167, *Ct. Fazal Ilahi v. Municipal Committee of Murree*, 5 P. R. 1896 Cr.

(9) *Imperator v. Bhojraj*, 18 Cr. L. J. 80 (37, 81)=13 I. C. 212=5 S. L. R. 137; See also *Inayat Hussain v. Empress*, (1699) A. W. N. 74; *Gundoo Chikka v. Emperor*, 23 Bom. L. R. 842=22 Cr. L. J. 603=62 I. C. 875; *Mohandas v. Emperor*, 20 S. L. R. 171=27 Cr. L. J. 1333 (1334).

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(3) *Chand v. Emperor*, 22 I. C. 161=11 A. L. J. 852=15 Cr. L. J. 17.

(4) *Chand v. Emperor*, 22 I. C. 161=11 A. L. J. 852=15 Cr. L. J. 17.

(5) *Muso v. Emperor*, 25 I. C. 977=8 S. L. R. 41=15 Cr. L. J. 649.

(6) *Nga Po v. Emperor*, 4 Bur. L. J. 65=26 Cr. L. J. 1817=69 I. C. 861.

(7) *Sudhama v. Empress*, 23 O. 328; *Girish Chander v. Empress*, 20 C. 867.

(8) *Ananda Chunder v. Basu Mudli*, 24 O. 167; *Ct. Fazal Hahi v. Municipal Committee of Murree*, 5 P. R. 1896 Cr.

(9) *Imperator v. Bhojraj*, 13 Cr. L. J. 80 (37, 81)=13 I. C. 222=5 S. L. R. 187; See also *Inayat Hussain v. Empress*, (1899) A. W. N. 74; *Gundoo Chikla v. Emperor*, 23 Bom. L. R. 842=22 Cr. L. J. 603=62 I. C. 875; *Molandas v. Emperor*, 20 S. L. R. 171=27 Cr. L. J. 1533 (1534).

from trying a case based on a private complaint and which has not been filed under his direction and sanction, merely and solely on the ground that the validity of certain orders passed by him in his capacity as an Executive or Revenue Officer is directly put in issue and is likely to be challenged before him and that the innocence or guilt of the accused considerably depends on the effect of such orders(1).

Local inspection.—A Magistrate does not make himself a witness in the case by incorporating into it the results of his inspection of a spot where something connected with the commission of the crime is alleged to have happened. Having visited the spot expressly for the purpose of the trial, he is fully justified in noting what he sees and in drawing reasonable inferences therefrom(2). The contrary view taken in *Empress v. Manikam*(3) is no longer tenable(4). A Magistrate may hold a local investigation in order to enable him to understand the evidence that is laid before him, and for no other purpose, e.g., the purpose of testing the credibility of the witnesses examined on either side(5). A personal inspection by a Magistrate of the locality to test the correctness of the evidence and plans, which may have been filed in a case which he is trying does not disqualify him from hearing and deciding it(5). It is undesirable, however, that a Magistrate, who by local investigation while on tour, having himself discovered the existence of crime and collected or ascertained the evidence in support of it, thereafter directs, recommends or invites the institution of judicial proceedings against it, should try the supposed criminal(7). It is not competent for a trial Magistrate when he goes to inspect any locality, to create, even *bona fide*, evidence and introduce it into the case for the purpose of his decision. Local inspection is permissible only for appreciating the evidence adduced into the case and not to create evidence(8). When a Magistrate goes to view a place for the purpose of understanding the evidence, he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other(9). Where the Magistrate on receipt of the complaint visited the spot and made a court inquiry extending over several days during which he collected various informations connected with the facts of the case, regarding which he had afterwards to come to judicial determination, it was held that it would be impossible to say that his mind would not be influenced on the trial, and that he should not therefore try the case(10). In another case where a Magistrate visited the scene of occurrence of the alleged offence and not merely noted the various features thereon of importance to a proper decision of the case, both parties being present on the occasion, but obtained information outside

(1) *Mohandas v. Emperor*, 20 S. L. R. 171=27 Cr. L. J. 1333=98 I. C. 405

(2) *Ahmad Yar v. Emperor*, 5 I. C. 602=1 P. W. R. 1909 Cr=11 Cr. L. J.

(3) *Empress v. Manikam*, 11 Cr. L. J. 1111=11 I. C. 1111

19 M. 203.

(3) 19 M. 203

(4) *Vide re Davaraja*, 2 Weir. 728.

(5) *Babbar v. Emperor*, 5 I. C. 365

=11 Cr. L. J. 121=37 C. 340 F. B.

(6) *Crown v. Harsa Singh*, 13 P. R. 1901 Cr.

(7) *Bhop Singh v. Marmoti*, 14 I. C. 428=8 N. L. R. 1=13 Cr. L. J. 236

(8) *Haldhar v. Emperor*, 2 Cr. Law. 245=1929 Pat. 160=116 I. C. 767=10 Pat. L. T. 95=30 Cr. L. J. 652

(9) *Empress v. Lalji*, 19 A. 301.

(10) *Hari Kishore v. Empress*, 21 C. 920.

for offences against the health and comfort of the town, is disqualified from trying municipal offences, in his capacity as Magistrate(1). But in one case it has been held that the District Magistrate is not disqualified from hearing the appeal merely because he happens to be the Chairman of the Municipal Board(2).

Concerned therein in a public capacity.—It is manifestly desirable that, when it could be avoided without inconvenience, the trial of an offence should not be had before a Judge or Magistrate who, in another capacity has had to do with the institution of the prosecution and it is the general practice to make arrangements accordingly(3). A Magistrate is disqualified from dealing with any case, in the police investigation of which he has taken more than a formal part, and, unless he obtains the permission of the appellate court, he is disqualified from trying a case or committing it for trial(4). A Magistrate taking an active part in forwarding the police inquiries and collecting evidence against the accused is disqualified from trying the accused(5). It cannot, however, be said that a Judge whose duty it is to see the law obeyed is personally interested within the meaning of this section merely by reason of that duty(6). Therefore a Magistrate in charge of the excise and opium administration of a district is not "personally interested" in the observance of the provisions of Act No. 1 of 1878. He is therefore not precluded from exercising jurisdiction in respect of offences against the above mentioned Act(7). A Magistrate is not disqualified under this section from trying a case, merely because of the fact that, in the departmental inquiry in the case, he forwarded the papers to the Collector with his opinion that there was apparently sufficient evidence to justify criminal prosecution(8). The fact that a subordinate Magistrate expressed his opinion in submitting a report, in a case referred to him for local investigation under s. 202, Cr. P. C., is no bar to his holding the trial on an order by the District Magistrate making over the case to him for that purpose(9). A Magistrate is not debarred from trying a case because he has heard a confessional statement made by the accused(10) or summoned the accused to answer a charge(11) or has ordered an inquiry under s. 476(12). A Magistrate is not disqualified

(1) *Erugadu v. Empress*, 15 M. 83 (88); *Nistarini v. Ghose*, 23 C. 44.

(2) *Empress v. Inayat Hussain*, 1899 A. W. N. 74.

(3) *Empress v. Nga Aung Gyi*, (1897) 1 U. B. R. 127; *Gopi Chand v. Emperor*, 76 I. C. 365=1 Rang. 17; *Aloo v. Empress*, 19 B. 605; *Mangal v. Emperor*, 13 Cr. L. J. 291; But see *Janki Das v. Emperor*, 5 A. L. J. 357; *Babu Ram v. Emperor*, 11 A. L. J. 852.

(4) *Emperor v. Maung Lal*, 2 L. B. R. 209; *Kharak Chand v. Tarak*, 10 C.

peror, 23 Cr. L. J. 446; *Hira Lal v. Emperor*, 24 Cr. L. J. 123.

(5) *Sudhama v. Empress*, 23 C. 323 (334); *Girish Chunder v. Empress*, 20 C. 857.

(6) *In re Ganeshi*, 15 A. 122=(1893) A. W. N. 79; *Janki Das v. Emperor*, 5 A. L. J. 357.

(7) *Ibid.*
(8) *Emperor v. Rarji*, 5 Bom. L. R. 542.

(9) *Anand Chunder v. Basu Mudh*, 24 C. 167; *Rani Mudhab v. Rataraj*, 4 C. W. N. 604.

(10) *Empress v. Fattah Chand*, 24 C. 499=1 C. W. N. 435.

(11) *Dasarath Rai v. Emperor*, 26 C. 869.

(12) *Empress v. Sarat Chandra*, 16 C. 766; *Emperor v. Banka Behari*, 7 C. W. N. 703.

L. J. 66=14 Bur. L. R. 335; *Faiz v. Emperor*, 14 Cr. L. J. 385; *Lorrinda v. Croton*, 1 Lah. 35; *Mamoon v. Em-*

under this section be prohibited from practising in that court or in any court within the jurisdiction of that court if he continues to practice therein(1). But there is no law or usage which can prevent a retired Judge ('permanent' or otherwise) from resuming practice after his retirement from the bench at the bar of the court in which he was previously a Judge(2).

558. The Local Government may determine what, for the purposes of this Code, shall be deemed to be the language of each court within the territories administered by such Government, other than the High Courts established by Royal Charter.

559. (1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office.

(2) When there is any doubt as to who is the successor-in-office of any Magistrate, the Chief Presidency Magistrate in a presidency town, and the District Magistrate outside such towns, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Magistrate.

(3) When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall for the purposes of this Code or of any proceedings or order thereunder be deemed to be the successor-in-office of such Additional or Assistant Sessions Judge.

This section has been substituted for the old one which ran thus :—

" 559. All powers conferred by this Code on the Governor-General in Council, or on the Local Government, may be exercised from time to time as occasion requires."

As regards this the Select Committee reported that the retention of this section was accidental, its provisions being covered by those of s. 14 of the General Clauses Act, 1897. The old section has therefore been omitted and this section dealing with successors in office of Judges and Magistrates has been substituted(3).

(1) *Emperor v. Nga Tha Shwin*,
76 I. C. 1031=4 U. B. R. (1922) 127=
1923 R. 119=25 Cr. L. J. 311,

(2) 8 C. W. N. col (1st column).
(3) Statement of Objects and Reasons
(1914).

the scope of such inspection as regards the presence of the accused and based his judgment thereon, it was held that the Magistrate has thus made himself a witness, and could not try the case(1). The fact that a Magistrate may have inspected a spot which is considered to be insani- tary does not prevent him from trying the offence of the fact sought to be established against the accused, but when the Magistrate takes cognizance of a case upon his own knowledge of the offence, he is under section 191 bound to inform the accused that he is entitled to have the case tried by another court, and he can in no case convict the accused merely on his own personal knowledge(2). An immediate report of what is seen should be placed on the record and laid open to the scrutiny of the parties(3).

Illustration.—The illustration prohibits a Magistrate from trying a case, which he himself institutes or gives order for the institution thereof. A District Magistrate who as Inspector of Factories orders an inquiry to be made and in the same capacity sanctions the prosecution, is disqualified by this section from trying the case(4). Similarly in *Mangal v. Emperor*(5), it was held that a trial of an offence under s. 48 of the Indian Excise Act was liable to be set aside under this section where the Magistrate himself in the capacity of Tahsildar had ordered to prosecute and search the house of the accused on the report of an opium contractor who was neither a Collector nor an Excise Officer. The illustration cannot be read as merely meaning that an officer may not try as Magistrate a complaint which he institutes as Collector, its evident intention is to debar him from the exercise of judicial function when he is himself the *fons et origo* of the prosecution(6). In *Queen-Empress v. Chanchi Reddi*(7), a distinction was drawn between a case where a Magistrate directed the prosecution and where he simply authorised the prosecution. It was held that section 556 did not cover the case of a Magistrate who merely authorised the prosecution and that he was not thereby disqualified from trying the case.

557. No pleader who practises in the court of any Magistrate in a presidency town or district shall sit as a Magistrate in such court or in any court within the jurisdiction of such court

Practising pleader
not to sit as Magis-
trate in certain
courts

Appointment of pleader as Magistrate: Prohibition to practice.—The appointment of a pleader to act as a Presidency Magistrate is not forbidden by any provision of the Code. The only thing required of him is to give up practice on appointment(8). But a pleader, who has been appointed a Magistrate in any court, cannot

(1) *Satri Dulali v. Empress*, 3 C. W. N. 607.

(4) *Lorinda v. Crown*, 1 Lah. 35-1 Lah. I. J. 95.

(5) 5 P. W. R. 1912 Cr.-14 I. C. 758.

(6) *Emperor v. Muhammad Shah* 8 Cr. L. J. 359 (356)-1 S. L. R. 98.

(7) 24 M. 238

(8) *In re Jicanji Adamji*, 23 B. 490,

This section has been added to the Code by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923. The reason for enacting the section is thus stated in the Statement of Objects and Reasons (1914): "By this section it is proposed to give statutory recognition to the inherent powers of the High Court—a principle which is already well-recognized."

Scope.—It is an established principle that courts must possess inherent powers, apart from the express provisions of the law which are necessary to their existence and the proper discharge of the duties imposed upon them by law(1). This doctrine finds expression in this section. It does not confer any new powers on the High Court, but merely recognises and presumes the inherent powers previously possessed by it(2). The section embraces three classes of orders which may be necessary, viz., (i) to give effect to any order passed under the Code; (ii) prevent abuse of the process of any Court; and (iii) to secure the ends of justice; but that the High Court does not possess an unrestricted and undefined power to make any order which it might please was in the interests of justice. The special jurisdiction recognised by this section can be invoked only in exceptional cases for which no express provision has been made by the Code, and to redress only such grievance as calls for an immediate relief(3).

Inherent power of High Court to alter or review judgment in criminal cases.—It has been held by the Lahore High Court, overruling an earlier case(4), that the High Court has no power to alter or review its own judgment in a criminal case, once it has pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits, or to correct a clerical error(5). On the other hand, it has been held by the Calcutta High Court that a Criminal Bench of the High Court, when it has signed its judgment, has no power to alter or review it, even if made without jurisdiction, except to correct a clerical error. According to that court the only remedy, in such circumstances, is to move the Local Government to exercise the Royal prerogative, where the accused has been prejudiced; otherwise there is no remedy(6). The Oudh Chief Court has held, following *Mathra Das*

(1) *Crown v. Sukh Dev*, 11 Lah. 539 (540), following courts and their jurisdiction by J. D. Works, section 27, page 170.

(2) *Crown v. Sukh Dev*, 11 Lah. 539 (540)—123 I. C. 280—31 P. L. R. 482—A. I. R. 1930 Lah. 465; *Raju v. Crown*, 10 Lah. 1; *Marudayya v. Shunmugasundara*, 91 I. C. 702—49 M. L. J. 593—1925 M. W. N. 772—23 L. W. 723—27 Cr. L. J. 126—A. I. R. 1926 M. 139; *Dahu v. Emperor*, 61 C. 155—A. I. R. 1933 C. 870—145 I. C. 937—38 C. W. N. 25.

(3) *Crown v. Sukh Dev*, 11 Lah. 539 (540); *Raju v. Crown*, 10 Lah. 1.

This section does not apply where there has been no miscarriage of justice: *Hans Raj v. Emperor*, A. I. R. 1934 Lah. 987—86 P. L. R. 262.

(4) *Mathra Das v. Crown*, 9 Lah. L. J. 42—89 I. C. 1039—A. I. R. 1927 Lah. 139—28 Cr. L. J. 239.

(5) *Raju v. Crown*, 10 Lah. 1—30 P. L. R. 247—A. I. R. 1928 Lah. 462—10 A. I. Cr. R. 494—110 I. C. 221; cf. *Nazar Muhammad v. Hara Singh*, 26 P. L. R. 616—5 A. I. Cr. R. 351.

(6) *Dahu v. Emperor*, 61 C. 155—A. I. R. 1933 C. 870—145 I. C. 937—38 C. W. N. 25—34 Cr. L. J. 1100.

Powers of Judges and Magistrates being exercised by their successors-in-office.—Under this section, subject to the other provisions of the Code, the powers of a Magistrate may be exercised by his successor-in-office and this provision is applicable also to proceedings under s. 476 of the Code(1).

Sub-section (2).—This section in its sub section (2) speaks of what is to be done when there is any doubt as to who is the successor-in-office of a Magistrate and directs that such doubt should be determined by order in writing of the District Magistrate(2) and by the Chief Presidency Magistrate in a presidency town

560. A public servant having any duty to perform in connection with the sale of any property under the Code shall not purchase or bid for the property.

Officers concerned in sales not to purchase or bid for property.

561. (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

Special provisions with respect to offence of rape by a husband.

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or

(b) commit the man for trial for the offence.

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a Police Officer, with respect to such an offence as is referred to in sub-section (1), no Police Officer of a rank below that of Police Inspector shall be employed either to make, or to take part in, the investigation.

Investigation by inferior Police Officer.—Where an offence to which the provisions of s. 561 (a) apply has been taken cognizance of by a District Magistrate, the fact that it has been investigated by a Police Officer below the rank of an Inspector is not a material irregularity.

Having or due rent power of High Court.

High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

(1) *Behram v. Emperor*, 95 I. O. 312
—7 Lah. 109—1926 Lah 305—27 Cr. L.
J. 776.

(2) *Ibid* at p. 312 col. 2.
(3) *Mehri v. Empress*, (1895) A. W.
N. 9

rehearing of an appeal presented by a convict under section 419 which was dismissed by a Judge of such court without the appellant or his pleader having had a reasonable opportunity of being heard in accordance with the provisions of the proviso to section 421 (1)(1). But in one case it has been held otherwise(2). The High Court is not powerless to set right an incorrect order of the Sessions Judge to which its attention is drawn even though it has dismissed the appeal as against that order(3).

Power to quash proceedings.—The High Court has jurisdiction to pass an order to set aside proceedings in a subordinate court if the proceedings constitute an abuse of the process of the court(4).

Application for restoration of attached property.—The court will not pass any orders under this section which would conflict with any of the provisions of the Code. An application made to the court under section 89 of the Code will not be entertained if it is made beyond the period prescribed in the section(5).

Time barred appeal.—An appellate court has no power to entertain a time-barred criminal appeal under the inherent power given by this section(6).

Inherent power of subordinate courts.—While section 151 of the Civil Procedure Code recognises the existence in civil cases of inherent jurisdiction in *all* the civil courts, superior as well as inferior; this section expressly confines its operation to the High Court(7).

Other remedy open.—The use of extra-ordinary powers under this section ought to be reserved as far as possible for extra-ordinary cases. They are not usually invoked when there is another remedy available(8).

Power of High Court to excuse personal attendance.—A High Court can, under its inherent powers, as declared by this section, pass an order excusing the personal attendance of the accused and permitting him to represent himself in court by a pleader(9).

High Court's power to order restitution of property.—The High Court has jurisdiction on setting aside an illegal order passed by a

(1) *Mahammad Sadig v. Crown*, 7 Lah. L. J. 108=88 I. O. 593=A. I. R. (1925) Lah. 355=26 Cr. L. J. 1169.

(2) *Nazar Muhammad v. Hara Singh*, 26 P. L. R. 616=91 I. C. 55=2 Lah. Cas. 103=27 Cr. L. J. 23=1926 L. 196.

(3) *Emperor v. Rash Behari*, A. I. R. 1934 Pat. 551=15 Pat. L. T. 475=152 I. O. 291=36 Cr. L. J. 100.

(4) *S. C. Mitra v. Kali Charan*, 3 Luck. 287=106 I. C. 694=1 Luck. Cas. 653=A. I. R. 1928 O. 104; *Sheo Saran v. Jitendra Nath*, A. I. R. 1928 O. 292=5 O. W. N. 357=10 A. J. Cr. R. 445;

(5) *In re Gurunath*, 26 Bom. L. R. 719=82 I. O. 365=1924 B. 485=25 Cr. L. J. 1293; See *Deva Singh v. Fazal Dad*, 111 I. C. 508=A. I. R. 1928 1 ab. 418.

(6) *Mahadya v. Emperor*, 122 I. C. 257=31 Cr. L. J. 381=A. I. R. 1931 Nag. 101=1931 Cr. C. 453.

(7) *Crown v. Sukh Dev*, 11 Lah. 539 (540); *Assistant Government Advocate v. Upendra Nath*, 11 Pat. L. T. 892.

(8) *In re Lloyds Bank*, A. I. R. 1934 B. 74=86 Bom. L. R. 88=58 B. 152=149 I. C. 1005=35 Cr. L. J. 1028.

(9) *Sarji v. Bhimi*, 121 I. C. 651=26 N. L. R. 50=A. I. R. 1930 Nag. 61=3 Cr. Law. Mag. 14=31 Cr. L. J. 284.

v. *Crown*(1), that this section is in no way limited or governed by s. 369 and the High Court has power to reconsider the question of sentence when the ends of justice require it(2). A contrary view has, however, been taken by the Nagpur Court in *Gauṣal v. Emperor*(3). According to that court where the appellate court or the court exercising revisional powers has considered the case in all its aspects including that of the sentence and has passed a judgment or order, that judgment or order must, be final under s. 369, and the provisions of this section cannot be invoked to allow the court to reconsider the question of sentence. A similar opinion is expressed in a recent Allahabad case(4).

Expunging from the judgment objectionable remarks.—Under the old Code there was some conflict of opinion on the question of expunction. The Burma Chief Court had in two cases(5) expressed the view that such jurisdiction existed. In *Emperor v. Lachhu*(6) Lindsay, J. C. sitting in the Oudh Judicial Commissioner's Court distinctly held that he had such jurisdiction and ordered certain remarks in the judgments of the courts below against a counsel who had appeared in the case to be expunged from the record. On the other hand, Gokul Prasad and Stuart, JJ., in the case of *Emperor v. Dunn*(7), held that the High Court had power to make an amendment of an effective order of the court below, and not that of expunging passages which do not commend themselves to it. As regards this the Joint Committee reported thus. "We understand that a High Court has recently held [44 A. 401] that it had no power to direct the *expunging of objectionable matter from a record*. We think it desirable that it should be made clear that this clause is intended to meet such a case"(8). All the courts are now agreed that the High Court has power to expunge passages from judgment delivered by itself or by subordinate courts and its power has been put beyond controversy by the enactment of this section(9). But the power to expunge a portion of a judgment delivered by a competent court is intended for cases of exceptional circumstances and should be sparingly exercised(10).

(1) 9 Lah. L. J. 42=99 I. C. 1039= A. I. R. 1927 I. 189.

193=7 A. I. Cr. R. 35; *Emperor v. Ram Lal*, 29 P. L. R. 461; *Gunwant v. Govind*, 107 I. C. 912=10 A. I. Cr. R.

(4) 1000 A. 300.

(5) *Emperor v. Thomas Pellako*, 14 I. C. 643; *Ma Kya v. Kin Lat Gyi*, 11 I. C. 1000.

(6) 24 I. C. 156.

(7) 44 A. 401.

(8) Report of the Joint Committee, 1922.

(9) *In re Daly*, 9 Lab. 269=A. I. R. 1928 Lab. 740=29 P. L. R. 461=109 I. C. 812=29 Cr. L. J. 620; *Panchanan v. Upendra Nath*, 49 A. 254=98 I. C. 719=27 Cr. L. J. 1407=1. R. 8 All. 5 (r.=25 A. L. J. 100=A. I. R. 1927 A.

1000 A. 300.

(10) *Mohammad Qasam v. Anwar Khan*, 93 I. C. 974=27 Cr. L. J. 510=A. I. R. 1926 Lab. 382; *Baddu Khan v. Emperor*, A. I. R. 1928 A. 182=9 L. R. A. Cr. 3.

second class not especially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-Divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

(1-A) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating, or any other offence under the Indian Penal Code, punishable with not more than two years' imprisonment, and no previous conviction is proved against him, the court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(2) An order under this section may be made by any appellate court or by the High Court when exercising its power of revision.

(3) When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law :

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the court by which the offender was convicted.

(4) The provisions of sections 122, 126-A, and 406-A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

Amendments.—The Amending Act of 1923 has remodelled this section. The following changes have been introduced in the section :
“ First, this section extends the list of offences on conviction for which a person may be released upon probation ; *secondly*, it is made clear that section 562 does not apply merely to the case of youthful offenders but applies to a wider class of persons ; *thirdly*, the word ‘trivial’ has been omitted ; *fourthly*, the period for which an offender may be released

Magistrate for delivery of property under s. 144 of the Code to direct that property be re-delivered to the person who was originally in possession of it(1).

Revision.—The High Court has ample jurisdiction to interfere in revision at any stage of the case, provided the case be a suitable one for interference. If a charge has been framed by a Magistrate when no charge should have been framed the High Court can interfere under this section(2). Proceedings under s. 176 of the Code are judicial proceedings. The High Court can, therefore, exercise its jurisdiction over such proceedings either under ss. 435 and 439 or under this section(3). An order passed by a District Magistrate or Chief Presidency Magistrate, under s. 7 of the Indian Extradition Act, 1903, is a judicial order and not an executive act. Such an order can be revised by the High Court either under s. 439 or this section, or interfered with under s. 491 of the Code(4).

FIRST OFFENDERS.

562. (1) When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation

Power of court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment

for life, and no previous conviction is proved against the offender, if it appears to the court before which he is convicted, regard being had to the age, character or antecedents of the offender * * * and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the

(1) *Hafiz-ud-Din v. Laborde*, 50 A. 414=105 I. C. 815=L. R. 8 A. 149 Cr.=8 A. I. Cr. R. 362=A. I. R. 1928 A. 14.

(2) *Gokul Pershad v. Devi Pershad*, 56 I. C. 294=23 A. I. J. 21=L. R. C. A. 60 Cr.=26 Cr. L. J. 748=A. I. R. 1925 A. 311.

(3) *In re Larminarayan*, 30 Bom.

L. R. 1050=1928 B. 890=112 I. C. 567.

(4) *In re Bai Aisha*, 31 Bom. L. R. 62=30 Cr. L. J. 772=53 B. 149=117 I. C. 321=A. I. R. 1929 Bom. 81=2 Cr. L. J. 317; See *Pratul Chandra v. Commandant*, 61 O. 197 and *Rameshwar v. Emperor*, 114 I. C. 192=1929 C. 367=32 C. W. N. 812.

committed is a hideous and reprehensible one, the mere youth of the offender does not entitle him to the benefit of this section(1). Under this section, the first offender, with a past good character and antecedents, need not necessarily be a youth : such an offender may be advanced in age. The first essential is that the accused must be first offender and if he is one, the extenuating considerations which entitle him to the indulgence are his youth, character and antecedents(2).

Accused when not entitled to the benefit of this section.—This section has not been enacted with the intention of letting off without imprisonment every juvenile offender on his first conviction for an offence described in the sections, regardless of the circumstances in which the crime was committed. The section has no application to the case of a youth who grapples with another and after having been separated by others turns back in rage on his adversary, and inflicts a heavy lathi blow on him, killing him almost instantaneously, and later on speaks of his act in a spirit of truculent braggadocio threatening to kill those who attempt to arrest him(3). Where the accused, a Lambardar, is convicted for pocketing the water rate money received by him as an agent of the Government from the complainant, a landowner, the case is not a fit one to be dealt with under this section(4). It is not desirable to apply the provisions of this section to a person found guilty of deliberately committing perjury to screen an offender(5). This section is intended to apply to offenders (especially youthful offenders) who without being persons of depraved character, may, on occasions succumb to sudden temptation. The section cannot properly apply to an offence of manufacturing illicit liquor which implies a good deal of preparation and it can never be said that it is done in consequence of succumbing to sudden temptation(6). This section dealing with first offenders should not be applied to the cases of people discovered with cocaine and other dangerous drugs upon them in defiance of the Excise Act(7). The exercise of discretion given to Magistrates under this section needs a considerable sense of responsibility and the Magistrate should not allow themselves to be misled into the use of this section by misplaced leniency and sympathy. Where, therefore, cattle lifting is an offence which is very common in the locality and it cannot be repressed without condign punishment the fact that the accused has not been convicted before is not in itself a sufficient reason for inflicting no penalty upon him; and it cannot be doubted that the knowledge that a first offence will go unpunished is very apt to lead

(1) *Emperor v. Sardha Ram*, 112 I. C. 680=A. I. R. 1929 Lah. 198=29 Cr. L. J. 1096.

(2) *Empress v. Tuka Ram*, 2 Bom.

(3) *Crown v. Alia*, 10 Lah. 876=31 F. L. R. 115=A. I. R. 1930 Lah. 269

(4) *Emperor v. Sohan Singh*, 94 I. C. 130=27 Cr. L. J. 562=A. I. R. 1925

Lah. 350=6 A. I. Cr. R. 87.

(5) *Emperor v. Akbar*, 107 I. C. 107=9 A. I. Cr. R. 496=29 P. L. R. 210=1928 L. 290.

(6) *Crown v. Sujan Singh*, 19 P. R. 1916 Cr.=17 Cr. L. J. 810=35 I. C. 486=41 P. W. R. 1916 Cr.; *Crown v. Piara Singh*, 7 Lab. 82=A. I. R. 1926 Lab. 166=27 P. L. R. 221=27 Cr. L. J. 661=91 I. C. 129=6 A. I. Cr. R. 81.

(7) *Emperor v. Tummam*, 120 I. C. 264=3 Cr. Law. All. 22=A. I. R. 1930 A. 19=81 Cr. L. J. 92=Ind. Rul. (1930) A. 40.

under this section has been extended from one to three years; *fifthly*, power has been conferred on an appellate court or upon a High Court in the exercise of its revisional jurisdiction to make an order under section 562; and *finally*, the High Court has been empowered, either on appeal or in revision, to inflict a sentence of imprisonment in lieu of an order under this section"(1). Sub-section (1-A) has been added on the recommendation of the Jail Committee by the Cr. P. C. (Second Amendment Act), XXXVII of 1923.

Scope and application of section.—This section should be used freely in suitable cases, but should not be applied indiscriminately to the cases of all first offenders(2). In order to enable a court to exercise the power conferred by this section, it is not necessary that the offender should be young, that the offence should be trivial, and that there should be extenuating circumstances. The mention of these conditions and of the character and antecedents of the offender merely indicates generally considerations with regard to which the discretion of the court should be exercised in dealing with first offenders who are convicted of any of the offences specified in the section(3). The sole intention of this section is that an accused person who is convicted of a crime should be given a chance of reformation which he would lose by being incarcerated in prison. The powers conferred by this section should not be used for the purpose of showing favour to any particular class of persons and in the exercise of these powers a Magistrate should see that the crime that the accused person has committed does not indicate that he is rather a fortunate habitual than a true first offender(4). Before applying this section one must consider whether there is a good case for its application or not. If the offence is by no means a simple crime such as is committed by children out of mere thoughtlessness rather than criminality, but it shows a singular combination of design and ingratitude and general character of craft and deceit on the part of an adult it would surely call for a very severe punishment indeed and resort should not be had to the provisions of this section. These observations made in the case of a juvenile offender apply with greater force to a case of an adult. Thus this section should not be applied where the offence committed by an adult accused was not committed out of mere thoughtlessness but was well designed and carried into effect by means of perjury, forgery and impersonation. The fact that the family of the accused will become destitute is no ground for showing the leniency and sympathy under the section(5). The mere fact that the accused comes of a respectable family cannot be a justification for imposing a lighter sentence or for releasing him under this section(6). Where, the offence

(5) *Emperor v. Allahdino*, A. I. R. 1934 S. 93=1934 Cr. C. 821=150 I. C. 763=35 Cr. L. J. 1149=27 S. L. R. 463;

(3) *Emperor v. Da Han*, 2 L. B. R. 65; *Emperor v. Nautara Singh*, (1904=06) 1 U. B. R. 17 Cr.; *Empress v. Tukaram*, 2 Bom. L. R. 817.

(4) *Emperor v. Mathro*, 92 I. C. 693=27 Cr. L. J. 809=1926 S. 101=20 S. L. R. 3.

certain offences punishable under the Indian Penal Code(1). It had no application to a conviction under a special or a local Act, e. g., a conviction under Gambling Act(2), or a conviction under Stamp Act(3), or a conviction under section 61 of the Punjab Excise Act(4), or a conviction under the Indian Railways Act(5). This section, as amended in 1923, covers all offences whether they are or are not under the Penal Code. But in cases of offences like those under s. 61 Excise Act, the section should not be resorted to(6).

Punishable with more than 2 years' imprisonment.—The unamended section was not applicable where the accused was convicted of an offence which was punishable with more than two years' imprisonment(7). Thus, the court could not make an order under this section where the offence disclosed was that punishable under section 456(8); nor could the section be applied to the offence of retaining stolen property(9), or of lurking house-trespass(10), or of house-breaking(11), or of using as genuine a forged document(12), or of aggravated form of theft under s. 381(13), or cheating under s. 420(14). The present section extends the list of offences on conviction for which a person may be released upon probation. No order can be made under this section, where the accused has been convicted of any offence not falling under this section, though he has also been convicted in the same trial of an offence not falling under this section(15).

Accused above 21 years.—In case of an accused not under 21 years of age this section is only applicable when the accused is convicted of an offence punishable with imprisonment for not more than seven years(16). The offence of house breaking by night in order to commit theft, under cl. 2 of section 457 of the Penal Code, is punishable with imprisonment for a term of 14 years and, therefore, this section is not applicable to this offence in the case of an adult(17). The

(1) *Narayanamasami Naidu v. Emperor*, 29 M. 567; *Emperor v. John Scott*, 1 N. L. R. 139.

(2) *Emperor v. Shanker Dayal*, 9 O. L. J. 667=A. I. R. 1922 O 224-25 O C. 111=71 I. C. 62=24 Cr. L. J. 14.

(3) *Emperor v. Ishwar Dayal*, 99 I. C. 598=L. L. 8 A. 81 Cr.=28 Cr. L. J. 166=A. I. B. 1927 A. 238-25 A. L. J. 401.

(4) *Emperor v. Ramji*, 10 O. L. J. 111=71 I. C. 62=24 Cr. L. J. 14.

(5) *Emperor v. Ramji*, 10 O. L. J. 111=71 I. C. 62=24 Cr. L. J. 14.

(6) *Emperor v. Ramji*, 10 O. L. J. 111=71 I. C. 62=24 Cr. L. J. 14.

(7) *Emperor v. Babudin*, (1897-01) 1 U. B. R. 139; *Crown v. Tha Dunu*, 1 L. B. R. 158.

(8) *Emperor v. Babudin*, (1897-01) 1 U. B. R. 139.

(9) *Crown v. Tha Dunu*, 1 L. B. R.

158; *Emperor v. Atmaram*, 2 Bom. L. R. 343.

(10) *Emperor v. Maruti*, 15 C. P. L. R. 11.

(11) *In re Pullabhalha*, 18 Cr. L. J. 469=39 I. C. 309.

(12) *Emperor v. Ramjan Dadubhai*, 17 Bom. L. R. 921=16 Cr. L. J. 781=31 I. C. 381.

(13) *Emperor v. Bapu Rao*, 4 N. L. R. 18=7 Cr. L. J. 319.

(14) *Crown v. Rab Naicar*, 1 Lah. 612; *Crown v. Neki Ram*, 23 P. W. R. 16.

(15) *Re Krishna Aiyangar*, 2 Wel. 731.

(16) *Emperor v. Hoshiara*, 94 I. C. 368=27 Cr. L. J. 624.

(17) *Emperor v. Nga Po Wun*, 103 I. C. 829=6 Bur. I. J. 83=A. I. R. 1927 Rang. 254=29 Cr. L. J. 750.

the young into a course of crime(1). So, obviously burglary is a serious crime and a person convicted of that offence in the absence of proper reasons should not be released on probation of good conduct under this section(2). So also, it is a very serious offence to possess firearms without a license and a person convicted of that offence cannot be released under this section even though he belongs to a respectable family and is a law student(3). This section is not appropriate where a false affidavit has been deliberately sworn(4). This section cannot be applied in a case under s. 411, Penal Code(5). Where the accused made a criminal assault of a daring nature on an innocent woman with intent to outrage her modesty publicly and in broad day-light and the Magistrate took action under this section, it was held that the high-handed action of the accused in outraging the modesty of the innocent woman publicly merited a substantial sentence of imprisonment(6). This section is not applicable where a juvenile has shown criminality rather than thoughtlessness(7).

Accused held entitled to the benefit of this section.—The accused's being a widow 45 years old and a puppet in the hands of other accused is a circumstance that would entitle her to the benefit of this section(8). Similarly, where on a charge under the latter part of section 304 read with section 149, Indian Penal Code it is found that the part which the young boys took in the crime was not very much, an order under this section on the young boys is appropriate(9). Where an offence of criminal breach of trust by a public servant was committed several years ago and the amount involved was not large and the accused was a man of 55 years of age and was a first offender, and the Magistrate directed his release under this section, it was held that Magistrate could not be held to have acted without reason in applying this section(10). In a petty case arising out of a squabble between two girls of 16 and 14 in which the younger girl is convicted of slapping the elder's cheek and pulling her hair, this section might fittingly be applied(11). Where the offender is a person of good position in life, he should rather be dealt with under this section than sentenced to whipping(12).

Sub-section (1).—Offences punishable under special or local law.
—The old section applied only where a person was convicted of one of

(1) *Emperor v. Jhangli*, A. I. R. 1933 S. 44=1933 Cr. C. 190=27 S. L. R. 34=142 I. C. 544=84 Cr. L. J. 420.

(2) *Crown v. Sardara*, 33 P. L. R. 215=1932 Cr. C. 323; *Emperor v. Bhagat Singh*, A. I. B. 1933 Lab. 393; *In re Pullabholia*, 18 Cr. L. J. 469=39 I. C. 309.

(3) *Nirmal Chandra v. Emperor*, 31 O. W. N. 239 (242)=29 Cr. L. J. 241 (242)=100 I. C. 113=1927 C. 265.

(4) *Gajadhar v. Emperor*, A. I. R. 1934 Nag. 193 (2)=1934 Cr. C. 692.

A. I. R. 1934 Lah. 36=14 L. 800=1934 Cr. C. 69=35 P. L. R. 83=148 I. C. 96=35 Cr. L. J. 613.

(7) *Daryalal v. Emperor*, A. I. R. 1925 S. 75=25 Cr. L. J. 1224=82 I. C. 152=18 S. L. R. 61.

(8) *Supdt. & Remem. v. Kiran Bala*, 93 I. C. 73=43 O. L. J. 79=30 O. W. N. 373=27 Cr. L. J. 409=1926 C. 531.

(9) *Bhusan Chandra v. Kanai Lal*, 44 O. L. J. 208=28 Cr. L. J. 6=79 I. C. 38=A. I. R. 1927 Cal. 73.

(10) *Emperor v. Nur Hussain*, 121 I. C. 315=A. I. R. 1930 Lah. 92=1930 Cr. C. 108=31 P. L. R. 334=Ind. R. (1930) Lab. 323=31 Cr. L. J. 633.

(11) *Ma Kyee v. Emperor*, 12 Cr. L. J. 242=10 I. C. 772=4 Bur. L. T. 68.

(12) *Baghel Singh v. Crown*, 9 P. W. R. 1907 Cr.=6 Cr. L. J. 217.

(6) *Emperor v. Mohammad Khan*,

offence under section 409 of the Penal Code is beyond the purview of this section and a Magistrate, therefore, acts without jurisdiction in releasing a person convicted of that offence on probation of good conduct(1).

Accused under 21 years.—This section does not apply in the case of a person under 21 years of age who is convicted of an offence under s. 409 I. P. C. since it is one punishable with transportation for life or imprisonment of either description for a term which may extend to ten years(2). In this case a patel, a young man of 20 years, who had hardly two years' experience as patel and who committed a temporary misappropriation made an unqualified admission of his guilt and was convicted under s. 409 of the I. P. C. and bound over under this section. The Chief Court holding that this section was inapplicable sentenced him to simple imprisonment for a week in view of the extenuating circumstances of the case. The phrase "punishable with death or transportation for life" must be interpreted disjunctively and women convicted of an offence for which transportation for life is one of the punishments provided are ineligible for release on probation under this section. The words "death or transportation for life" must be read as referring to offences the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments awarded and not necessarily both(3). As the offence under s. 394 is punishable with transportation for life, a youth of 18 years convicted under ss. 394 and 451, Penal Code cannot be bound down under this section(4). As one of the alternative punishments for an offence under s. 307 Penal Code, is transportation for life, it is obvious

“an offence

an offence
punishable

with fine only does not come within the scope of the sub-section(6). A first offender is entitled to the benefit of this section, provided the other provisions of the section apply, even when without such provisions the Magistrate would be obliged to pass a sentence of imprisonment upon the offender(7).

Previous conviction.—This section is applicable to the case of an accused person against whom no previous conviction is proved,

(1) *Emperor v. Rahmat Khan*, 100 I. C. 225=28 Cr. L. J. 257.

(2) *In re Chikka Peddanna*, 7 Mys. L. J. 137.

(3) *Emperor v. Janki*, A. I. R. 1932 Nag. 190=1932 Cr. C. 666=28 N. L. R. 200=33 Cr. L. J. 844=140 I. C. 59; following *Emperor v. Nga San Htwa*, A. I. R. 1927 Rang. 205=104 I. C. 101=28 Cr. L. J. 778=5 Rang. 276 F. B. dissenting from *Tularam v. Emperor*, A. I. R. 1937 Nag. 53=97 I. C. 39=27 Cr. L. J. 1063 and *Muhammad Yusoof v. Emperor*, A. I. R. 1926 Rang. 51=93 I.

C. 65=27 Cr. L. J. 401=3 Rang. 539

(4) *Emperor v. Bakhsha*, A. I. R. 1934 Lah. 131=152 I. C. 233=36 P. L. R. 370

(5) *Emperor v. Bahawalji*, A. I. R. 1928 Lah. 920=110 I. C. 339.

(6) *Emperor v. Kasturi Shidrama*, 28 Bom. L. R. 1031=1926 B. 544=27 Cr. L. J. 1158=97 I. C. 742; *Emperor v. Amercanji*, 52 B. 250=29 Cr. L. J. 566.

(7) *Emperor v. Jinga Gamaji*, 27 Bom. L. R. 111=68 I. C. 70=A. I. R. (1925) B. 192=26 Cr. L. J. 634.

of the section, applies also to sub s. (1-A) which has been newly added to the section(1). This view is in accord with that taken by the Nagpur Court(2) but is opposed to that taken by the Allahabad Court(3).

Joint trial of young and aged offenders.—It was held that where two accused were jointly charged with theft before a second class Magistrate, and one of them was of tender age both of them could not be sent to a first class Magistrate under this section in order that the one of tender age be dealt with under it(4). The case of both accused may now be sent to the first class Magistrate.

Sub section (1-A).—This sub-section refers in express terms to the offences named therein and other offences under the Indian Penal Code punishable with not more than two years' imprisonment. The sub-section has no application to offences punishable by any other law in force(5). It cannot be applied to offences punishable under the City of Bombay Municipal Act and a Magistrate has, therefore, no jurisdiction to warn and discharge a person who has been found guilty of an offence under section 471 of the City of Bombay Municipal Act(6). It does not apply to offences under Special Acts, e.g., the Motor Vehicle Act, 1914(7). It has no application to offences committed under the Public Gambling Act, III of 1867(8). Nor does it apply to offences committed under the Criminal Tribes Regulation(9) or under the Stamp Act(10).

Offences to which applicable.—The words "theft", "dishonest misappropriation", and "cheating" as used in this section include only offences punishable under sections 379, 403 and 417 respectively of the Indian Penal Code which are denoted respectively thereby, that is, s. 379, protanto s. 380, s. 403 and s. 415. The terms cannot

(1) *Emperor v. Ranchhod*, 27 Bom. L. R. 1019=5 A. I. Cr. R. 81=A. I. R. 1925 B. 479=89 I. C. 1029=26 Cr. L. J. 1461.

(2) *Emperor v. Daulat Singh*, 11 N. L. J. 245=A. I. R. 1928 Nag 343.

(3) *Murlidhar v. Mahbub Khan*, 47 A. 353=26 Cr. L. J. 624=85 I. C. 848.

(4) *Emress v. Yessu*, 2 Bom. L. R. 112.

(5) *In re Venkata*, 7 Mys. L. J. 468; *In re Tarachand*, 7 Mys. L. J. 171; *In re Venkatamma*, 8 Mys. L. J. 330; *Merwanji v. Emperor*, 109 I. C. 502=30 Bom. L. R. 375=1 I. R. 1928 B. 138=10 A. I. Cr. R. 286; *Emperor v. Pandu Ramji*, 93 I. C. 992=28 Bom. L. R. 297=27 Cr. L. J. 528=1926 B. 230=6 A. I. Cr. R. 271; *Emperor v. Kodumal*, A. I. R. 1935 S. 90.

(6) *Merwanji v. Emperor*, 80 Bom. L. R. 375=109 I. C. 502=A. I. R. 1928 B. 152=52 B. 250=29 Cr. L. J. 566.

(7) *Emperor v. Pandu Ramji*, 93 I. C. 992=28 Bom. L. R. 297=27 Cr. L. J.

528=1926 B. 230.

(8) *Emperor v. Shankar Dayal*, 71 I. C. 62=25 O. C. 111=1922 O. 224=9 O. L. J. 667=24 Cr. L. J. 14.

(9) *In re Venkatamma*, 8 Mys. L. J. 330.

(10) *Emperor v. Iswar Dayal*, 25 A. L. J. 401=28 Cr. L. J. 166 (167)=93 I. C. 598=1927 A. 238.

(11) *Emperor v. Nga Pyi*, 3 L. B. R. 95=3 Cr. L. J. 21; *Emperor v. Bapu Rao*, 4 N. L. R. 18=7 Cr. L. J. 319; *Harnam Singh v. Crown*, 16 P. R. 1911 Cr.=155 P. L. R. 1911=10 I. C. 114=12 Cr. L. J. 213=155 P. L. R. 1911; *Emperor v. Neki Ram*, 8 Cr. L. J. 455=3 (1908) P. W. R. Cr. 62; *Emperor v. Ramjan*, 17 Bom. L. R. 921; *Emperor v. Rahmat Khan*, 7 A. I. Cr. R. 960; *Emperor v. Nga Po Wun*, 8 A. I. Cr. R. 568; *Sundaram Ayyar v. Emperor*, 41 M. 533; *Crown v. Rab Niwaz*, 59 I. C. 854=1 Lab. 612=22 Cr. L. J. 150; *Deva Kantha v. Emperor*, 56 I. C. 500=5 Fat. L. J. 267=21

peace and be of good behaviour(1).

Bond by minor.—It was held that the third proviso to section 118 that a bond for keeping the peace for good behaviour in respect of a minor should be executed only by his sureties, did not apply to bonds of first offenders released on probation under this section(2). This is no longer law in view of s. 514-B newly added to the Code.

Procedure if person ordered to give security is unable to do so.—There is no authority for the view that if an accused person is ordered to give security under this section and fails to do so, he should be detained in prison till the expiration of the period for which security is to be furnished. The proper course for the Magistrate is to ascertain before passing an order under this section, whether, the accused is likely to be able to give security immediately or within a reasonable time. If he fails to give security within a reasonable time the Magistrate should pass sentence(3). The order of imprisonment on failure to furnish a security cannot be added to the order of release on probation of good conduct. If on the application of the surety the security bond is cancelled, the convict should be given an opportunity to execute another bond with a fresh surety(4).

Deaf and dumb accused.—A deaf and dumb person was convicted of an attempt to commit suicide. He had attempted suicide apparently because his brother refused to partition the joint lands. He made certain signs to signify what took place but it did not appear how the questions put to him at the trial were communicated to him. It was held that the justice of the case would be met by affirming the conviction and directing that he be sentenced to one day's simple imprisonment; also that that was not advisable to proceed under this section as it did not appear that the accused would be capable of entering into a bond(5).

Proviso.—All second class Magistrates in the Punjab are duly empowered to exercise the powers conferred by this section by the Punjab Government Notification No. 431 of 1910(6). The contrary view taken in *Crown v. Jowali*(7) is untenable. As to the power of a Bench of Magistrates in Sind to make an order under this section, see *Emperor v. Noor Mahomed*(8).

Applicability of proviso to sub-s. (1-A).—It has been held by the High Court of Bombay that the proviso which stands in the middle

(1) *Empress v. Yessu*, 2 Bom. L. R. 112

(2) *Emperor v. Mi Pyu*, 4 L.B.R. 12, overruling *Emperor v. Nga Pan Tin*, 2 L. B. R. 137.

(3) *Emperor v. Tun Gaing*, 3 L. B. R. 2; *Nasu Meah v. Emperor*, 2 Rang. 360=84 I. C. 349=1925 Rang. 42=26 Cr. L. J. 285 (section 123 of this Code was originally only to sections 106 and

be awarded)

(4) *Jamsher v. Emperor*, A. I. R.

1934 Lah. 582=35 P.L. R. 368=153 I. C. 272

(5) *Emperor v. Khashaba Tatyai*, 81 I. C. 148=25 Bom. L. R. 43=1923 B. 194=25 Cr. L. J. 660

(6) *Crown v. Bukhshan*, 8 Lah. 28=100 I. C. 540=23 P. L. R. 285=1927 Lah. 101; *Emperor v. Hasham*, 109 I. C. 604=10 Lah. L. J. 153=29 P. L. R. 215=10 A. I. Cr. R. 230

(7) 5 Lah. 86=81 I. C. 948=1924 Lah. 454=25 Cr. L. J. 1124.

(8) 105 I. C. 433=28 Cr. L. J. 913=1923 S. I.

which held that though s. 562 read by itself would seem to confine the power to use the section to the court convicting the accused, yet reading it with s. 423 cl. (d) it is clear that an appellate court or a court of revision can also use the section(1). Where on an appeal from a conviction the appellate courts make an order under this section but the accused fails to furnish security as directed by the order, the original sentence passed on the accused is not revived. The effect of the order passed by the appellate court is to set aside the sentence passed on the accused by the trial court, and the case must be dealt with as if the accused had been released on probation of good conduct by the trial court itself, that is to say, the accused should be produced before the appellate court for the purpose of suitable punishment being awarded(2).

Sub-section (3).—An appeal lies under ss. 407 and 408 from an order passed under this section. The restrictions in ss. 413, 414 and 415 do not apply to such orders(3). An appeal will lie to the Sessions Judge from an order of a Magistrate under this section passed in a summary trial(4). Subject to the law of limitation, the convict is entitled to prefer his appeal even after expiration of the term of the bond(5). No appeal, however, lies to the High Court from an order passed by a Presidency Magistrate under this section(6).

Revisional power of High Court to substitute sentence of imprisonment.—Sub-section (3) of this section, as recently amended, empowers the High Court in the exercise of its powers of revision to set aside an order under this section(7). The decision in *Emperor v. Ghasite*(8) to the contrary is no longer law. But the High Court is not bound to interfere on its revisional side with an order under this section even if it is illegal(9). The High Court would not interfere in revision with an order of a Magistrate under sub-section (1-A) releasing accused person on admonition, unless, a strong case is made out on the merits(10). Where the Magistrate makes an order of release under this section in a case to which the provisions of this section are

(1) *Emperor v. Birch*, 21 A. 306; *Narayanawami v. Emperor*, 29 M. 567; *Narayani v. Govt. of Mysore*, 4 Mys L J. 192 Cr.

(2) *Badsha v. Emperor*, 86 I. C. 59=21 L. W. 40=A. I. R. (1925) M. 496=26 Cr. L. J. 683.

(3) *Bahadur v. Ismail*, 52 C. 463=85 I. C. 135=29 C. W. N. 151=41 C. L. J. 45=A. I. R. (1925) C. 929=26 Cr. L. J. 455; *Mi Shwe Nyun v. Emperor*, 1 Cr. L. J. 543; *Emperor v. Manohar Das*, 24 P. B. 1904 Cr.; *Hayata v. Emperor*, 18 Cr. L. J. 401; *Emperor v. Ghasita*, 37 A. 31, 33; *Ma Chit Su v. Emperor*, 5 L. B. R. 129.

(4) *Emperor v. Hira Lal*, 46 A. 828; *Moyandi v. Kuduban*, A. I. R. 1935 M. 157=82 I. C. 173=1924 A. 765=25 Cr. L. J. 1944; *Emperor v. Madhav Raghavendra*, 28 Bom. L. R. 671=96

I. C. 191=1926 B. 382=27 Cr. L. J. 873.

(5) *Hayata v. Crown*, 20 P. B. 1917 Cr.=18 Cr. L. J. 401=38 I. C. 961=18 P. W. R. 1917 Cr.

(6) *Birks v. Emperor*, 36 C. W. N. 459=A. I. R. 1932 C. 488=1932 Cr. C. 480=198 I. C. 27=33 Cr. L. J. 639.

(7) *Emperor v. Kesar*, 27 Cr. L. J. 303=92 I. C. 591=7 L. R. A. Cr. 28=A. I. R. 1926 A. 226=24 A. L. J. 223=5 A. I. Cr. R. 180; *Emperor v. Muhammad Khan*, A. I. R. 1934 Lah. 36(2).

(8) 37 A. 81=12 A. L. J. 1244=16 Cr. L. J. 43; see also *Crown v. Harnam Singh*, 16 P. B. 1916 Cr.=12 Cr. L. J. 219.

(9) *Emperor v. Hoshiara*, 6 A. I. Cr. R. 229.

(10) *Surendra Nath v. Dhirendra Nath*, 124 I. C. 76=A. I. R. 1929 C. 785

apply to dishonest misappropriation or cheating in all their forms(1). Where, therefore, a person is convicted of the offence of criminal breach of trust under s. 405 of the Penal Code, the court has no power under this section to release him after an admonition(2). But the Allahabad High Court has arrived at a contrary result. According to that court the words "dishonest misappropriation" in this section apply to the offence of criminal misappropriation in all its forms and are intended to include offences punishable under section 404 as well as under section 403 of the Indian Penal Code. Similarly, the word "cheating" in the section covers the offence of cheating in all its forms and is intended to include offences punishable under sections 418, 419 and 420 as well as under section 417 of the Code(3). In the Nagpur Court Hallifax, A. J. C., held the same view in *Emperor v. Jiyalal*(4).

Any other offences punishable with not more than two years' imprisonment.—As already stated this sub-section refers in express terms to the offences named in it and other offences under the Indian Penal Code punishable with not more than 2 years' imprisonment(5). When the offence is not one of those explicitly mentioned in the sub-section, the term of imprisonment which can be awarded is the test for determining whether this sub-section can be applied(6). The maximum sentence under section 324, I. P. C., is 3 years, but an attempt to commit that offence is only punishable with one and-a-half year. Hence a boy of 18 years who attempted to cause hurt with a dangerous weapon may be dealt with under this sub-section(7). The offence of retaining stolen property(8), or of criminal breach of trust(9), or of house breaking by night under section 457 I. P. C.(10) or of culpable homicide not amounting to murder under section 304 I. P. C.(11), is not one of the offences to which the provisions of this sub-section can be applied in the case of first offenders, sub-section (1-A) covers offences punishable only with fine(12).

Defamation.—Admonition is not intended to apply to offences of defamation. It is an extension of the principle that leniency should be shown to people of tender years and first offenders and is not applicable to men of responsible position who make defamatory statements and aggravate the offence by repeating them and attempting justification(13).

Sub section (2).—This sub-section confirms the following decisions

Cr. L. J. 468.

(1) *Emperor v. Ali Kutta*, 12 Rang 559=A I. R. 1931 Rang. 203=150 I. C. 1121=35 Cr. L. J. 1241.

(2) *Ibid*

(3) *Har Narayan v. Ramji Das*, 23 I. C. 743=12 A. L. J. 465=15 Cr. L. J. 375

(4) 24 Cr. L. J. 251=A. I. R. 1928 Nag. 159=71 I. C. 795

(5) *In re Venkata*, 7 Mys. L. J. 468.

(6) *Emperor v. Kra Pru Aung*, 3 L. B. R. 80

(7) *Ibid*

(8) *Crown v. Tha Duno*, 1 L. B. R. 159; *Emress v. Afmaram*, 2 Bom J. R. 343.

(9) *Emperor v. Ah Wun*, 7 Bar. L. R. 14; see also *Crown v. Ali Hla Yin*, 1 L. B. R. 142.

(10) *Emress v. Maruti*, 15 C. P. L. R. Cr. 11; *In re Pullabhotla*, 18 Cr. L. J. 469=89 I. C. 309; *Mayandi v. Kaduban*, A. I. R. 1935 M. 157.

(11) *Addala Yerrivadu v. Emperor*, 11 M. L. T. 404=14 I. C. 600=13 Cr. L. J. 248

(12) *Emperor v. Manchershaw*, A. I. R. 1935 B. 156=37 B. L. R. 105; *Cf. Emperor v. Kasturi*, 97 I. C. 742=27 Cr. L. J. 1153.

(13) *Babu Lal v. Tundilal*, 28 N. L. R. 106=1932 Cr. C. 519.

563 shall affect the provisions of section 31 of the Reformatory Schools Act, 1897.

The words "sub-section (1)" have been inserted by the Repealing and Amending Act, VII of 1924. This amendment makes it clear that section 564 (1) does not relate to the release of an offender under sub-section (1-A) of section 562(1).

Previously Convicted Offenders.

Order for notifying address of previously convicted offender.

565. (1) When any person having been convicted—

(a) by a court in British India of an offence punishable under section 215, section 489-A, section 489 B, section 489-C, or section 489-D, of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(b) By a court or tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor-General in Council or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or chapters of the Indian Penal Code with like imprisonment for a like term,

is again convicted of any offence punishable under any of those sections or chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate, or Magistrate of the first class, * * * such court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

applicable after taking into consideration all the relevant circumstances of the case, the High Court will not interfere with exercise of his discretion in revision, unless a strong case is made out justifying such interference(1). This section cannot properly be used in cases falling under section 457, Indian Penal Code, but where it has been wrongly applied by a Magistrate, it is open to the High Court on revision side to interfere or not as it thinks fit upon a consideration of all the circumstances(2). Although in a case of embezzlement usually a sentence of imprisonment should be passed, where the trying Magistrate has given the accused the benefit of this section, the High Court will not interfere with his order in revision especially after the lapse of a long time(3). But the High Court will in revision, interfere with unjust orders passed under this section, however legal or illegal they may be(4). The High Court has power on revision to quash the conviction of the accused who have been dealt with by an appellate court under this section even if the convicts have not moved the High Court to exercise that power(5).

563. (1) If the court which convicted the offender or a court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the court issuing the warrant, and such court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such court may, after hearing the case, pass sentence.

This section empowers a court having power to pass sentence to order the arrest of a first offender for breach of the conditions.

564. (1) The court, before directing the release of an offender under section 562, sub-section (1), shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in sections 562 and

(1) *Emperor v Kesho Ram*, 100 I. C. 127=28 Cr. L. J. 255=1917 Lab. 353, *Emperor v Daulat*, 1928 Nag 243=113 I. C. 911.

(2) *Adul v. Emperor*, 6 I. C. 639=19 P. W. R. 1910 Cr.=11 Cr. L. J. 389.

(3) *Emperor v Kharaiti Lal*, 1928 L. 926=107 I. C. 775=29 Cr. L. J. 291

=10 A. I. Cr. R. 27; *Ct. Emperor v. Shah Hiram*, A. I. R. 1935 Pesh. 48

(4) *Emperor v Daulat Singh*, 113 I. C. 911=1928 N. 345=30 Cr. L. J. 220.

(5) *Radha Kishan v. Emperor*, 15 I. C. 316=7 P. W. R. 1912 Cr.=67 P. L. R. 1912=13 Cr. L. J. 476.

Any offence punishable under Chap. XII or Chap. XVII.—Where either the previous or subsequent conviction of an accused person is under section 511, I. P. C., for an attempt to commit an offence punishable for a term of three years or upwards, under any of the sections specified in Chapter XII or Chapter XVII of the Indian Penal Code, the court trying the case has no power to proceed and pass an order against him under this section(1). The conviction for a trifling offence should not be made the occasion for a long period of police surveillance(2).

Transportation or imprisonment.—The order contemplated by the section can only be made at the time of passing sentence of transportation or imprisonment upon a convict. It cannot be made where a court, instead of passing that sentence, passes a sentence of whipping(3).

Absence from such residence.—Under the unamended section where all that was proved was that the accused who had been ordered to notify his residence and change of residence, was absent from his house for a single night without notifying his absence, it was held that such temporary absence did not amount to a change of residence and that the accused was not guilty of an offence under section 176, Indian Penal Code(4). Under the amended section absence from residence must also be notified.

Clause (b).—This clause overrides *Ghasia Teli v. Emperor*(5), which held that this section did not apply where the previous conviction had been in a Native State.

Sub section (2).—A Magistrate is not entitled to use an order which had been set aside, on whatever grounds, as proof that the accused is an old offender(6).

Sub-section (3).—Under the unamended section the appellate court, or a court of revision, could not pass an order under this section, unless the accused has been tried and convicted by a Magistrate empowered by the Local Government to make an order under this section(7). Under the amended section courts of appeal or revision have been empowered to pass orders under this section.

Sub section (5).—Under the unamended section it was held that a person refusing or neglecting to comply with any rule made under s. 565 (3) was punishable as if he had committed an offence under the first part of section 176 of the Penal Code(8). The failure to give such notice will henceforth be dealt with under the second part of section 176 I. P. C.

(1) *Harnam v. Emperor*, 17 P. R. 1907 Cr.=6 Cr. L. J. 378=2 P. W. R. Cr. 95.

(2) *Jowahir Singh v. Emperor*, 22 I. C 759=4 P. L. R. 1914=3 P. W. R. 1914=15 Cr. L. J. 183; See also *Labb Singh v. Crown*, 27 P. L. R. 267.

(3) *Emperor v. Tulji Ditya*, 12 Bom. L. R. 901=35 B. 137=8 I. C 623=11 Cr. L. J. 691.

(4) *Re Chengadu*, 40 M. 789=18 Cr. L. J. 698=39 I. C. 1006.

(5) 1 N. L. R. 137=2 Cr. L. J. 749.

(6) *Nga Po Than v. Emperor*, 3 Rang 156=A. I. R. 1925 Rang 277=89 I. C. 320=26 Cr. L. J. 1344.

(7) *Crown v. Dino*, 8 S. L. R. 340.

(8) *Emperor v. Bhola*, 1 N. L. R. 133=2 Cr. L. J. 745; *Emperor v. Hussain Beg*, 31 M. 548=18 M. L. J. 274.

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.

(4) An order under this section may also be made by an appellate court or by the High Court when exercising its powers of revision.

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code to have omitted to give a notice required for the purpose of preventing the commission of an offence.

(6) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.

Amendments explained.—The Amending Act of 1923 has remodelled this section. The following changes have been introduced:—*Firstly*, it extends the list of offences after a conviction for which a person may be required to notify his residence and subsequent changes

Secondly, on the analogy of section 25 of the Penal Code, it extends the provisions of this section to persons convicted of offences under the jurisdiction of the Local Government; *Thirdly*, all first class Magistrates, in place of those specially empowered, have been authorised to pass orders under this section; *Fourthly*, the rule making power has been extended to cover the provision of this section relating to the notification of residence, or change of residence, or absence from residence of released convicts; *Fifthly*, the punishment of a breach of the rules made under this section has been enhanced; and *lastly*, courts of appeal or revision have been empowered to pass orders under this section "(1).

Having been convicted.—Where there is no previous conviction, the accused shall not be asked to notify his residence(2). An order under this section to remain under police surveillance cannot be passed against a first offender(3).

Details of previous conviction.—An order under this section is not a punishment within the meaning of section 221 (7), and may, therefore, be passed without the details of the previous convictions on which it is based being mentioned in the charge(4).

(1) Statement of Objects and Reasons (1914)

(2) *Kotta Parambil v. Emperor*, 8 I. C. 800—(1910) 1 M. W. N. 567=11 Cr. L. J. 636.

(3) *Bakhshu v. Emperor*, A. I. R. 1931 Lah. 675 (1)=35 P. L. R. 615=153

I. O. 434=1933 Cr. C. 1001; *In re Huliga*, 7 Mys. L. J. 150.

(4) *Emperor v. Jhagroo*, 9 N. L. R. 88=20 I. C. 214=14 Cr. L. J. 390; See *Dhekli v. Emperor*, 23 Cr. L. J. 74=65 I. C. 425.

SCHEDULE II

TABULAR STATEMENT OF OFFENCES

EXPLANATORY NOTE.—The entries in the second and seventh columns of this schedule headed respectively "Offence" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

The third column of this schedule applies also to the police in the towns of Calcutta and Bombay.

CHAPTER V.—ABETMENT.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether not.	Whether a instance.			Punishment under the Indian Penal Code.	By what court tri- able.
09	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	According as the offence abetted is compoundable or not.	The same punishment as for the offence abetted.	The court by which the offence abetted is triable.
10	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Ditto ...	Ditto
11	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso	Ditto ...	Ditto ...	Ditto ..	Ditto...	The same punishment as for the offence intended to be abetted.	Ditto
13	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Ditto ...	Ditto ...	Ditto...	Ditto...	The same punishment as for the offence committed.	Ditto
14	Abetment of any offence, if abettor is present when offence is committed.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto

SCHEDULES

SCHEDULE I

REPEAL OF ENACTMENTS

Repealed by the Amending and Repealing Act X of 1914

Offences under the following sections of the I. P. C. may be tried by any Magistrate:—140, 143, 144, 145, 147, 151, 153, 160, 170, 171, 172, 174, 277, 278, 279, 285, 286, 289, 290, 294-A, 323, 334, 336, 341, 352, 356, 357, 358, 374, 379, 380, 403, 426, 447, 448, 451, 504, 510.

Offences under the following sections of the I. P. C. may be tried by First class Magistrate:—

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Offences under the following sections of the I. P. C. to be tried by first class Magistrate:—

Offences under the following sections of the I. P. C. are exclusively triable by the Magistrate:—

or upwards.

Offences under the following sections of the I. P. C. to be tried as warrant-cases:—115 to 136, 144 to 146, 152, 153, 163-A, 159, 161 to 170, 177, 181, 182 to 201, 203 to 227, 229 to 267, 270 to 281, 295 to 333, 335, 338, 342 to 348, 353 to 357, 363 to 424, 427 to 440, 448 to 483, 489-A, to 489-D, 493 to 500, 511.

Offences under the following sections of the I. P. C. to be tried as summons-cases:—137 to 143, 151, 153 to 158, 160, 171, 171-E, 171-F, 171 G to 171 I, 172 to 180, 182 to 188, 202, 225-B, 228, 269, 271 to 280, 282 to 294-A, 334, 336, 337, 341, 352, 358, 426, 447, 484 to 489, 490 to 492, 510.

Offences under the following sections of the I. P. C. are punishable with fine only.—137, 154, 155, 156, 171 G to 171 I, 263-A, 278, 283, 290, 294-A, partly.

Offences under the following sections of the I. P. C. are compoundable:—

Note.—Offences enclosed in brackets () above are compoundable with permission of the court.

SCHEDULE II

TABULAR STATEMENT OF OFFENCES

EXPLANATORY NOTE.—The entries in the second and seventh columns of this schedule headed respectively "Offence" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

The third column of this schedule applies also to the police in the towns of Calcutta and Bombay.

CHAPTER V.—ABETMENT.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether not	Whether a warrant or instance.		Whether	Punishment under the Indian Penal Code.	By what court tri- able.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bail-able or not.	According as the offence abetted is compoun-dable or not.	The same puni-shment as for the offence abetted.	The court by which the offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso	Ditto ...	Ditto ...	Ditto ..	Ditto...	The same puni-shment as for the offence in-tended to be abetted.	Ditto
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor	Ditto ...	Ditto ...	Ditto...	Ditto...	The same punish-ment as for the offence com-mitted.	Ditto
114	Abetment of any offence, if abettor is present when offence is committed.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
115.	Abetment of an offence, punishable with death or transportation for life, if the offence be not committed in consequence of the abetment.	May arrest without warrant if the offence abetted may be made without warrant but not otherwise.	According as a warrant or summons may issue for the offence abetted.	Not bailable.	According as the offence abetted is compoundable or not	Imprisonment of either description for seven years and fine	The Court by which the offence abetted is triable.
	If an act which causes harm be done in consequence of the abetment.	Ditto ...	Ditto ..	Ditto...	Ditto...	Imprisonment of either description for 14 years and fine.	Ditto.
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment	Ditto ...	Ditto ...	According as the offence abetted is bailable or not.	Ditto...	Imprisonment extending to a quarter part of the longest term and of any description, provided for the offence, or fine, or both.	Ditto.
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Ditto ...	Ditto ...	Ditto...	Ditto ..	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto.
117	Abetting the commission of an offence by the public, or by more than ten persons.	Ditto ..	Ditto ...	Ditto ..	Ditto ...	Imprisonment of either description for three years, or fine, or both.	Ditto.
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed.	Ditto ...	Ditto ...	Not bailable	Ditto.	Imprisonment of either description for seven years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
	If the offence be not committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant but not otherwise.	According as a warrant or summons may issue for the offence abetted.	Bailable	According as the offence abetted is compoundable or not.	Imprisonment of either description for three years and fine.	The court by which the offence abetted is triable.
119	A public servant concealing a design to commit an offence which it is his duty to prevent if the offence be committed.	Ditto ...	Ditto ...	According as the offence abetted is bailable or not.	Ditto ...	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine or both.	Ditto.
	If the offence be punishable with death or transportation for life	Ditto ...	Ditto ...	Not bailable.	Ditto ..	Imprisonment of either description for ten years.	Ditto.
	If the offence be not committed.	Ditto ...	Ditto ...	Bailable	Ditto ...	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both	Ditto.
120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed.	Ditto ...	Ditto ...	According as the offence concealed is bailable or not.	Ditto ..	Ditto ...	Ditto.
	If the offence be not committed	Ditto ...	Ditto ...	Bailable	Ditto ...	Imprisonment extending to one eighth part of the longest term, and of the description, provided for the offence, or fine, or both.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
115.	Abetment of an offence, punishable with death or transportation for life, if the offence be not committed in consequence of the abetment.	May arrest without warrant if arrest for the offence abetted may be made without warrant but not otherwise	According as a warrant or summons may issue for the offence abetted	Not bailable.	According as the offence abetted is compoundable or not.	Imprisonment of either description for seven years and fine.	The Court by which the offence abetted is triable
	If an act which causes harm be done in consequence of the abetment,	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years and fine.	Ditto.
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto	Ditto				Ditto.
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Ditto	Ditto	not.	Ditto	offence, or fine, or both	Ditto.
117	Abetting the commission of an offence by the public, or by more than ten persons,	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for three years, or fine, or both.	Ditto.
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for seven years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
	If the offence be not committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant but not otherwise.	According as a warrant or summons may issue for the offence abetted.	Bailable	According as the offence abetted is compoundable or not.	Imprisonment of either description for three years and fine.	The court by which the offence abetted is triable.
119	A public servant concealing a design to commit an offence which it is his duty to prevent if the offence be committed.	Ditto ...	Ditto ...	According as the offence abetted is bailable or not.	Ditto ...	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine or both.	Ditto.
	If the offence be punishable with death or transportation for life	Ditto ...	Ditto ...	Not bailable.	Ditto ..	Imprisonment of either description for ten years.	Ditto.
	If the offence be not committed	Ditto ...	Ditto ...	Bailable	Ditto ...	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto.
120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed.	Ditto ...	Ditto ...	According as the offence concealed is bailable or not.	Ditto ..	Ditto ...	Ditto.
	If the offence be not committed.	Ditto ...	Ditto ...	Bailable	Ditto ...	Imprisonment extending to one eighth part of the longest term, and of the description, provided for the offence, or fine, or both.	Ditto.

*CHAPTER V-A.—CRIMINAL CONSPIRACY.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
120-B	Criminal conspiracy to commit an offence punishable with death, transportation or imprisonment for life.	May arrest without warrant if arrest for the offence.	According as a warrant or summons may issue for the offence.	According as the offence which is the object of the conspiracy is bailable or not.	Not compoundable.	The same punishment as that provided for the abetment of the offence which is the object of the conspiracy.	Part of Session Court when the offence which is the object of the conspiracy is triable exclusively by such court; in the case of all other offences Court of Session, Presidency Magistrate or Magistrate of the first class.
	Any other criminal conspiracy.	Shall not arrest without a warrant.	Summons.	Bailable	Not compoundable.	Imprisonment of either description for 6 months and fine, or both.	Presidency Magistrate or Magistrate of the first class.

*This Chapter was inserted by s. 16, and the Schedule of the Indian Criminal Law (Amendment) Act, 1913 (VIII of 1913).

CHAPTER VI.—OFFENCES AGAINST THE STATE.

121	Waging or attempting to wage war, or abetting the waging of war, against the Queen.	Shall not arrest without warrant.	Warrant	Not bailable	Not compoundable.	Death or transportation for life and fine.	Court of Session.
121-A	Conspiring to commit certain offences against the State.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life or any shorter term, or imprisonment of either description for 10 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
122	Collecting arms, etc., with the intention of waging war against the Queen.	Ditto ...	Warrant.	Not bailable.	Not compoundable.	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session.
123	Concealing with intent to facilitate a design to wage war.	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Imprisonment of either description for 10 years and fine.	Ditto.
124	Assaulting Governor-General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Ditto.
124-A	Sedition ...	Shall not arrest without warrant.	Ditto ...	Ditto ..	Ditto ..	Transportation for life or for any term and fine, or imprisonment of either description for 3 years and fine, or fine.	Court of Session, Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered by the Local Govt. in that behalf.
125	Waging war against any Asiatic power in alliance or at peace with the Queen, or abetting the waging of such war.	Ditto ...	Ditto ...	Ditto...	Ditto..	Transportation for life and fine, or imprisonment of either description for 7 years and fine, or fine.	Court of Session.
126	Committing depredation on the territories of any power in alliance or at peace with the Queen.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 7 years and fine and forfeiture of certain property.	Ditto.

*CHAPTER V-A.—CRIMINAL CONSPIRACY.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
120 B	Criminal conspiracy to commit an offence punishable with death, transportation or imprisonment for life.	May arrest without warrant if arrest for the offence.	According as a warrant or summons may issue for the offence.	According as the offence which is the object of the conspiracy is triable exclusively by such court; in the case of all other offences Court of Session, Presidency Magistrate or Magistrate of the first class.	Not compoundable.	The same punishment as that provided for the abetment of the offence which is the object of the conspiracy.	By what court triable.
	wards	may be made without warrant but not otherwise.	conspiracy	bailable or not.			
	Any other criminal conspiracy.	Shall not arrest without a warrant.	Summons.	Bailable	Not compoundable.	Imprisonment of either description for 6 months and fine, or both.	Presidency Magistrate or Magistrate of the first class.

*This Chapter was inserted by s. 16, and the Schedule of the Indian Criminal Law (Amendment) Act, 1913 (VIII of 1913).

CHAPTER VI.—OFFENCES AGAINST THE STATE.

121	Waging or attempting to wage war, or abetting the waging of war, against the Queen.	Shall not arrest without warrant.	Warrant	Not bailable	Not compoundable.	Death or transportation for life and fine.	Court of Session.
121-A	Conspiring to commit certain offences against the State.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life or any shorter term, or imprisonment of either description for 10 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what court triable
134	Abetment of such assault, if the assault is committed.	May arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session
135	Abetment of the desertion of an officer, soldier or sailor.	Ditto ...	Ditto ...	Bailable	Ditto...	Imprisonment of either description for 2 years or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
136	Harbouring such an officer, soldier or sailor, who has deserted.	Ditto ..	Ditto ...	Ditto ...	Ditto..	Ditto ...	Ditto.
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof.	Shall not arrest without warrant.	Summons	Ditto ...	Ditto ...	Fine of 500 rupees	Ditto.
138	Abetment of act of insubordination by an officer, soldier or sailor, if the offence be committed in consequence.	May arrest without warrant.	Warrant.	Ditto ..	Ditto...	Imprisonment of either description for 6 months, or fine, or both	Ditto.
140	Wearing the dress or carrying any token used by a soldier, with intent that it may be believed that he is such a soldier.	Ditto ...	Summons	Ditto..	Ditto...	Imprisonment of either description for 8 months, or fine of 500 rupees, or both.	Any Magistrate.

CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILITY.

143	Being member of an unlawful assembly.	May arrest without warrant	Summons	Bailable	Not compoundable	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate.
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1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what Court triable.
127	Receiving property taken by war or depredation mentioned in sections 125 and 126.	Shall not arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 7 years and fine and forfeiture of certain property.	Court of Session.
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape	Ditto ...	Ditto ...	Ditto...	Ditto ..	Transportation for life or imprisonment of either description for 10 years and fine.	Ditto.
129	Public servant negligently suffering prisoner of State or war in his custody to escape	Ditto ...	Ditto ..	Bailable	Ditto ..	Simple imprisonment for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class
130	Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner	Ditto ..	Ditto ..	Not bailable	Ditto...	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session

CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY.

131	Abetting mutiny, or attempting to seduce an officer, soldier or sailor from his allegiance or duty.	May arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session.
132	Abetment of mutiny, if mutiny is committed in consequence thereof	Ditto ...	Ditto ...	Ditto...	Ditto...	Death or transportation for life, or imprisonment of either description for 10 years and fine	Ditto.
133	Abetment of an assault by an officer, soldier or sailor on his superior officer, when in the execution of his office.	Ditto ...	Ditto				or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
152	Assaulting or obstructing public servant when suppressing riot, etc.	May arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for three years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed.	Ditto ..	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for one year, or fine, or both.	Any Magistrate.
	If not committed	Ditto ..	Summons.	Ditto ...	Ditto ...	Imprisonment of either description for 6 months, or fine or both.	Ditto.
153-A	Promoting enmity between classes.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for two years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
154	Owner or occupier of land not giving information of riot, etc.	Ditto ...	Summons	Bailable	Ditto...	Fine of 1,000 rupees.	Presidency Magistrate or Magistrate of the first or second class.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Ditto ..	Ditto ...	Ditto...	Ditto...	Fine	Ditto.
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Ditto ...	Ditto .	Ditto...	Ditto...	Do.	Ditto.
157	Harbousing persons hired for an unlawful assembly.	May arrest without warrant	Ditto ...	Ditto...	Ditto ..	Imprisonment of either description for six months, or fine, or both.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offences.	Whether the Police not.	Whether a warrant or instance.		Whether	Punishment under the Indian Penal Code.	By what Court tribunal.
144	Joining an unlawful assembly armed with any deadly weapon	May arrest without warrant.	Warrant.	Ballable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Ditto ...	Ditto ...	Ditto...	Ditto ...	Ditto ...	Ditto.
147	Rioting ...	Ditto ...	Ditto ...	Ditto ..	Ditto...	Ditto ...	Ditto.
148	Rioting, armed with a deadly weapon.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for three years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly, shall be guilty of the offence.	According as arrest may be made without warrant for the offence or not.	According as a warrant or summons may issue for the offence.	According as the offence is ballable or not.	Ditto...	The same as for the offence.	The court by which the offence is triable.
150	Hiring, engaging or employing persons to take part in an unlawful assembly.	May arrest without warrant.	According to the offence committed by the person hired, engaged or employed.	Ditto...	Ditto...	The same as for a member of such assembly and for any offence committed by any member of such assembly.	Ditto.
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Ditto ...	Summons	Ballable	Ditto...	Imprisonment of either description for six months, or fine or both.	Any Magistrate.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Simple imprisonment for 1 year, or fine, or both.	Ditto.
167	Public servant framing an incorrect document with intent to cause injury.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
168	Public servant unlawfully engaging in trade.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
169	Public servant unlawfully buying or bidding for property.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 2 years, or fine, or both and confiscation of property if purchased.	Ditto
170	Personating a public servant.	May arrest without warrant.	Warrant	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate
171	Wearing garb or carrying token used by public servant with fraudulent intent.	Ditto ...	Summons	Ditto...	Ditto...	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Ditto.

1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
158	Being hired to take part in an unlawful assembly or riot	May arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for six months or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
159*	Or to go armed	Ditto ...	Warrant	Ditto ..	Ditto...	Imprisonment of either description for two years, or fine, or both.	Ditto
160	Committing affray	Shall not arrest without warrant.	Summons	Ditto ..	Ditto...	Imprisonment of either description for one month, or fine of 100 rupees, or both	Any Magistrate.

CHAPTER IX.—OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS

161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Shall not arrest without warrant	Summons	Bailable	Not compoundable	Imprisonment of either description for three years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
162	Taking a gratification in order by corrupt or illegal means to influence a public servant.	Ditto ..	Ditto ...	Ditto...	Ditto	Ditto ...	Ditto.
163	Taking a gratification for the exercise of personal influence with a public servant.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself	Ditto ...	Ditto ...	Ditto...	Ditto	Imprisonment of either description for 3 years, or fine, or both,	Court of Session, Presidency Magistrate or Magistrate of the first class.

* Omitted by Act, No. XXXVII of 1925.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether ballable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Shall not arrest without warrant.	Summons	Ballable	Not compoundable.	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 year, or fine, or both.	Ditto.
167	Public servant framing an incorrect document with intent to cause injury.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
168	Public servant unlawfully engaging in trade.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
169	Public servant unlawfully buying or bidding for property.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 2 years, or fine, or both and confiscation of property if purchased.	Ditto.
170	Personating a public servant.	May arrest without warrant.	Warrant	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both	Any Magistrate
171	Wearing garb or carrying token used by public servant with fraudulent intent.	Ditto ...	Summons	Ditto...	Ditto...	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Ditto.

*CHAPTER IX-A.-OFFENCES RELATING TO ELECTIONS.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
171-E	Bribery ..	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both, or if treating only, fine only.	Presidency Magistrate or Magistrate of the first class
171-F	Undue influence and personation at an election.	Ditto ..	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 1 year, or fine, or both.	Ditto.
171-G	False statement in connection with an election	Ditto ...	Ditto ...	Ditto...	Ditto...	Fine ...	Ditto.
171-H	Illegal payments in connection with elections	Ditto ..	Ditto ..	Ditto...	Ditto...	Fine of 500 rupees.	Ditto.
171-I	Failure to keep election accounts	Ditto ..	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.

*This Chapter was added by the Elections Offences and Inquiries Act (XXXIX of 1920), s. 3.

CHAPTER X.-CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS

172	Abdconding to avoid service of summons or other proceedings from a public servant.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate
	If summons or notice require attendance in person, etc., in a court of justice.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation	Ditto ..	Ditto ..	Ditto...	Ditto..	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code	By what court triable.
	If summons, etc., require attendance in person, etc., in a court of justice.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
	If the order require personal attendance, etc., in a court of Justice.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 6 months, or fine of 1,000 rupees or both.	Ditto.
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	The court in which the offence is committed, subject to the provisions of Chapter XXXV; or, if not committed in a court, a Presidency Magistrate or Magistrate of the first or second class.
	If the document is required to be produced in or delivered to a Court of Justice.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.

*CHAPTER IX-A.—OFFENCES RELATING TO ELECTIONS.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police	Whether a warrant or		Whether	Punishment under the Indian Penal Code.	By what court triable.
		How.	Instances				
171-E	Bribery ...	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both, or if treating only, fine only.	Presidency Magistrate or Magistrate of the first class.
171-F	Undue influence and personation at an election.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto.
171-G	False statement in connection with an election.	Ditto	Ditto	Ditto	Ditto	Fine	Ditto
171-H	Illegal payments in connection with elections.	Ditto	Ditto	Ditto	Ditto	Fine of 500 rupees.	Ditto.
171-I	Failure to keep election accounts	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.

*This Chapter was added by the Elections Offences and Inquiries Act (XXXIX of 1920), s. 3.

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS

172	Abstending to avoid service of summons or other proceedings from a public servant.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate
	If summons or notice require attendance in person, etc., in a court of justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether not	Whether a warrant or instance.		Whether	Punishment under the Indian Penal Code.	By what court tri- able.
180	Refusing to sign a statement made to a public servant when legally required to do so.	Shall not arrest without warrant.	Summons	Bailable	Not com- pound- able.	Simple imprisonment for 3 months, or fine of 500 rupees, or both	The court in which the offence is committed, subject to the provisions of Chapter XXXV, or, if not committed in a court, a Presidency Magistrate or Magistrate of the first or second class.
181	Knowingly stating to a public servant on oath as true that which is false	Ditto ...	Warrant	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto ...	Summons	Ditto...	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees or both.	Presidency Magistrate or Magistrate of the first or second class.
183	Resistance to the taking of property by the lawful authority of a public servant	Ditto ...	Ditto				Presidency
184	Obstructing sale of property offered for sale by authority of a public servant.	Ditto ...	Ditto	Ditto ..	Ditto ..	of 1,000 rupees, or both. Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	first or second class Ditto

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information	Shall not arrest without warrant.	Summons	Bailable.	Not compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both,	Presidency Magistrate or Magistrate of the first or second class.
	If the notice or information required respects the commission of an offence, etc.	Ditto ...	Ditto ...	Ditto .	Ditto ..	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both,	Ditto.
177	Knowingly furnishing false information to a public servant.	Ditto ...	Ditto ..	Ditto...	Ditto...	Ditto ...	Ditto.
	If the information required respects the commission of an offence, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
178	Refusing oath when duly required to take oath by a public servant.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 6 months, or fine of 1,000 rupees or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV ; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
179	Being legally bound to state truth, and refusing to answer questions.	Ditto ...	Ditto ...	Ditto...	Ditto ..	Ditto ...	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
180	Threatening a public servant with injury to him, or one in whom he is interested to induce him to do, or forbear to do, any official act.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or Second class.
190	Threatening any person to induce him to refrain from making a legal application for protection from injury.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 1 year, or fine, or both.	Ditto

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

193	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	Giving or fabricating false evidence in any other case.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Ditto.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Ditto ...	Ditto ...	"	"	"	Court of Session.
	If innocent person be thereby convicted and executed.	Ditto ...	Ditto ...	Ditto...	Ditto...	years and fine	Ditto.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life, or with imprisonment for 7 years or upwards.	Ditto ...	Ditto ...	*Ditto...	Ditto...	The same as for the offence.	Ditto.

* The words "Not bailable" were substituted for the word "Bailable" by Part II of the Second Schedule to the Repealing and Amending Act, 1903 (1 of 1903).

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorized sale, or bidding without intending to perform the obligations incurred thereby.	Shall not arrest without warrant.	Summons	Bailable.	Not compoundable.	Imprisonment of either description for 1 month, or fine of 200 rupees, or both.	Presidency Magistrate or Magistrate of the first or Second class.
186	Obstructing public servant in discharge of his public functions	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 months, or fine of 500 rupees, or both	Ditto.
187	Omission to assist public servant when bound by law to give such assistance.	Ditto ..	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
	Willfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 6 months, or fine of 500 rupees, or both.	Ditto.
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
	If such disobedience causes danger to human life, health or safety, etc	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether warrant or not.	Whether a warrant or in the first instance.		Whether not.	Punishment under the Indian Penal Code.	By what Court triable
	If punishable with transportation for life or imprisonment for 10 years.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class
	If punishable with less than 10 years' imprisonment.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Presidency Magistrate or Magistrate of the first class
						the description, provided for the offence, or fine, or both.	first class, or court by which the offence is triable.
202	Intentional omission to give information of an offence by a person legally bound to inform.	Ditto ...	Summons.	Ditto ...	Ditto ...	Imprisonment of either description for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
203	Giving false information respecting an offence committed.	Ditto ...	Warrant.	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Ditto
204	Secreting or destroying any document to prevent its production as evidence.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Presidency Magistrate or Magistrate of the first class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code	By what court triable.
196	Using in a judicial proceeding evidence known to be false or fabricated	Shall not arrest without warrant	Warrant	According as the offence of giving such evidence is bailable or not	Not compoundable.	The same as for giving or fabricating false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Ditto ...	Ditto ..	Bailable.	Ditto ..	The same as for giving false evidence	Ditto.
198	Using as a true certificate one known to be false in a material point.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Ditto ...	Ditto.
199	False statement made in any declaration which is by law receivable as evidence.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
200	Using as true any such declaration known to be false.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Ditto ...	Ditto ...	Ditto .	Ditto...	Imprisonment of three months with fine not less.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
211	False charge of offence made with intent to injure.	Shall not arrest without warrant.	Warrant.	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
	If offence charged be punishable with imprisonment for 7 years or upwards.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If offence charged be capital, or punishable with transportation for life.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Court of Session.
212	Harbouring an offender, if the offence be capital.	May arrest without warrant.	Ditto ...	Ditto ..	Ditto ...	Imprisonment of either description for 5 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with transportation for life or with imprisonment for 10 years.	Ditto ...	Ditto ...	Ditto ..	Ditto ..	Imprisonment of either description for 3 years, and fine.	Ditto
	If punishable with imprisonment for 1 year and not for 10 years.	Ditto ...	Ditto	-	-	-	Presidency
213	Taking gift, etc., to screen an offender from punishment, if the offence be capital.	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Imprisonment for either description for 7 years and fine	first class, or Court by which the offence is triable
	If punishable with transportation for life or with imprisonment for 10 years.	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Imprisonment of either description for 3 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Shall not arrest without warrant.	Warrant.	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto ..	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Ditto.
208	Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Presidency Magistrate or Magistrate of the first class.
209	False claim in a Court of Justice.	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Imprisonment of either description for 2 years, and fine.	Ditto.
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	May arrest without warrant.	Warrant	Bailable	Not-compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years with or without fine.	Ditto.
	If with imprisonment for 1 year and not for 10 years.	Ditto ...	Ditto ..	Ditto ..	Ditto...	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or court by which the offence is triable.
216 A	Harbouring robbers or dacoits	Ditto ...	Ditto ...	Ditto...	Ditto...	Rigorous imprisonment for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Shall not arrest without warrant	Summons	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Ditto ...	Warrant	Ditto...	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what court triable.
	If with imprisonment for less than 10 years	May arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or court by which the offence is triable.
214	Offering gift or restoration of property in consideration of screening offender, if the offence be capital.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years	Ditto	Ditto	Ditto	Ditto	the description provided for the offence, or fine, or both.	the first class, or court by which the offence is triable.
215	Taking gift to help to recover moveable property of which a person has been deprived by an offence, without causing apprehension of offender.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
	If under sentence of transportation or penal servitude for life, or transportation, imprisonment or penal servitude for 10 years or upwards.	Shall not arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 7 years, with or without fine.	Court of Session
	If under sentence of imprisonment for less than 10 years or lawfully committed to custody.	Ditto ...	Ditto ...	Bailable	Ditto ..	Imprisonment of either description for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
223	Escape from confinement negligently suffered by a public servant.	Ditto ...	Summons.	Ditto...	Ditto...	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
224	Resistance or obstruction by a person to his lawful apprehension.	May arrest without warrant.	Warrant	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto
	If charged with an offence punishable with transportation for life, or imprisonment for 10 years.	Ditto ...	Ditto ...	Not bailable			Court of Session, Magistrate of the first class.
	If charged with a capital offence	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years, and fine.	Court of Session.

1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Ditto ..	Ditto ...	Ditto .	Ditto...	Ditto ...	Ditto.
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender if the offence be capital	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 7 years with or without fine.	Ditto
	If punishable with transportation for life or imprisonment for 10 years.	Ditto ...	Ditto				
	If with imprisonment for less than 10 years.	Ditto ..	Ditto				first class.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice if under sentence of death.	Ditto ...	Ditto ...	Not bailable.	Ditto..	fine. Transportation for life, or imprisonment of either description for 14 years, with or without fine.	first or second class Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
227	Violation of condition of remission of punishment.	Shall not arrest without warrant.	Summons	Not bailable.	Not compoundable.	Punishment of original sentence, or if part of the punishment has been undergone, the residue	The court by which the original offence was triable
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Ditto ...	Ditto ...	Bailable	Ditto...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	The court in which the offence is committed, subject to the provisions of Chapter XXXV.
229	Personation of a juror or assessor.	Ditto.	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for two years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

231	Counterfeiting or performing any part of the process of counterfeiting coin.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine	Court of Session.
232	Counterfeiting, or performing any part of the process of counterfeiting, the Queen's coin.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.
233	Making, buying or selling instrument for the purpose of counterfeiting coin	Ditto ...	Ditto ...	Ditto			Court of Session
234	Making, buying or selling instrument for the purpose of counterfeiting the Queen's coin.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years, and fine.	Magistrate of the first class or Court of Session

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code	By what court triable.
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards.	May arrest without warrant	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 7 years and fine	Court of Session.
	If under sentence of death.	Ditto ...	Ditto ...	Ditto...	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine	Ditto.
225-A	Omission to apprehend, or sufferance of escape on part of public servant, in cases not otherwise provided for—						
	(a) in cases of intentional omission or sufferance;	Shall not arrest without warrant	Ditto ..	Bailable	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class
	(b) in case of negligent omission or sufferance	Ditto ...	Summons	Ditto	Ditto.	Simple imprisonment for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
225-B	Resistance or obstruction to lawful apprehension, or escape, or rescue, in cases not otherwise provided for	May arrest without warrant.	Warrant	Ditto ...	Ditto	Imprisonment of either description for six months, or fine, or both	Ditto.
226	Unlawful return from transportation.	Ditto .	Ditto ..	Not bailable	Ditto .	Transportation for life, and fine, and rigorous imprisonment for 3 years before transportation	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
251	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered.	May arrest without warrant	Warrant.	Not Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine of ten times the value of the coin	Presidency Magistrate or Magistrate of the first or second class.
255	Counterfeiting a Government stamp	Ditto ...	Ditto ...	Bailable	Ditto...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Ditto ...	Ditto ..	Ditto...	Ditto...	Imprisonment of either description for 7 years, and fine.	Ditto.
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
258	Sale of counterfeit Government stamp	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
259	Having possession of a counterfeit Government stamp.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Court of Session, Presidency Magistrate or Magistrate of the first class.
260	Using as genuine a Government stamp known to be counterfeit.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If Queen's coin	Ditto ..	Ditto ...	Ditto ...	Ditto ..	Imprisonment of either description for 10 years, and fine	Court of Session. .
236	Abetting in British India the counterfeiting out of British India of coin.	Ditto ..	Ditto ...	Ditto ..	Ditto ..	The punishment provided for abetting the counterfeiting of such coin within British India.	Ditto.
237	Import or export of counterfeit coin, knowing the same to be counterfeit	Ditto ...	Ditto ..	Ditto ..	Ditto	Imprisonment of either description for 3 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
239	Import or export of counterfeits of the Queen's coin, knowing the same to be counterfeit.	Ditto ...	Ditto ..	Ditto ..	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
240	Having any counterfeit coin known to be such when it came into possession, and delivering, etc., the same to any person	Ditto	Ditto ...	Ditto	Ditto	Imprisonment of either description for 5 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
240	The same with respect to the Queen's coin.	Ditto ...	Ditto ..	Ditto	Ditto	Imprisonment of either description for 10 years, and fine	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
267	Making or selling false weights or measures for fraudulent use	Shall not arrest without warrant	Summons	Bailable	Not Compoundable	Imprisonment of either description for one year, or fine, or both.	Presidency Magistrate or Magistrate of the first class or second class

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 2 years or fine, or both	Presidency Magistrate or Magistrate of the first or second class.
271	Knowingly disobeying any quarantine rules.	Shall not arrest without warrant	Ditto ...	Ditto ...	Ditto...	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
272	Adulterating food or drink intended for sale, so as to make the same noxious	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
273	Selling any food or drink as food and drink knowing the same to be noxious.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Ditto ...	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
261	Effacing a n y writing from a substance bearing a Govern- ment stamp, or removing from a document a stamp used for it with intent to cause loss to Government.	May arrest without warrant	Warrant	Bailable	Not com- pound- able	Imprisonment of either descrip- tion for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magis- trate of the first class.
262	Using a Govern- ment stamp known to have been before used.	Ditto ..	Ditto ..	Ditto ..	Ditto..	Imprisonment of either descrip- tion for 2 years, or fine, or both.	Presidency Magistrate or Magis- trate of the first or second class.
263	Erasure of mark denoting that stamp has been used.	Ditto	Ditto	Ditto	-	or both.	of Magis- trate of the first class.
263- A	Fictitious stamps.	Ditto	Ditto	Ditto	Ditto	Fine of 200 rupees.	Presidency Magistrate or Magis- trate of the first class.

CHAPTER XIII—OFFENCES RELATING TO WEIGHTS AND MEASURES.

264	Fraudulent use of false instru- ment for weighing	Shall not arrest without warrant	Summons	Bailable	Not com- pound- able.	Imprisonment of either descrip- tion for 1 year, or fine, or both	Presidency Magistrate or Magis- trate of the first or second class.
265	Fraudulent use of false weight or measure	Ditto ..	Ditto	Ditto	Ditto..	Ditto	Ditto
266	Being in posses- sion of false weights or measures for fraudulent use.	Ditto ..	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
283	Causing danger, obstruction or injury in any public way or line of navigation.	May arrest without warrant.	Summons	Bailable	Not Compoundable.	Fine of 200 rupees	Presidency Magistrate or Magistrate of the first or second class. Ditto.
284	Dealing with any poisonous substance so as to endanger human life, etc.	Shall not arrest without warrant.	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Ditto ...	Any Magistrate.
286	So dealing with any explosive substance.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
287	So dealing with any machinery.	Shall not arrest without warrant.	Ditto ...	Ditto...	Ditto...	Ditto ...	Presidency Magistrate or Magistrate of the first or second class. Ditto.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has right, entitling him to pull it down or repair it.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
289	A person omitting to take order with any animal in his possession so as to guard against danger to human life, or of grievous hurt, from such animal.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Ditto ...	Any Magistrate.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code.	By what Court triable.
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated	Shall not arrest without warrant.	Summons	Bailable	Not Compoundable.	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.	Ditto ..	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.
277	Defiling the water of a public spring or reservoir.	May arrest without warrant.	Ditto ...	Ditto.	Ditto ..	Imprisonment of either description for 8 months, or fine of 500 rupees, or both.	Any Magistrate.
278	Making atmosphere noxious to health.	Shall not arrest without warrant	Ditto ...	Ditto...	Ditto...	Fine of 500 rupees.	Ditto.
279	Driving or riding on a public way so rashly or negligently as to endanger human life, etc	May arrest without warrant	Ditto ...	Ditto .	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
280	Navigating any vessel so rashly or negligently as to endanger human life, etc.	Ditto ..	Ditto ...	Ditto	Ditto...	Ditto ...	Presidency Magistrate or Magistrate of the first or second class.
281	Exhibition of a false light, mark or buoy.	Ditto ...	Warrant.	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
282	Conveying for hire any person, by water, in a vessel in such a state, or so loaded, as to endanger his life	Ditto	Summons	Ditto ..	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
297	Trespassing in place of worship or sepulchre, disturbing funeral with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	May arrest without warrant.	Summons.	Bailable	Not compoundable.	Imprisonment of either description for 1 year or fine or both	Presidency Magistrate or Magistrate of the first or second class.
298	Uttering any word or making any sound in the hearing, or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feeling	Shall not arrest without warrant.	Ditto ...	Ditto...	Compoundable.	Ditto ...	Ditto

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences affecting Life.

301	Murder ...	May arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Death or transportation for life and fine.	Court of Session.
303	Murder by a person under sentence of transportation for life.	Ditto ...	Ditto ...	Ditto...	Ditto ..	Death ...	Ditto.
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.

1	2	3	4	5	5	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instant	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
290	Committing a public nuisance	Shall not arrest without warrant.	Summons	Bailable.	Not compoundable.	Fine of 200 rupees.	Any Magistrate
291	Continuance of nuisance after injunction to discontinue	May arrest without warrant	Ditto				
292	Sale, etc., of obscene books, etc.	Ditto ...	Warrant.	Ditto ..	Ditto ...	Imprisonment of either description for 3 months, or fine, or both.	first or second class. Presidency Magistrate or Magistrate of the first class.
293	Sale, etc., of obscene objects to young persons.	Ditto ...	Ditto ..	Ditto ..	Ditto ...	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
294	Obscene songs ...	Ditto ..	Ditto	Ditto ..	Ditto ..	Ditto ...	Any Magistrate
294-A	Keeping a lottery office.	Shall not arrest without warrant.	Summons.	Ditto	Ditto ..	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
	Publishing proposals relating to lotteries	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Fine of 1,000 rupees.	Ditto.

CHAPTER XV—OFFENCES RELATING TO RELIGION.

295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons	May arrest without warrant.	Summons.	Bailable	Not Compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
295-A	Maliciously insulting the religion or the religious beliefs of any class	Shall not arrest without warrant.	Warrant.	Not bailable	Ditto ..	Ditto ...	Court of Session or Presidency Magistrate.
296	Causing a disturbance to an assembly engaged in religious worship	May arrest without warrant.	Summons	Bailable.	Ditto	Imprisonment of either description for 1 year, or fine, or both	Presidency Magistrate, or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
309	Attempt to commit suicide.	May arrest without warrant.	Warrant	Bailable	Not compoundable.	Simple imprisonment for 1 year, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug ...	Ditto ...	Ditto ...	Not bailable	Ditto...	Transportation for life and fine.	Court of Session.

Of the Causing of Mi-carriage; of Injuries to Unborn Children; of the Exposure of Infants, and of the Concealment of Births

312	Causing mis-carriage.	Shall not arrest without warrant.	Ditto ...	Bailable	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
313	Causing mis-carriage without woman's consent.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
314	Death caused by an act done with intent to cause mis-carriage	Ditto ...	Ditto ...	Ditto	Ditto...	Imprisonment of either description for 10 years and fine	Ditto.
	If act done without women's consent	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life or as above.	Ditto.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto ..	Ditto ...	Ditto ...	Ditto...	Imprisonment of either description for 10 years, or fine, or both.	Ditto
316	Causing death of a quick unborn child by an act amounting to culpable homicide	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
	If act is done with knowledge that it is likely to cause death, but without any intention to cause death, etc.	May arrest without warrant.	Warrant.	Not Bailable	Not compoundable.	Imprisonment of either description for 10 years, or fine, or both,	Court of Session.
304-A	Causing death by rash or negligent act.	Ditto ...	Ditto ...	Bailable	Ditto.	Imprisonment of either description for 2 years, or fine, or both,	Court of Session, Presidency Magistrate or Magistrate of the first class
305	Abetment of suicide committed by a child, or insane or delirious person, or an idiot, or a person intoxicated.	Ditto ...	Ditto	Not bailable	Ditto.	Death or transportation for life, or imprisonment for 10 years and fine.	Court of Session
306	Abetting the commission of suicide.	Ditto	Ditto ...	Ditto ..	Ditto ..	Imprisonment of either description for 10 years, and fine	Ditto.
307	Attempt to murder.	Ditto .	Ditto ...	Ditto .	Ditto	Ditto ..	Ditto.
	If such act cause hurt to any person.	Ditto ..	Ditto ...	Ditto	Ditto	Transportation for life or as above	Ditto
	Attempt by life convict to murder, if hurt is caused.	Ditto ...	Ditto	Ditto ..	Ditto	Death or as above.	Ditto.
308	Attempt to commit culpable homicide	Ditto ...	Ditto .	Bailable	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
	If such act cause hurt to any person.	Ditto .	Ditto ..	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
309	Attempt to commit suicide.	May arrest without warrant.	Warrant.	Bailable	Not compoundable.	Simple imprisonment for 1 year, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug ...	Ditto ...	Ditto ...	Not bailable	Ditto ...	Transportation for life and fine.	Court of Session.

Of the Causing of Mis-carriage; of Injuries to Unborn Children; of the Exposure of Infants, and of the Concealment of Births

312	Causing mis-carriage.	Shall not arrest without warrant.	Ditto ...	Bailable	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child,	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
313	Causing mis-carriage without woman's consent.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
314	Death caused by an act done with intent to cause mis-carriage.	Ditto ...	Ditto ...	Ditto	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
	If act done without women's consent	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life or as above.	Ditto.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto ...	Ditto ...	Ditto ...	Ditto...	Imprisonment of either description for 10 years, or fine, or both.	Ditto.
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police not.	Whether a warrant or instance		Whether not.	Punishment under the Penal Code.	By what court triable.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
318	Concealment of birth by secret disposal of dead body.	Ditto ...	Ditto ...	Ditto ...	Ditto	Imprisonment of either description for 2 years, or fine, or both	Ditto.*

Of Hurt

323	Voluntarily causing hurt.	Shall not arrest without warrant.	Summons	Bailable	Compoundable	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant	Ditto ...	Ditto...	Compoundable when permission is given by the court before which a prosecution is pending.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
325	Voluntarily causing grievous hurt.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Ditto ...	Ditto ...	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

*The words "or second" have been omitted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
309	Attempt to commit suicide.	May arrest without warrant.	Warrant	Bailable.	Not compoundable.	Simple imprisonment for 1 year, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug ...	Ditto ...	Ditto ...	Not bailable	Ditto...	Transportation for life and fine.	Court of Session.

Of the Causing of Mi-carriage; of Injuries to Unborn Children; of the Exposure of Infants, and of the Concealment of Births

312	Causing mis-carriage.	Shall not arrest without warrant.	Ditto ...	Bailable	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
313	Causing mis-carriage without woman's consent.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
314	Death caused by an act done with intent to cause mis-carriage	Ditto ...	Ditto ...	Ditto	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
	If act done without women's consent	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life or as above.	Ditto.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto ...	Ditto ...	Ditto ...	Ditto...	Imprisonment of either description for 10 years, or fine, or both.	Ditto.
316	Causing death of a quick unborn child by an act amounting to culpable homicide	Ditto ...	Ditto ...	Ditto...	Ditto ..	Imprisonment of either description for 10 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police not.	Whether a warrant or instance		Whether	Punishment under the Penal Code.	By what court triable.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
318	Concealment of birth by secret disposal of dead body.	Ditto ...	Ditto ..	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.*

Of Hurt

323	Voluntarily causing hurt.	Shall not arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant	Ditto ...	Ditto...	Compoundable when permission is given by the court before which a prosecution is pending.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
325	Voluntarily causing grievous hurt.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
326	Voluntarily causing grievous hurt by dangerous weapons or means	Ditto ..	Ditto ...	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

*The words "or second" have been omitted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	May arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
328	Administering stupefying drug with intent to cause hurt, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Court of Session.
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine	Ditto.
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	Ditto ...	Ditto ...	Not bailable	Ditto...	Imprisonment of either description for 10 years and fine	Ditto.
332	Voluntarily causing hurt to deter public servant from his duty.	Ditto ...	Ditto.	Bailable	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police not.	Whether a warrant or instance		Whether	Punishment under the Penal Code.	By what court triable.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session; Presidency Magistrate or Magistrate of the first class.
318	Concealment of birth by secret disposal of dead body.	Ditto ...	Ditto ...	Ditto ...	Ditto ..	Imprisonment of either description for 2 years, or fine, or both.	Ditto.*

Of Hurt.

323	Voluntarily causing hurt.	Shall not arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant	Ditto ...	Ditto...	Compoundable when permission is given by the court before which a prosecution is pending.	Imprisonment of either description for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
325	Voluntarily causing grievous hurt.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Ditto .	Ditto ...	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

*The words "or second" have been omitted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	May arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
328	Administering stupefying drug with intent to cause hurt, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Court of Session.
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	Ditto ...	Ditto ...	Not bailable	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
332	Voluntarily causing hurt to deter public servant from his duty.	Ditto ...	Ditto.	Bailable	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may.	Whether a warrant or instance.		Whether	Punishment under the Indian Penal Code.	By what court triable.
333	Voluntarily causing grievous hurt to deter public servant from his duty.	May arrest without warrant.	Warrant	Not bailable	Not compoundable	Imprisonment of either description of 10 years and fine	Court of Session
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Shall not arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 1 month, or fine of 500 rupees, or both	Any Magistrate
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	May arrest without warrant	Ditto ...	Ditto	Compoundable when permission is given by the court before which the prosecution is pending	Imprisonment of either description for 4 years, or fine of 2,000 rupees or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
336	Doing any act which endangers human life or the personal safety of others.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 3 months, or fine of 250 rupees, or both.	Any Magistrate.
337	Causing hurt by an act which endangers human life, etc.	Ditto	Ditto	Ditto	Compoundable when permission is given by the court before which the prosecution is pending	Imprisonment of either description for 6 months, or fine of 500 rupees, or both	Presidency Magistrate or Magistrate of the first or second class

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what court triable.
338	Causing grievous hurt by an act which endangers human life, etc.	May arrest without warrant.	Summons	Bailable	Compoundable when permission is given by the court before which the prosecution is pending.	Imprisonment of either description for 2 years, or fine of 1,000 Rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.

Of wrongful Restraint and Wrongful Confinement.

341	Wrongfully restraining any person.	May arrest without warrant.	Summons	Bailable.	Compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate
342	Wrongfully confining any person.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
343	Wrongfully confining for three or more days.	Ditto ...	Ditto ...	Ditto...	Compoundable when permission is given by the court before which the prosecution is pending.	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
344	Wrongfully confining for ten or more days	Ditto ...	Ditto ...	Ditto...	Not compoundable.	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first or second class

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police not.	Whether a warrant or in the first instance.		Whether not.	Punishment under the Indian Penal Code.	By what court triable.
333	Voluntarily causing grievous hurt to deter public servant from his duty.	May arrest without warrant.	Warrant	Not bailable	Not compoundable	Imprisonment of either description of 10 years and fine	Court of Session.
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Shall not arrest without warrant.	Summon	Bailable	Compoundable.	Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Any Magistrate
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	May arrest without warrant.	Ditto ...	Ditto	Compoundable when permission is given by the court before which the prosecution is pending	Imprisonment of either description for 4 years, or fine of 2,000 rupees or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
336	Doing any act which endangers human life or the personal safety of others.	Ditto ...	Ditto ..	Ditto	Not compoundable.	Imprisonment of either description for 3 months, or fine of 250 rupees, or both.	Any Magistrate.
337	Causing hurt by an act which endangers human life, etc.	Ditto	Ditto ..	Ditto	Compoundable when permission is given by the court before which the prosecution is pending	Imprisonment of either description for 6 months, or fine of 500 rupees, or both	Presidency Magistrate or Magistrate of the first or second class

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
354	Assault or use of criminal force to a woman with intent to outrage her modesty;	May arrest without warrant	Warrant	Bailable	Not Compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
355	Assault or criminal force with intent to dishonour a person other wise than on grave and sudden provocation.	Shall not arrest without warrant	Summons	Ditto...	Compoundable.	Ditto	Ditto
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Ditto	Any Magistrate
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Ditto ...	Ditto ...	Bailable.	Compoundable when permission is given by the court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both	Ditto.
358	Assault or use of criminal force on grave and sudden provocation.	Shall not arrest without warrant.	Summons	Ditto...	Compoundable	Simple imprisonment, for 1 month, or fine of 200 rupees; or both	Ditto.

Of Kidnapping, Abduction, Slavery and Forced Labour.

363	Kidnapping ...	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what court triable.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation	Shall not arrest without warrant	Summons	Bailable	Not compoundable	Imprisonment of either description for 2 years, in addition to imprisonment under any other section	Court of Session, Presidency Magistrate or Magistrate of the first or second class
346	Wrongful confinement in secret.	May arrest without warrant.	Ditto ...	Ditto ...	Compoundable when permission is given by the court before which the prosecution is pending	Ditto ...	Ditto.
347	Wrongful confinement for the purpose of extorting property or constraining to an illegal act, etc.	Ditto ..	Ditto ...	Ditto...	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Ditto.
348	Wrongful confinement for the purpose of extorting confession or information, or of compelling a restoration of property, etc.	Ditto ..	Ditto ...	Ditto...	Ditto...	Ditto ..	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Criminal Force and Assault.

352	Assault or use of criminal force otherwise than on grave provocation.	Shall not arrest without warrant.	Summons	Bailable.	Compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both	Any Magistrate.
353	Assault or use of criminal force to deter a public servant from discharge of his duty.	May arrest without warrant.	Warrant	Ditto...	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code	By what court triable.
370	Buying or disposing of any person as a slave.	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
371	Habitual dealing in slaves.	May arrest without warrant.	Ditto ...	Not bailable.	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
372	Selling or letting to hire a minor for purposes of prostitution, &c.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
373	Buying or obtaining possession of a minor for the same purposes.	Ditto ...	Ditto ...	Ditto .	Ditto...	Ditto ...	Ditto.
374	Unlawful compulsory labour.	Shall not arrest without warrant.	Ditto ...	Bailable	Compoundable.	Imprisonment of either description for 1 year, or fine, or both	Any Magistrate

Of Rape.

376	Rape— If the sexual intercourse was by a man with his own wife not being under 12 years of age.	Ditto ...	Summons	Ditto ..	Not compoundable	Imprisonment of either description for 2 years or fine or both.	Court of Session Chief Presidency Magistrate or District Magistrate
	If the sexual intercourse was by a man with his own wife being under 12 years of age	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
	In any other case.	May arrest without warrant.	Warrant	Not bailable	Ditto	Ditto ...	Ditto

Of Unnatural Offences

377	Unnatural offences.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
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1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code.	By what Court triable.
364	Kidnapping or abducting in order to murder.	May arrest without warrant	Warrant	Not bailable	Not compoundable.	Transportation for life, or rigorous imprisonment for 10 years and fine	Court of Session.
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Court of Session.
366-A	Procurement of minor girl.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
366-B	Importation of girl from foreign country.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
368	Concealing or keeping in confinement a kidnapped person.	Ditto	Ditto	Ditto	Ditto	Punishment for kidnapping or abduction.	Court of Session, Presidency Magistrate or Magistrate of the first class.
369	Kidnapping or abducting a child with intent to take property from the person of such child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily be issued in the first instance	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
385	Putting or attempting to put in fear of injury, in order to commit extortion.	Shall not arrest without warrant	Warrant	Bailable	Not compoundable	Imprisonment of either description for 2 years, or fine, or both.	Ditto
386	Extortion by putting a person in fear of death or grievous hurt.	Shall not arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session
387	Putting or attempting to put a person in fear of death or grievous hurt in order to commit extortion	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine	Ditto.
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years	Ditto ...	Ditto ...	Bailable	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
	If the offence threatened be an unnatural offence.	Ditto ...	Ditto	Ditto ...	Ditto ...	Transportation for life.	Ditto.
389	Putting a person in fear of accusation of offence punishable with death, transportation for life, or with imprisonment for 10 years, in order to commit extortion.	Ditto	Ditto ..	Ditto ...	Ditto ...	Imprisonment of either description for 10 years and fine.	Ditto.
	If the offence be an unnatural offence	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY.

Of Theft.

379	Theft ..	May arrest without warrant	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Any Magistrate
380	Theft in a building, tent or vessel.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto
381	Theft by clerk or servant of property in possession of master or employer.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
382	Theft, preparation having been made for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, in order to the committing of such theft, or to retreating after committing it, or to retaining property taken by it.	Ditto ...	Ditto ..	Ditto	Ditto ..	Rigorous imprisonment for 10 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Extortion.

384	Extortion ...	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
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1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Penal Code.	By what court triable.
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity.	May arrest without warrant.	Warrant	Not bailable.	Not compoundable.	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
401	Belonging to a wandering of persons associated for the purpose of habitually committing thefts.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Rigorous Imprisonment for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
402	Being one of five or more persons assembled for the purpose of committing dacoity	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Court of Session.

Of Criminal Misappropriation of Property

403	Dishonest misappropriation of moveable property, or converting it to one's own use.	Shall not arrest without warrant.	Warrant.	Bailable	compoundable, when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years or fine, or both.	any Magistrate.
404	Dishonest misappropriation of property knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Ditto ...	Ditto ...	Ditto ...	Not compoundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what court triable.

Of Robbery and Dacoity

392	Robbery ...	May arrest without warrant.	Warrant	Not bailable	Not compoundable	Rigorous imprisonment for 10 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If committed on the high way between sunset and sunrise.	Ditto ..	Ditto .	Ditto ..	Ditto ...	Rigorous imprisonment for 14 years and fine.	Ditto.
393	Attempt to commit robbery.	Ditto .	Ditto ..	Ditto ..	Ditto	Rigorous imprisonment for 7 years and fine	Ditto.
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery.	Ditto	Ditto .	Ditto	Ditto	Transportation for life, or rigorous imprisonment for 10 years and fine.	Ditto.
395	Dacoity .	Ditto ..	Ditto	Ditto	Ditto	Ditto ...	Court of Session.
396	Murder in dacoity	Ditto ..	Ditto .	Ditto	Ditto	Death, transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session
397	Robbery or dacoity, with attempt to cause death or grievous hurt	Ditto .	Ditto ...	Ditto ...	Ditto .	Rigorous imprisonment for not less than 7 years	Ditto.
398	Attempt to commit robbery or dacoity when armed with deadly weapon	Ditto	Ditto	Ditto	Ditto ..	Ditto ..	Ditto .
399	Making preparation to commit dacoity.	Ditto .	Ditto	Ditto .	Ditto	Rigorous imprisonment for 10 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity.	May arrest without warrant	Warrant.	Not bailable	Not compoundable.	Transportation for life, or rigorous imprisonment for 10 years and fine	Court of Session.
413	Habitually dealing in stolen property.	Ditto ...	Ditto ...	Ditto ..	Ditto .	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto
414	Assisting in concealment or disposal of stolen property knowing it to be stolen.	Ditto ...	Ditto ...	Ditto...	Ditto	Imprisonment of either description for 3 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Of Cheating.

417	Cheating	Shall not arrest without warrant.	Warrant.	Bailable	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine or both	Presidency Magistrate or Magistrate of the first or second class.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
419	Cheating by personation.	May arrest without warrant	Ditto ...	Ditto...	Ditto...	Ditto ...	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
	If by clerk or person employed deceased.	Shall not arrest without warrant.	Warrant.	Bailable	Not Compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Of Criminal Breach of Trust

406	Criminal breach of trust.	May arrest without warrant.	Warrant.	Not bailable	Not compoundable	Imprisonment of either description for 3 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
407	Criminal breach of trust by a carrier, wharfinger, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
408	Criminal breach of trust by a clerk or servant	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
409	Criminal breach of trust by public servant or by banker, merchant or agent, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of the Breach of Trust by Deception

411	Di						
	10g 10 10 10 stolen.					10g. 10 10 10 both	Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
<i>Of mischief</i>							
426	Mischief ...	Shall not arrest without warrant	Summons.	Bailable	Compoundable when the only loss or damage caused is loss or damage to a private person.	Imprisonment of either description for 3 months, or fine, or both	Any Magistrate
427	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Ditto ...	Warrant.	Ditto ..	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class
428	Mischief, by killing, poisoning, maiming, or rendering useless any animal of the value of 10 rupees or upwards.	May arrest without warrant.	Ditto ..	Ditto ...	Not compoundable	Ditto ...	Ditto
429	Mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, etc., whatever may be its value, or any other animal of the value of 50 rupees or upwards.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 5 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
420	Cheating and thereby dishonestly inducing delivery of property or the making, alteration, or destruction of a valuable security.	May arrest without warrant	Warrant.	Bailable	Compoundable when permission is given by the court before which the prosecution is pending	Imprisonment of either description for 7 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class

Of Fraudulent Deeds and Disposition of Property.

421	Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
423	Fraudulent execution of deed of transfer containing a false statement of consideration	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
424	Fraudulent removal or concealment of property, of himself, or any other person, or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled	Ditto	Ditto	Ditto	Ditto...	Ditto	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or, in case of agricultural produce, 10 rupees or upwards	May arrest without warrant	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
436	Mischief by fire of explosive substance with intent to destroy a house, etc	Ditto ...	Ditto ..	Not bailable	Ditto ..	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 10 years, and fine.	Ditto.
438	The mischief described in the last section when committed by fire or any explosive substance	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
439	Running vessel ashore with intent to commit theft, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 10 years, and fine.	Ditto.
440	Mischief committed after preparation made for causing death, or hurt, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Criminal Trespass.

447	Criminal trespass	May arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate
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1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
430	Mischief by causing diminution of supply of water for agricultural purposes, etc.	May arrest without warrant.	Warrant.	Bailable	Compoundable when permission is given by the court before which the prosecution is pending	Imprisonment of either description for 5 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
431	Mischief by injury to public road, bridge, navigable river or navigable channel and rendering it impassable or less safe for travelling or conveying property	Ditto ...	Ditto ...	Ditto ...	Not compoundable.	Ditto ...	Ditto.
432	Mischief by causing inundation or obstruction to public drainage, attended with damage	May arrest without warrant.	Ditto ...	Ditto ...	Ditto ..	Ditto ...	Ditto
433	Mischief by destroying or moving or rendering less useful a lighthouse or sea-mark, or by exhibiting false lights	Ditto ..	Ditto ...	Ditto ...	Ditto ...	Imprisonment for either description for 7 years, or fine, or both.	Court of Session. ...
434	Mischief by destroying or moving, etc., a land-mark fixed by public authority.	Shall not arrest without warrant.	Ditto ...	Ditto .	Ditto ...	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
453	Lurking house-trespass, or house breaking.	May arrest without warrant.	Warrant	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years and fine.	Presidency Magistrate or Magistrate of the first or second class.
454	Lurking house-trespass, or house-breaking in order to the commission of an offence punishable with imprisonment. If the offence is theft	Ditto ...	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine	Court of Session, or Magistrate of the first or second class Ditto
455	Lurking house-trespass, or house-breaking after preparation made for causing hurt, assault, etc	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
456	Lurking house-trespass, or house-breaking by night.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
457	Lurking house-trespass, or house-breaking by night in order to the commission of an offence punishable with imprisonment. If the offence is theft.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 5 years and fine.	Ditto.
		Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 14 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what Court triable.
448	House trespass	May arrest without warrant.	Warrant	Bailable	Compoundable	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both	Any Magistrate.
449	House-trespass in order to the commission of an offence punishable with death.	Ditto ...	Ditto ...	Not bailable	Not compoundable.	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
450	House-trespass in order to the commission of an offence punishable with transportation for life	Ditto .	Ditto ..	Ditto .	Ditto...	Imprisonment of either description for 10 years and fine	Ditto
451	House-trespass in order to the commission of an offence punishable with imprisonment.	Ditto ...	Ditto ..	Bailable	Compoundable when permission is given by the court before which the prosecution is pending	Imprisonment of either description for 2 years and fine.	Any Magistrate
	If the offence is theft.	Ditto ...	Ditto ..	Not bailable	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class
452	House trespass, having made preparation for causing hurt, assault, etc.	Ditto .	Ditto	Ditto .	Ditto	Ditto ...	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
466	Forgery of a record of a Court of Justice or of a Register of Births, etc., kept by a public servant.	Shall not arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
467	Forgery of a valuable security, Will or authority to make or transfer any valuable security, or to receive any money, etc.	Ditto ..	Ditto ...	Ditto ..	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
	When the valuable security is a promissory note of the Government of India.	May arrest without warrant.	Ditto ...	Ditto ..	Ditto...	Ditto ...	Ditto.
468	Forgery for the purpose of cheating	Shall not arrest without warrant	Ditto				...
469	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Ditto ...	Ditto ...	Bailable.	Ditto...	Imprisonment of either description for 3 years and fine.	rate of the first class Ditto.
471	Using as genuine a forged document which is known to be forged.	Shall not arrest without warrant.	Warrant.	Bailable	Ditto...	Punishment for forgery of such document	Same court as that by which the forgery is triable.
	When the forged document is a promissory note of the Government of India	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Ditto ...	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable
458	Lurking house-trespass, or house-breaking by night after preparation made for causing hurt, etc.	May arrest without warrant	Warrant	Not bailable	Not-compoundable.	Imprisonment of either description for 14 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
459	Grievous hurt caused whilst committing lurking house-trespass or house-breaking	Ditto ...	Ditto ...	Ditto...	Ditto ..	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
460	Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night, etc	Ditto ...	Ditto ...	Ditto...	Ditto..	Ditto ..	Ditto.
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property.	Ditto ...	Ditto			or fine, or both	Magistrate of the first or second class
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Ditto ...	Ditto .	Ditto...	Ditto .	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS.

465	Forgery	... shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code or possessing counterfeit marked material.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life or imprisonment of either description for 7 years and fine.	Court of Session.
476	Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
477	Fraudulently destroying or defacing, or attempting, to destroy or deface, or secreting, a will, etc	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 7 years and fine	Ditto ...
477-A	Falsification of accounts.	Ditto ...	Ditto ...	Bailable	Ditto...	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Trial

482	Using a false trade or property mark, with intent to deceive or injure any person.	Shall not arrest without warrant.			permission is given by the Court before which the prosecution is pending	of the first or second class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
472	Making or counterfeiting a seal, plate, etc. with intent to commit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc. knowing the same to be counterfeit	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable	Transportation for life, or imprisonment of either description for 7 years and fine.	Court of Session.
473	Making or counterfeiting a seal, plate, etc. with intent to commit a forgery punishable otherwise than under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc. knowing the same to be counterfeit	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
474	Having possession of a document knowing it to be forged, with intent to use it as genuine, if the document is one of the descriptions mentioned in section 466 of the Indian Penal Code	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
	If the document is one of the descriptions mentioned in sect. 467 of the Indian Penal Code.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 7 years and fine.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
487	Fraudulently making false mark upon any package or receptacle containing goods with intent to cause it to be believed that it contains goods which it does not contain, etc.	Ditto ...	Ditto ...	Ditto...	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class
488	Making use of any such false mark.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ..	Ditto.
489	Removing, destroying or defacing any property-mark with intent to cause injury	Ditto ...	Ditto ...	Ditto...	Ditto ...	Imprisonment of either description for 1 year, or fine or both	Presidency Magistrate or Magistrate of the first or second class.

**Of Currency-Notes and Bank Notes.*

489-A	Counterfeiting currency notes or bank-notes	May arrest without warrant.	Warrant	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine	Court of Session.
489-B	Using as genuine forged or counterfeit currency-notes or bank notes.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto...	Ditto.
489-C	Possession of forged or counterfeit currency-notes or bank-notes	Ditto ...	Ditto ...	Bailable.	Ditto..	Imprisonment of either description for 7 years, or fine, or both	Ditto.
489-D	Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.

*This portion was added to the Schedule by s 3 of the Currency Notes Forgery Act, 1899 (XII of 1899).

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
433	Counterfeiting a trade or property mark used by another, with intent to cause damage or injury.	Shall not arrest without warrant	Warrant	Bailable	Compoundable when permission given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years or fine, or both	Presidency Magistrate or Magistrate of the first or second class.
464	Counterfeiting a property mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of any property.	Ditto	Summons	Ditto...	Not compoundable	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class
485	Fraudulently making or having possession of any die, plate or other instrument for counterfeiting any public or private property or trade mark	Ditto	Ditto ..	Ditto	Ditto ..	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
486	Knowingly selling goods marked with a counterfeit property or trade-mark.	Ditto .	Ditto	Ditto .	Compoundable with permission of the Court before which the prosecution is pending	Imprisonment of either description for 1 year or fine, or both	Presidency Magistrate or Magistrate of the first and second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what court triable.
494	Marrying again during the lifetime of a husband or wife.	Shall not arrest without warrant.	Warrant.	Bailable	Compoundable with permission of the court before which the prosecution is pending.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
495	Same offence, with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Ditto ...	Ditto ...	Ditto ...	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session.
496	A person with fraudulent intention going through the ceremony of being married, knowing that he is not there by lawfully married.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
497	Adultery ...	Ditto ...	Ditto ...	Ditto...	Compoundable.	Imprisonment of either description for 5 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class.
498	Enticing or taking away or detaining, with a criminal intent a married woman.	Ditto ...	Ditto ...	Ditto...	Ditto..	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.

CHAPTER XIX—CRIMINAL BREACH OF CONTRACTS OF SERVICE

490	Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so.	Shall not arrest without warrant	Summons	Bailable	Compoundable	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease and voluntarily omitting to do so.	Ditto ..	Ditto ..	Ditto ..	Ditto ..	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Ditto.
492	Being bound by contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer, and voluntarily deserting the service or refusing to perform the duty	Ditto	Ditto ..	Ditto ..	Ditto ..	Imprisonment of either description for 1 month, or fine of double the expense incurred, or both.	Ditto.

CHAPTER XX—OFFENCES RELATING TO MARRIAGE.

493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief	Shall not arrest without warrant	Warrant.	Not bailable	Not compoundable	Imprisonment of either description for 10 years, and fine.	Court of Session.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
494	Marrying again during the lifetime of a husband or wife.	Shall not arrest without warrant.	Warrant.	Bailable	Compoundable with permission of the court before which the prosecution is pending.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
495	Same offence, with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Ditto ...	Ditto ...	Ditto ..	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session.
496	A person with fraudulent intention going through the ceremony of being married, knowing that he is not there by lawfully married.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
497	Adultery ...	Ditto ...	Ditto ..	Ditto...	Compoundable.	Imprisonment of either description for 5 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class.
498	Enticing or taking away or detaining, with a criminal intent a married woman.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description of 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code	By what court triable.

CHAPTER.—XXI —DEFAMATION.

500	Defamation	Shall not arrest without warrant.	Warrant	Bailable.	Compoundable.	Simple imprisonment for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
501	Printing or engraving matter knowing it to be defamatory.	Ditto ...	Ditto ...	Ditto ..	Ditto...	to ...	Ditto.
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	Ditto ..	Ditto	Ditto	Ditto	Ditto ..	Ditto.

CHAPTER XXII —CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

501	Insult intended to provoke a breach of the peace	Shall not arrest without warrant	Warrant	Bailable	Compoundable.	Imprisonment of either description for two years, or fine or both.	Any Magistrate
505	False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace	Ditto	Ditto	Not bailable	Not compoundable	Do	Presidency Magistrate or Magistrate of the first class
506	Criminal intimidation	Shall not arrest without warrant	Ditto	Bailable	Compoundable	Imprisonment of either description for 2 years, or fine, or both	(*Presidency Magistrate or Magistrate of the first or second class

* These words were substituted for the word "Ditto," by Part II of the Second Schedule to the Repealing and Amending Act, 1903 (1 of 1903), General Acts, Vol V.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code.	By what court triable.
	If threat be to cause death or grievous hurt, etc.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
507	Criminal Intimidation by anonymous communication or having taken precaution to conceal whence the threat comes.	Ditto ...	Ditto ..	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, in addition to the punishment under above section.	Ditto.
508	Act caused by inducing a person to believe that he will be rendered an object of of Divine displeasure	Ditto ...	Ditto ...	Ditto ...	Compoundable.	Imprisonment of either description 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
509	Uttering any word or making any gesture intended to insult the modesty of a woman, etc.	Ditto ...	Ditto ...	Ditto ...	Compoundable when permission is given by the court before which the prosecution is pending.	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
510	Appearing in a public place, etc., in a state of intoxication and causing annoyance to any person.	Ditto .	Ditto ...	Ditto ...	Not compoundable.	Simple imprisonment for 24 hours, or fine of 10 rupees, or both.	Any Magistrate.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code	By what court triable.

CHAPTER—XXI.—DEFAMATION.

500	Defamation	Shall not arrest without warrant.	Warrant	Bailable.	Compoundable.	Simple imprisonment for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
501	Printing or engraving matter knowing it to be defamatory.	Ditto ...	Ditto ...	Ditto .	Ditto...	to ..	Ditto.
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	Ditto	Ditto	Ditto .	Ditto ..	Ditto ..	Ditto.

CHAPTER XXII—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

501	Insult intended to provoke a breach of the peace.	Shall not arrest without warrant	Warrant	Bailable	Compoundable.	Imprisonment of either description for two years, or fine or both.	Any Magistrate.
505	False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace	Ditto	Ditto	Not bailable	Not compoundable	Do	Presidency Magistrate or Magistrate of the first class
506	Criminal intimidation	Shall not arrest without warrant	Ditto ..	Bailable	Compoundable	Imprisonment of either description for 2 years, or fine, or both.	[*Presidency Magistrate or Magistrate of the first or second class

* These words were substituted for the word "Ditto," by Part II of the Second Schedule to the Repealing and Amending Act, 1903 (1 of 1903), General Acts, Vol V.

SCHEDULE III.

(N. B.—The changes introduced have been shown in italics.)

(See section 36.)

ORDINARY POWERS OF PROVINCIAL MAGISTRATES.

I.—Ordinary Powers of a Magistrate of the Third Class.

- (1) Power to arrest, or direct the arrest of, and to commit to custody, a person committing an offence in his presence, section 64
- (2) Power to arrest, or direct the arrest in his presence of, an offender, section 65.
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, sections 83, 84 and 86
- (4) Power to issue proclamations in cases judicially before him, section 87.
- (5) Power to attach and sell property *and to dispose of claims to attached property* in cases judicially before him, section 88.
- (6) Power to restore attached property, section 89.
- (7) Power to require search to be made for letters and telegrams, section 95.
- (8) Power to issue search-warrant, section 98
- (9) Power to endorse a search-warrant and order delivery of things found, section 99.
- (10) Power to issue a warrant for the arrest of a person found, section 100.
- (11) Power to issue a warrant for the arrest of a person found, section 128.
- (12) Power to issue a warrant for the arrest of a person found, section 130.
- (13) * * * * *
- (14) Power to authorize detention *not being detention in the custody of the Police* of a person during a Police investigation, section 167.
- (14a) *Power to postpone issue of process and inquire into case himself, section 202.*
- (15) Power to detain offender found in court, section 351.
- (16) * * * * *
- (17) Power to apply to District Magistrate to issue commission for examination of witness, section 506 (2).
- (18) Power to recover forfeited bond for appearance before Magistrate's Court, section 514, *and to require fresh security, section 514 A*
- (18a) *Power to make order as to custody and disposal of property pending inquiry or trial, section 516 A.*
- (19) * * * * *
- (20) * * * * *
- (21) * * * * *
- (22) * * * * *
- (1) * * * * *
- (2) * * * * * Magistrate
- (3) *Power to postpone issue of process and to inquire into a case or direct* *to First Class* *of an inquiry, section 98.*
- (3) *Power to issue search warrant for discovery of persons wrongfully confined, section 100*
- (4) Power to require security to keep the peace, section 107.
- (5) Power to require security for good behaviour, section 109.
- (6) Power to discharge sureties, section 126 A
- (6a) *Power to make orders as to local nuisances, section 133.*
- (7) Power to make orders, etc., in possession cases, sections 145, 146 and 147.
- (7a) *Power to record statements and confessions during a Police investigation, section 164.*

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not,	Punishment under the Indian Penal Code.	By what court triable.

CHAPTER XXIII—ATTEMPTS TO COMMIT OFFENCES

511	Attempting to commit offences punishable with transportation or imprisonment for 7 years or upwards the commission of the offence.	According as the offence is one in respect of warrant or not.	According as the offence is one in respect of bailable issue.	According as the offence is contemptable or not.	Compoundable when the offence attempted is compoundable.	Transportation or imprisonment not exceeding half of the longest term, and of any description, provided for the offence, or fine, or both.	The Court by which the offence attempted is triable.
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Offences against other Laws

If punishable with death, transportation or imprisonment for 7 years, or upwards.	May arrest without warrant.	Warrant	Not bailable	Not compoundable	...	Court of Session.
If punishable with imprisonment for 8 years and upwards, but less than 7 years.	Ditto ...	Ditto ...	Not bailable except in cases under the Indian Arms Act, 1878, section 19, which shall be bailable.	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
If punishable with imprisonment for 1 year and upwards, but less than 3 years.	Shall not arrest without warrant.	Summons	Bailable	Ditto.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
If punishable with imprisonment for less than 1 year, or with fine only.	Ditto ...	Ditto	Ditto ..	Ditto	Any Magistrate

- (10) Power to hear or refer appeals from convictions by Magistrate of the second and third classes, section 407.
- (11) Power to call for records, section 435
- (12) Power to order inquiry into complaint dismissed or case of accused discharged, section 436.
- (13) Power to order commitment, section 437.
- (14) Power to report case to High Court, section 438.
- (15) * * *
- (16) * * *
- (17) Power to appoint person to be Public Prosecutor in particular case, section 492 (2).
- (18) Power to issue commission for examination of witness, sections 503, 506.
- (19) Power to hear appeals from or revise orders passed under sections 514, 515.
- (20) Power to compel restoration of abducted female, section 552.

SCHEDULE IV.

(See sections 37 and 38)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED.

POWERS WITH WHICH
A MAGISTRATE OF
THE FIRST CLASS
MAY BE INVESTED.BY THE LOCAL
GOVERNMENT.

- (1) Power to require security for good behaviour in case of sedition, section 108.
- (2) Power to require security for good behaviour, section 110.
- (3) * * *
- (4) Power to make orders prohibiting repetitions of nuisances, section 143.
- (5) Power to make orders under section 144.
- (6) * * *
- (7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186.
- (8) Power to take cognizance of offences upon complaint section 190.
- (9) Power to take cognizance of offences upon Police reports, section 190.
- (10) Power to take cognizance of offences without complaint, section 190.
- (11) Power to try summarily, section 200
- (12) Power to hear appeals from Magistrates of the second

or
&c.BY THE DISTRICT
MAGISTRATE

- (14) * * *
- (15) Power to try cases under section 124 A of the Indian Penal Code.
- (1) Power to make orders prohibiting repetitions of nuisances, section 143.
- (2) Power to make orders under section 144.
- (3) * * *
- (4) Power to take cognizance of offences upon complaint, section 190.
- (5) Power to take cognizance of offences upon police reports, section 190
- (6) Power to transfer cases, section 192.

- (7a) *Power to authorize detention of a person in the custody of the Police during a Police investigation, section 167.*
 (7b) *Power to hold inquests, section 174.*
 (8) *Power to commit for trial, section 206.*
 (9) *Power to stop proceedings when no complaint, section 249.*
 (9a) *Power to tender pardon to accomplices during inquiry into case by himself, section 337.*
 (10) *Power to make orders of maintenance, sections 488 and 489.*
 (11) *Power to take evidence on commission, section 503.*
 (12) *Power to recover penalty on forfeited bond, section 514.*
 (12a) *Power to require fresh security, section 514 A.*
 (12b) *Power to recall case made over by him to another Magistrate, section 528 (4)*

(3) *Power to require security for good behaviour, section 110.*

(4) * * * * *

(5) *Power to make orders prohibiting repetitions of nuisances, section 143.*

(6) *Power to make orders under section 144.*

(7) *Power to depute Subordinate Magistrate to make local inquiry, section 148*

(8) *Power to order Police investigation into cognizable case, section 156.*

(9) *Power to receive report of Police Officer and pass order, section 173.*

(10) * * * * *

(11) * * * * * mitted an

(12)

(13)

(14)

(15)

(16)

section 349.

(17) *Power to forward record of inferior court to District Magistrate, section 435 (2).*

(18) *Power to sell property alleged or suspected to have been stolen, etc., section 521.*

(19) *Power to withdraw cases other than appeals, and to try or refer them for trial, section 528.*

(20) * * * * *

V.—Ordinary Powers of a District Magistrate†

(1) *The ordinary powers of a Sub-Divisional Magistrate*

(1a) *Power to try juvenile offenders, section 29 A*

(2) *Power to require delivery of letters, telegrams, etc., section 95*

(3) *Power to issue search-warrants for documents in custody of postal or telegraph authority, section 96.*

(4) *Power to require security for good behaviour in case of sedition, section 103.*

(5) *Power to discharge persons bound to keep the peace or to be of good behaviour, section 124*

(6) *Power to cancel bond for keeping the peace, section 125.*

(6a) *Power to order preliminary investigation by Police Officer not below the rank of Inspector in certain cases, section 196 B.*

(7) *Power to try summarily, section 260*

(7a) *Power to tender pardon to accomplice at any stage of a case, section 337.*

(8) *Power to quash convictions in certain cases, section 350*

(9) *Power to hear appeals from orders requiring security for keeping the peace or good behaviour, section 406.*

(9a) *Power to hear appeals from orders of Magistrates refusing to accept or rejecting sureties, section 406A.*

* Words in brackets, added by Act XVIII of 1922.

† Under the Punjab Frontier Crimes Regulation, 1901 (III of 1901), have the powers specified in Part V of the Third Schedule—see s. 4 (2) Additional District Magistrates appointed under s. 4 of the Regulation, P. & N. W. F. Code.

SCHEDULE V.

(N.B.—The changes introduced have been shown in italics.)

(See section 555.*)

FORMS.

I.—Summons to an Accused Person (see section 68.)

To _____ of _____
 WHEREAS your attendance is necessary to answer to a charge of (*state shortly the offence charged*), you are hereby required to appear in person (*or by pleader, as the case may be*) before the (*Magistrate*) of _____
 , on _____ the _____ day of _____
 Herein fail not _____
 Dated this _____ day of _____ 19 ____
 (Seal) _____ (Signature)

II.—Warrant of Arrest (see section 75).

To (*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS _____ of _____ stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said _____ and to produce him before me.

Herein fail not.

Dated this _____ day of _____ 19 ____
 (Seal) _____ (Signature)

(See section 76)

This warrant may be endorsed as follows:—

If the said _____ shall give bail himself in the sum of _____ (or two
 sureties each in the sum of) to attend before me on the _____ day of _____
 and to continue so to attend until otherwise directed by me, he may be released.

Dated this _____ day of _____ 19 ____
 (Signature)

III.—Bond and Bail-bond after Arrest under a Warrant (see section 86).

I (*name*), of _____, being brought before the District Magistrate of _____
 (*or as the case may be*) under a warrant issued to compel my appearance to answer to the charge of _____, do hereby bind myself to attend in the Court of _____
 on the _____ day of _____ next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court; and, in case of my making default herein, I bind myself to forfeit, to Her Majesty the Queen-Empress of India, the sum of rupees _____

Dated this _____ day of _____ 19 ____
 (Signature)

_____ that he
 _____ day
 _____ shall
 _____ making
 _____ be sum
 of rupees _____

Dated this _____ day of _____ 19 ____
 (Signature)

IV.—Proclamation requiring the Appearance of a Person accused (see section 87).

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or is suspected to have committed*) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or is concealing himself to avoid the service of the said warrant*);

* These figures were substituted for the figures "551" by Part II of the second Schedule to the Repealing and Amending Act, 1903 (I of 1903).

			<ul style="list-style-type: none"> (1)* (2) Power to make orders prohibiting repetitions of nuisances, section 143. (3) Power to make orders under section 144. (3a) <i>Power to record statements</i>
POWERS WITH WHICH A MAGISTRATE OF THE SECOND CLASS MAY BE INVESTED	BY THE LOCAL GOVERNMENT.		<ul style="list-style-type: none"> tion, section 167. (4) Power to hold inquests, section 174. (5) Power to take cognizance of offences upon complaint, section 190. (6) Power to take cognizance of offences upon Police reports, section 190. (7) Power to take cognizance of offences without complaint, section 190. (8) Power to commit for trial, section 206. (9) Power to make orders as to first offenders, section 562.
			<ul style="list-style-type: none"> (1) Power to make orders prohibiting repetitions of nuisances, section 143 (2) Power to make orders under section 144 (3) Power to hold inquests, section 174. (4) Power to take cognizance of offences upon complaint, section 190. (5) Power to take cognizance of offences upon Police reports, section 190
		BY THE DISTRICT MAGISTRATE.	<ul style="list-style-type: none"> (1) Power to make orders prohibiting repetitions of nuisances, section 143. (2) * (3) Power to hold inquests, section 174 (4) Power to take cognizance of offences upon complaint, section 190. (5) Power to take cognizance of offences upon Police reports, section 190. (6) *
	BY THE DISTRICT MAGISTRATE.		<ul style="list-style-type: none"> (1) Power to make orders prohibiting repetitions of nuisances, section 143. (2) * (3) Power to hold inquests, section 174 (4) Power to take cognizance of offences upon complaint, section 190. (5) Power to take cognizance of offences upon Police reports, section 190. (6) *
			<ul style="list-style-type: none"> (1) Power to make orders prohibiting repetitions of nuisances, section 143. (2) * (3) Power to hold inquests, section 174 (4) Power to take cognizance of offences upon complaint, section 190 (5) Power to take cognizance of offences upon Police reports, section 190.
			<ul style="list-style-type: none"> (1) Power to make orders prohibiting repetitions of nuisances, section 143. (2) * (3) Power to hold inquests, section 174 (4) Power to take cognizance of offences upon complaint, section 190 (5) Power to take cognizance of offences upon Police reports, section 190.
POWERS WITH WHICH A MAGISTRATE OF THE THIRD CLASS MAY BE INVESTED.	BY THE LOCAL GOVERNMENT		<ul style="list-style-type: none"> (1) Power to make orders prohibiting repetitions of nuisances, section 143. (2) * (3) Power to hold inquests, section 174 (4) Power to take cognizance of offences upon complaint, section 190 (5) Power to take cognizance of offences upon Police reports, section 190.
		BY THE DISTRICT MAGISTRATE.	<ul style="list-style-type: none"> (1) Power to make orders prohibiting repetitions of nuisances, section 143. (2) * (3) Power to hold inquests, section 174 (4) Power to take cognizance of offences upon complaint, section 190 (5) Power to take cognizance of offences upon Police reports, section 190.
POWERS WITH WHICH A SUB DIVISIONAL MAGISTRATE MAY BE INVESTED.	BY THE LOCAL GOVERNMENT.		<ul style="list-style-type: none"> Power to call for records, section 435.

* The words and figures "(1) Power to pass sentences of whipping, section 32" were repealed by the Whipping Act, 1909 (iv of 1909).

Order authorizing an Attachment by the Deputy Commissioner as Collector (*see section 88*).

To the Deputy Commissioner of the district of

WHEREAS complaint has been made before me that (*name, description and*

You are hereby authorized and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of this order.

Dated this

day of

19

(Seal)

(Signature).

VII.—Warrant in the first instance to bring up a witness (*see section 90*).

plained of,

Given under my hand and the seal of the Court, this

day of

19

(Seal)

(Signature).

VIII.—Warrant to search after information of a particular offence (*see section 96*)

To (*name and designation of the Police Officer or other person or persons who is or are to execute the warrant*).

Whereas information has been received that (*name and designation of the person or persons who is or are to execute the warrant*),

(Seal)

(Signature).

IX.—Warrant to search suspected place of deposit (*see section 98*).

* Substituted for the words "Proclamation was duly issued" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

† The words "but he has not appeared" have been omitted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

Proclamation is hereby made that the said _____ of _____ is required to appear at (place) before this Court (or before me) to answer the said complaint (on the _____ day of _____).

Dated this _____
(Seal)

day of _____

19 _____

(Signature).

V Proclamation requiring the Attendance of a Witness *see section 87*.

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of (mention the offence concisely) and a warrant has been issued to compel the attendance of (name, description and address of the witness) before this Court to be examined touching the _____

before the Court of _____ on the _____ day of _____ next at _____ o'clock, to be examined touching the offence complained of.

Dated this _____
(Seal)

day of _____

19 _____

(Signature)

VI.—Order of Attachment to compel the Attendance of a Witness *(see section 88)*.

To the Police Officer in charge of the Police station at _____

place mentioned therein:

This is to authorize and require you to attach by seizure the moveable property _____ you the _____ the _____

Dated this _____
(Seal)

day of _____

19 _____

(Signature).

Order of Attachment to compel the Appearance of a Person accused *(see section 89)*

To (name and designation of the person or persons who is or are to execute the warrant)

WHEREAS complaint has been made before me that (name, description and _____)

answer the said charge within _____ days; and where is the said _____ is possessed of the following property other than land-paying revenue _____ in the district of _____ village (or town) of _____ has been made for the attachment thereof.

(Seal)

(Signature).

* Substituted for the words "Proclamation was duly served" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923)

† The words "and he has failed to appear" have been substituted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

upon him to show cause why he should not enter into a bond for rupees
with one surety (or a bond with two sureties each in rupees _____), that he, the
_____, _____, _____, _____, _____, _____, _____, _____, _____, _____
months; and whereas an _____
and find such security (*state*
in the summons), and he

This is to authorize and require you, the said Superintendent (or Keeper), to receive
the said (name) into your custody, together with this warrant, and him safely to keep in
the said Jail for the said period of *term of imprisonment* unless he shall in the
mean time* [be lawfully ordered to be released] and to return this warrant with an
endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this _____ day of _____ 19
(Seal) (Signature)

XIV.—Warrant of Commitment on Failure to find Security for Good Behaviour.

(See section 123.)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS it has been made to appear to me that (name and description) has
been and is lurking within the district of _____ having no ostensible means of
subsistence (or, that he is unable to give any satisfactory account of himself);

or
WHEREAS evidence of the general character of (name and description) has been
adduced before me and recorded, from which it appears that he is an habitual robber (or
house-breaker, etc., as the case may be);

And whereas an order has been recorded stating the same and requiring the said
(name) to furnish security for his good behaviour for the term of (*state the period*) by
him- _____

_____ fault
_____ done

furnished;
This is to authc _____ Keeper), to receive
the said (name) into _____ safely to keep in
the said Jail for the _____ he shall in the
meantime [be lawf _____ warrant with an
endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this _____ day of _____ 19
(Seal) (Signature)

XV.—Warrant to Discharge a Person imprisoned on Failure to give Security.

(See sections 123 and 124)

(or other

_____) was committed to your custody
y of _____ and has since duly
given security under section _____ of the Code of Criminal Procedure;

or
and there has appeared to me sufficient ground for the opinion that he can be released
without hazard to the community;

This is to authorize and require you forthwith to discharge the said (name) from your
custody unless he is liable to be detained for some other cause.

Given under my hand and the seal of the Court, this _____ day of _____ 19
(Seal) (Signature)

*Where made as a condition for the release of a person with the said order by himself
he shall be
Repeating

by himself
shall be re-
(1 of 1903)

This is to authorize and require you to enter the said house (or other place) with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (or other place or if the search is to be confined to a part, specify the part clearly) and to seize and take possession of any property (or

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____
(Seal) (Signature)

X.—Bond to keep the Peace (see section 107).

WHEREAS I (name), inhabitant of (place), have been called upon to enter into a bond to keep the peace, for the term of _____ or until the completion of the inquiry in the matter of _____ now pending in the Court of _____ * I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term or until the completion of the said inquiry* and in case of my making default therein, I hereby bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees _____

Dated this _____ day of _____ 19 ____
(Signature)

XI.—Bond for Good Behaviour (see sections 108, 109 and 110).

I bind myself to forfeit to Her Majesty the sum of rupees _____
Dated this _____ day of _____ 19 ____

(Signature)

_____ hereby declare
ur to Her
or until
we bind

19 ____
(Signature)

XII.—Summons on Information of a probable Breach of the Peace (see section 114).

To _____ of _____
_____ that (state the
breach of the peace
you are hereby required
of the Magistrate of
_____ clock in the forenoon,
a bond for rupees _____
by the bond of one (or two,
each if more

day of _____ 19 ____
(Signature)

XIII.—Warrant of Commitment on Failure to find Security to keep the Peace (see section 123).

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (name and address) appeared before me in person (or by his authorized agent) on the _____ day of _____ in obedience to a summons calling

I. XIX.—Injunction to provide against Imminent Danger pending Inquiry by Jury (*see section 142*).

To (name, description and address).

WHEREAS the inquiry by a Jury appointed to try whether my order issued on the day of 19 is reasonable and proper is still pending, and it has been made to said order is attended with so imminent
 y immediate measures to prevent such
 142 of the Code of Criminal Procedure,
 nly what is required to be done as a
 temporary safeguard), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this day of 19 .

(Seal)

(Signature).

XX.—Magistrate's Order prohibiting the Repetition, etc., of a Nuisance (*see section 143*).

the proper recital.
 nuisance by again
 19 .

(Seal)

(Signature)

XXI.—Magistrate's Order to prevent Obstruction, Riot, etc. (*see section 144*).

To (name, description and address).

have the
 the said
 upon the
 or

lead to a riot or an affray ;

or

WHEREAS, etc. (*as the case may be*);

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road ;

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (*or as the case recited may require*)

Given under my hand and the seal of the Court, this day of 19 .

(Seal)

(Signature).

XXII.—Magistrate's Order declaring Party entitled to retain Possession of Land, etc., in Dispute (*see section 145*)

likely to induce a
 or resid-
 incised
 parties
 of actual
 very bad
 to the
 names

subject
 of dispute) and entitled to retain such possession until ousted by due course of law and do
 strictly forbid any disturbance of his (or their) possession in the mean time.

Given under my hand and the seal of the Court, this day of 19 .

(Seal)

(Signature).

XVI.—Order for the removal of Nuisances (*see section 139*)

To (name, description and address)

WHEREAS it has been made to appear to me that you have caused an obstruction (or nuisance) to persons using the public road way (or other public place) which, etc., (*describe the road or public place*), by, etc. (*state what it is that causes the obstruction or nuisance*), and that such obstruction (or nuisance) still exists;

or

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (*state the Particular trade or occupation and the place where it is carried on*), and that the same is injurious to the public health (or comfort) by reason (*state briefly in what manner the injurious effects are caused*), and should be suppressed or removed to a different place;

or

..... session
..... public
..... reason

or

WHEREAS, etc. (*as the case may be*);

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate the nuisance*) or to appear at in the Court of on the day of next, and to show cause why this order should not be enforced;

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc.;

or

I do hereby direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind of fence and the part to be fenced*); or to appear, etc.;

or

I do hereby direct and require you, etc. (*as the case may be*)

Given under my hand and the seal of the Court, this day of 19 ..
(Seal) (Signature).

XVII.—Magistrate's Order constituting a Jury (*see section 138*).

WHEREAS on the day of 19 .., an order was issued to (name) (name) has applied to for an order appointing; I do hereby appoint try and decide the said days from

Given under my hand and the seal of the Court, this day of 19 ..
(Seal) (Signature).

XVIII.—Magistrate's Notice and Peremptory Order after the Finding by a Jury (*see section 140*).

To (name, description and address).

Given under my hand and the seal of the Court, this day of 19 ..
(Seal) (Signature).

XXIII.—Warrant of Attachment in the case of a Dispute as to the Possession of Land, etc.

(see section 145).

To the Police Officer in charge of the Police station at
Collector of]

[or, To the

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (describe the parties concerned by name and residence

of the said parties was in possession as aforesaid] .

This is to authorize and require you to attach the said (the subject of dispute) by taking and keeping possession thereof, and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession, shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this

day of 19 .

(Seal)

(Signature).

XXIV.—Magistrate's Order prohibiting the doing of anything on Land or Water (see section 147).

A dispute has been made to appear to me that a dispute likely to induce a breach of the peace existed between (state concisely the subject of the dispute) a possession of which land (or persons), and it appearing to me or (water) has been open to the

their interest, shall not take (or retain) possession of the said land (or water) to the exclusion of the enjoyment of the right of use aforesaid, until he (or they) shall obtain the decree or order of a competent Court adjudging him (or them) to be entitled to exclusive possession.

Given under my hand and the seal of the Court, this

day of 19 .

(Seal)

(Signature)

XXV. Bond and Bail bond on a Preliminary Inquiry before a Police Officer (see section 169)

I (name), of , being charged with the offence of , and after inquiry required to appear before the Magistrate of

or

and after inquiry called upon to enter into my own recognizance to appear when required, do hereby bind myself to appear at , in the Court of , on the day of next (or on such day as I may hereafter be required to attend) to answer further to the said charge, and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this

day of

19 .

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the above said that he shall attend at , in the Court of , on the day of next (or on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and, in case of his making default therein, I hereby bind myself (or we hereby bind ourselves) to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this

day of

19 .

(Signature)

(4) That you, on or about the _____ day of _____, in the course of the inquiry into _____, before
 Alternative _____, stated in evidence that "_____,"
 charges on section _____ and that you, on or about the _____ day of _____, at
 193 _____, in the course of the trial of _____, before
 _____, stated in the evidence that "_____," one of which statements
 you either knew or believed to be false, or did not believe to be true, and thereby committed
 an offence punishable under section 193 of the Indian Penal Code, and within the cognizance
 of the Court of Session [or High Court.]

[In cases tried by Magistrates substitute "within my cognizance" for "within
 the cognizance of the Court of Session" and in (c) omit "by the said Court."]

III Charge for Theft after previous Conviction.

I (name and office of Magistrate, etc) hereby charge you (name of accused
 person) as follows :—

That you, on or about the _____ day of _____, at _____, had
 committed theft, and thereby committed an offence punishable under section 379 of the
 Indian Penal Code, and within the cognizance of the Court of Session [or {High Court}
 {Magistrate}]
 as the case may be]

And you, the said (name of accused), stand further charged that you, before the
 committing of the said offence, that is to say, on the _____ day of _____, had
 been convicted by the (state Court by which conviction was had) at _____
 of an offence punishable under Chapter XVII of the Indian Penal Code with imprison-
 ment for a term of three years, that is to say, the offence of house-breaking by night
 (describe the offence in the words used in the section under which the accused was
 convicted), which conviction is still in full force and effect and that you are thereby
 liable to enhanced punishment under section 75 of the Indian Penal Code.

And I hereby direct that you be tried, etc.

XXIX.—Warrant of Commitment on a Sentence of Imprisonment or Fine if passed by a
 Magistrate.

(See sections 245 and 258)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS on the _____ day of _____ 19 _____, (name of prisoner),
 the (1st, 2nd, 3rd, as the case may be) prisoner in case No. _____ of the
 Calendar for 19 _____ was convicted before me (name and official designation) of the
 offences (mention the offence or offences concisely) under section (or sections) of the
 Indian Penal Code (state the section or sections) and I hereby direct that the punishment fully

for (name of prisoner), to receive
 with this warrant

day of _____ 19 _____
 (Signature)

(Seal)

XXX.—Warrant of Imprisonment on Failure to recover amends by Attachment and Sale.

(see section 250.)

To the Superintendent (or Keeper) of the Jail at _____

and description of
 same has been
 awarded pay-
 amends; and
 for his simple
 to recover paid;

(7) That you, on or about the _____ day of _____, at _____, abetted the commission of suicide by *A B*, a person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(8) That you, on or about the _____ day of _____, at _____, voluntarily caused grievous hurt to _____, and thereby committed an offence punishable under section 325 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(9) That you, on or about the _____ day of _____, at _____, robbed [state the name], and thereby committed an offence punishable under section 392 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(10) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session," and in (c) omit "by the said Court"]

(II) Charge with two or more Heads.

(a) I [name and office of Magistrate, etc.] hereby charge you [name of accused person] as follows, —

(b) *First*—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, delivered the same to another person, by name *A B*, as genuine and thereby committed an offence punishable under section 241, of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly—That you, on or about the _____ day of _____, at _____, committed the offence of _____, and thereby committed an offence punishable under section _____ of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(c) _____

[Signature and Seal of the Magistrate]

[To be substituted for (b)].—

(2) *First*—That you, on or about the _____ day of _____, at _____, committed murder under sections 302 and _____ of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly—That you, on or about the _____ day of _____, at _____, using the death of _____, committed culpable homicide not amounting to murder, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(3) *First*—That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

_____ in order to the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Thirdly—That you, on or about the _____ day of _____, at _____, committed _____, and thereby committed an offence punishable under section _____ of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Fourthly—That you, on or about the _____ day of _____, at _____, committed _____, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

XXXV.—Warrant of Execution on a Sentence of Death (*see* section 381).

To the Superintendent (or Keeper) of the Jail at
 WHEREAS (name of prisoner) the (1st, 2nd, 3rd, as the case may be) prisoner
 in case No. of the Calendar at the Session held before me on the day of 19, has been by warrant of this Court dated the day of 19, committed to your custody under sentence of death; and whereas the order of the Court of confirming the said sentence has been received by this Court;

This is to authorize and require you, the said Superintendent (or Keeper) to carry out the sentence of death to be hanged by the Court of his warrant to the day of 19, (Signature)

XXXVI.—Warrant after a Commutation of a Sentence (*see* sections 381 and 382).

To the Superintendent (or Keeper) of the Jail at
 WHEREAS at a Session held on the day of 19, (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner of the Calendar at the said Session punishable under section and was thereupon the Court of the punishment adjudged by the

or
 if the mitigated sentence is one of imprisonment after the words "custody in punishment of imprisonment under

(Seal)

day of 19 (Signature)

XXXVII.—Warrant to levy a Fine by Attachment and Sale [*see* section 386 (1) (a)].

To (name and designation of the Police Officer or other person or persons who is or are to execute the warrant).

WHEREAS (name and description of the offender) was on the day of 19, convicted before me of the offence of (mention the offence concisely), and sentenced to pay a fine of rupees; and whereas the said (name) although required to pay the said fine, has not paid the same or any part thereof;

This is to authorize and require you to attach any* moveable property belonging to the said (name) which may be found within the district of; and if within (state the number of days or hours allowed) next after such attachment; the said sum shall not be paid (or forthwith), to sell the moveable property attached; or so much thereof as shall be sufficient to satisfy the said fine, returning this warrant with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19.

(Seal)

(Signature)

*Substituted for the words "make distress by seizure of any" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

†Substituted for "such distress" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

‡Substituted for "property distrained" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

This is to authorize and require you, the said Superintendent (or keeper), to receive the said (name) into your custody, together with this warrant, and him safely to keep subject to the provisions of _____ paid, and on the receipt with an endorsement certi-

Given under my hand and the seal of the Court, this _____ day of 19 . .
(Seal) _____ (Signature)

XXXI.—Summons to Witness (see sections 68 and 252)
To _____ of _____

WHEREAS complaint has been made before me that _____ has (or is suspected to have) committed the offence of (state the offence concisely with time and place), and it appears to me that you are likely to give material evidence for the prosecution ;

_____ day of _____
_____ morning the matter of the
_____ court ; and you are hereby
_____ appear on the said date, at

_____ day of 19 . .
(Seal) _____ (Signature)

XXXII —Precept to District Magistrate to summon Jurors and Assessors (see section 326).

To the District Magistrate of _____

(Here enter the names of Jurors and Assessors)

Given under my hand and the seal of the Court, this _____ day of 19 . .
(Seal) _____ (Signature)

(XXXIII —Summons to Assessor or Juror (see section 328).

To (name), of (place)

PURSUANT to a precept directed to me by the Court of Session of _____ requiring your attendance as an Assessor (or a Juror) at the next Criminal Session, you are hereby summoned to attend at the said Court of Session at (place) at ten o'clock in the forenoon on the _____ day of _____ next.

Given under my hand and the seal of office, this _____ day of 19 . .
(Seal) _____ (Signature)

XXXIV.—Warrant of Commitment under Sentence of Death (see section 374).

To the Superintendent (or Keeper) of the Jail at _____

_____ day of _____
_____ prisoner in the case
_____ icted of the offence of
_____ the Indian Penal Code,
_____ e said sentence by the

Court of _____

_____ (or Keeper), to receive
_____ with this warrant,
_____ rant or order of this

Given under my hand and the seal of the Court, this _____ day of 19 . .
(Seal) _____ (Signature)

reason of (state the reason) unable to maintain herself (or himself) and to have neglected (or refused) to do so, and an order has been duly made requiring the said (name) to allow to his said wife (or child) for maintenance the monthly sum of rupees ; and whereas it has been further proved that the said (name) in wilful disregard of the said order has failed to pay rupees , being the amount of the allowance for the month (or months) of ; and thereupon an order was made adjudging him to undergo simple

(Seal)

(Signature).

XLI.—Warrant to enforce the Payment of Maintenance by Attachment and Sale (see section 483) |

To (name and designation of the Police Officer or other person to execute the warrant.)

whereas the said
being the

This is to authorise and require you to *attach any** moveable property belonging to within sum hereof element

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature).

XLII.—Bond and Bail-bond on a Preliminary Inquiry before a Magistrate (see sections 496 and 499)

I (name), of (place), being brought before the Magistrate of (as the case may be) charged with the offence of , and required to give security for my attendance in his Court and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the Preliminary Inquiry into the said charge and, should the case be sent for trial by the Court of Session, to be, and appear before the said Court when called upon to answer the charge against me; and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this

day of

19

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of on every day of the preliminary inquiry into the said charge and, should the case be sent for trial by the Court of Session, to be, and appear before the said Court when called upon to answer the charge against me; and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this

day of

19

(Signature).

*Substituted for the words "make distress by seizure of any" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

†Substituted for "such distress" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

‡Substituted for "property distrained" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

XXXIV.A.—Bond for Appearance of Offender released pending Realisation of Fine (see section 388).

of rupees
for
on condition of my executing a bond for my appearance on the following date or dates, namely,

I hereby bind myself to appear before the Court of at o'clock on the following date or dates, namely, and in case of making default herein, I bind myself to forfeit to His Majesty the King-Emperor of India, the sum of rupees

Dated this day of 19 (Signature).

Where a bond with sureties is to be executed, add—

rupees
(Signature)

XXXVIII.—Warrant of Commitment in certain cases of Contempt when a Fine is imposed (see section 480).

To the Superintendent (or Keeper) of the Jail at

WHEREAS at a Court holden before me on this day (name and description of the offender) in the presence (or view) of the court committed wilful contempt;

And whereas for such contempt the said (name of offender) has been adjudged by the Court to pay a fine of rupees, or in default to suffer simple imprisonment for the space of (state the number of months or days);

Given under my hand and the seal of the Court, this day of 19 (Seal) (Signature).

XXXIX.—Magistrate's or Judge's Warrant of Commitment of Witness refusing to answer (see section 485)

To (name and description of officer of Court)

WHEREAS (name and description), being summoned (or brought before this Court,) as a witness and this day required to give evidence on an inquiry into an alleged offence; refused to answer a certain question (or certain questions) put to him touching the said alleged offence, and duly recorded, without alleging any just excuse for such refusal, and for his contempt has been adjudged detention in custody for (term of detention adjudged)

This is to authorise and require you take the said (name) into custody and him safely to keep in your custody for the space of days unless in the mean time he shall consent to be examined and to answer the question asked of him, and on the last of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 (Seal) (Signature).

XL.—Warrant of Imprisonment on Failure to pay Maintenance (see section 488).

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name, description and address) has been proved before me to be possessed of sufficient means to maintain his wife (name) (or his child (name)), who is by

XLVIII.—Warrant of Commitment of the Surety of an accused person admitted to Bail
(see section 514)

To the superintendent (or keeper) of the Civil Jail at

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (*name*) has therein made default whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen-Empress of India; and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his, and an order has been made for his imprisonment in the Civil Jail for (*specify the period*);

This is to authorize and require you, the said Superintendent (or keeper), to receive the said (*name*) into your custody with this warrant and him safely to keep in the said Jail for the said (*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature)

XLIX.—Notice to the Principal of Forfeiture of a Bond to keep the Peace (see section 514).

To (*name, description and address*).

WHEREAS on the day of 19, you entered into a bond not to commit, etc. (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded;

You are hereby called upon to pay the said penalty of rupees or to show cause before me within days why payment of the same should not be enforced against you.

Dated this day of 19

(Seal)

(Signature)

L.—Warrant to attach the property of the Principal on breach of a bond to keep the peace,
(see section 514).

To (*name and designation of Police Officer*), at the Police station of

WHEREAS (*name and description*) did on the day of 19, enter into a bond for the sum of rupees binding himself not to commit breach of the peace, etc., (*as in the bond*), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

This is to authorize and require you to attach by seizure moveable property belonging to the said (*name*) to the value of rupees which you may find within the district of , and, if the said sum be not paid within , to sell the property so attached or so much of it as may be sufficient to realise the same; and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature)

LI.—Warrant of Imprisonment on breach of a bond to keep the peace (see section 614).

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Her Majesty the Queen-Empress of India, the sum of rupees

... how cause why
thereof
made for
imprisonment);

This is to authorize and require you, the said Superintendent (or Keeper) of the said Civil Jail, to receive the said (*name*) into your custody, together with this warrant, and



him safely to keep in the said Jail for the said period of (term of imprisonment), and to return this warrant with an endorsement certifying the manner of its execution.

[illegible]

III.—Warrant of attachment and sale on forfeiture of bond for good behaviour (see section 514).

To the Police Officer in charge of the Police station at

WHEREAS (*name, description and address*), did, on the day of 19 ,
give security by bond in the sum of rupees for the good behaviour of (*name,*
etc., of the said person) before me and duly recorded of the com-
mission by whereby the said bond has been
forfeited, & id (*name*) calling upon him to show
cause why failed to do so or to pay the said
sum:

This is to authorize and require you to attach by seizure moveable property belonging to the said (name) to the value of rupees _____ which you may find within the district of _____, and, if the said sum be not paid within _____, to sell the property so attached, or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19____.

(Seal) (Signature)

LIII.—Warrant of Imprisonment on forfeiture of bond for good behaviour (*see section 514*).

To the Superintendent (or Keeper) of the Civil Jail at

give security
of the press
duly recorded
India, the
cause why
thereof can
made for the

[illegible]

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